

# Article 3 of the European Convention on Human Rights

Uğur Erdal &  
Hasan Bakırcı

A PRACTITIONER'S  
HANDBOOK

With a Preface by Sir Nigel Rodley



**OMCT Handbook Series Vol.1**

Series Editor: Boris Wijkström

The World Organisation Against Torture (OMCT) coordinates the activities of the SOS-Torture Network, which is the world's largest coalition of non-governmental organisations fighting against torture and ill-treatment, arbitrary detention, extrajudicial executions, forced disappearances, and other serious human rights violations. OMCT's growing global network currently includes 282 local, national, and regional organisations in 92 countries spanning all regions of the world. An important aspect of OMCT's mandate is to respond to the advocacy and capacity-building needs of its network members, including the need to develop effective international litigation strategies to assist victims of torture and ill-treatment in obtaining legal remedies where none are available domestically, and to support them in their struggle to end impunity in states where torture and ill-treatment remain endemic or tolerated practices. In furtherance of these objectives, OMCT has published a *Handbook Series* of four volumes, each one providing a guide to the practice, procedure, and jurisprudence of the regional and international mechanisms that are competent to examine individual complaints concerning the violation of the absolute prohibition of torture and ill-treatment. This *Practitioner's Handbook* on Article 3 of the European Convention on Human Rights is the first of the series.

## **ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS A PRACTITIONER'S HANDBOOK**

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## Note to Readers

This *Practitioner's Handbook* constitutes a capacity-building tool which is meant to support NGOs, advocates, lawyers, and indeed, the victims of torture themselves, in developing effective litigation strategies before the European Court of Human Rights in respect of violations of Article 3 of the European Convention on Human Rights. As such, OMCT has striven for comprehensive coverage of the relevant areas of substance and procedure but also for clarity and accessibility. OMCT is continuously looking for ways to improve its materials and enhance their impact. Please help us do this by submitting your comments on this book, preferably in English or French, at: [handbook@omct.org](mailto:handbook@omct.org)

Readers are also invited to visit our website ([www.omct.org](http://www.omct.org)) featuring a page devoted to the *Handbook* which contains further reference materials including electronic versions of all of the *Handbook's* appendices.

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I would like to thank Roderick Liddell, Head of External Relations and Communication at the European Court of Human Rights, for allowing us to reproduce various documents available on the Council of Europe's website which appear in several of the *Textboxes* and Appendices of this *Handbook*.

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*Boris Wijkström*  
*Series Editor*  
*July 2006*

**DISCLAIMER**

The views expressed in this book are solely those of the authors and do not represent those of the European Court of Human Rights or any other institution.

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## PREFACE

I welcome the publication of what is certain to be a most useful contribution to better practice before the European Court of Human Rights in cases alleging violations of the Article 3 prohibition of torture and inhuman or degrading treatment or punishment under the European Convention on Human Rights. It is written by persons with extensive inside experience of the Court's work.

At first sight, one might wonder why another 'how to' book on the Court is necessary. In fact, the Court has developed such an extensive case law on both substance and procedure, potential applicants or their lawyers will be well served by this article-specific work. This is particularly apposite in the context of Article 3 violations: torture and other prohibited ill-treatment generally occur far from the public eye, in secret, dark places where the victim has no control over the circumstances and where the ensuing physical and psychological trauma make access to justice more difficult even after the torture stops. Moreover, it is a commonplace observation that public officials who commit torture are careful to cover up their tracks and usually have ample means at their disposal to do so. As a consequence, litigating a case under Article 3 presents special evidential and other challenges for the victim. In this connection, the comprehensive treatment the *Handbook* accords to the 'establishment of facts' and other procedural and evidential challenges peculiar to Article 3 complaints will be especially helpful. In fact, a review of the current state of the literature reveals that while increasing attention is being focused on the development of the Court's Article 3 jurisprudence, and indeed the jurisprudence on torture of international tribunals generally, there is little which treats these developments specifically from the perspective of an applicant wishing to seek justice before the Strasbourg Court.

The definitional aspects are an especially important element of substance. In the past, the Court has inexplicably insisted on maintaining an approach which sees 'torture' as involving even more pain or suffering than is inherent in the notion of inhuman treatment, apparently because of the 'special stigma' associated with torture. Today, however, it is becoming increasingly common for the Court, in finding violations of Article 3, not to specify which aspect of the Article was violated. The extensive discussion in this *Handbook* of Article 3 severity threshold issues usefully draws out the practical implications of this trend.

The scope of subject-matter is also noteworthy, ranging as it does from brutal interrogation methods through inhumane conditions of detention to arbitrary methods of expulsion. The treatment of interim measures is of great significance in Article 3 cases, particularly those involving attempts to avoid

extradition or deportation to a country where their mental or physical integrity could be at risk.

Practitioners should be immeasurably assisted by the appendices that provide an accessible guide to best practice before the Court in Article 3 cases.

*Professor Sir Nigel Rodley KBE  
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July 2006*

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*Worm v. Austria*, no. 22714/93, 29 August 1997

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*Zeynep Avcı v. Turkey*, no. 37021/97, 6 February 2003



## INTRODUCTION

The purpose of this *Handbook* is to provide practical advice to persons wishing to bring a case to the European Court of Human Rights under Article 3 of the European Convention on Human Rights. Article 3 of the Convention prohibits the use of *torture or inhuman or degrading treatment or punishment* by Contracting Parties. This prohibition is absolute, allowing for no derogation or exceptions under any circumstances. The European Court has held that the Article 3 prohibition enshrines “one of the fundamental values of the democratic societies making up the Council of Europe.”<sup>1</sup>

The *Handbook* is intended for advocates and practitioners of varying levels of experience including those who have little or no prior experience of litigating cases in Strasbourg. Indeed, applicants themselves should be able to use it to lodge an application with the Court. Naturally, the risks of oversimplification had to be avoided particularly in relation to some of the more complex areas of substance and procedure. It is hoped that the more experienced readers will find the *Handbook* useful as a reference tool, especially on such issues as the evidential rules and the establishment of facts, which, in the opinion of OMCT, have not traditionally received the attention they deserve and which have not previously been the subject of article-specific treatment.

Although the focus of this *Handbook* is Article 3, the analyses it contains should in theory enable a prospective applicant to formulate an application under any Article of the Convention. Nevertheless, due to its article-specific nature, all the substantive and procedural areas covered here are discussed in the context of the Court’s Article 3 jurisprudence. In this connection, ample use has been made of the Court’s judgments concerning ill-treatment to illustrate the operation of procedural rules and the application of substantive law to factual scenarios. Additionally, special emphasis has been placed on giving practical and strategic litigation advice in relation to matters which may pose particular challenges to Article 3 litigants. In doing so, the authors have drawn on their own experience in the Registry of the European Court.

The *Handbook* was written at a time when significant changes to the structure and procedure of the Court were underway. They include: the expected entry into force of Protocol No. 14 which will amend certain provisions of the Convention with the aim of improving the Court’s efficiency; the amended Rules of Court which entered into force on 1 December 2005; the increasing tendency of the Court to examine admissibility and merits in a joint procedure, and finally, the creation of a fifth Section on 1 April 2006. This book

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1 *Soering v. UK*, no. 14038/88, 7 July 1989, § 88.

takes into account the changes already in place as well as those that will follow when Protocol No. 14 enters into force.

For practical reasons, a simple method of reference was employed when referring to the decisions and reports of the European Commission of Human Rights and decisions and judgments of the Court. Thus, the reference “*A. v. the United Kingdom*, no. 25599/94, 23 September 1998” includes [the applicant’s name] v. [the respondent State], the application number, and the date of the judgment. The initials “GC” in square brackets in some case references indicate that the decision or judgment was adopted by the Grand Chamber of the Court.

Throughout this book, the European Court of Human Rights is referred to as “the Court” or “the Strasbourg Court”; the Convention for the Protection of Human Rights and Fundamental Freedoms as “the European Convention on Human Rights” or “the Convention”; and the word “ill-treatment”, unless otherwise specified, is employed as a collective term for all forms treatment prohibited by Article 3, i.e. torture, inhuman treatment and degrading treatment. Whenever inhuman or degrading *punishment* is meant, it is referred to as such. Finally, the person lodging the application and corresponding with the Court is referred to simply as “the applicant” even though in practice that person may be the applicant’s lawyer.

A number of documents have been appended to the *Handbook* including reference materials such as the European Convention, Protocol No. 14, Practice Directions, and so forth. The appendices also include a model Article 3 application to which applicants may refer in formulating their own applications, and a detailed analysis of the Court’s Article 3 jurisprudence.<sup>2</sup> In recognition of the important role that non-judicial preventive mechanisms play in the struggle to eradicate torture and ill-treatment, the appendices include an article describing the mandate and working methods of the relevant European institutions including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>3</sup> Due to space constraints, a number of these appendices were placed in the CD-ROM which accompanies this book. The appendices are generally intended to be consulted in conjunction with the sections to which they relate, as explained below.

Section 1 of the *Handbook* presents an overview of the Council of Europe, the Court, the Convention, and provides a general description of the Court’s

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2 See Appendix No. 10, “Analysis of the Court’s Article 3 Jurisprudence,” prepared by the Deutsches Institut für Menschenrechte in collaboration with OMCT.

3 See Appendix No. 11, “European Mechanisms for the Prevention of Torture and Ill-treatment”, by Dr. Reinhard Marx, Deutsches Institut für Menschenrechte.

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proceedings. The latter is intended to give the reader a bird's-eye view of these proceedings and may be particularly useful to persons who have no prior experience with the Court. Readers are referred *inter alia* to Appendix No. 5, "Submitting a Complaint to the European Court of Human Rights: Eleven Common Misconceptions", and *Textbox ii*, "Case-Processing Flowchart".

Section 2 deals with the admissibility and standing requirements of the Convention. The issue of substantiation is analysed in detail since the large percentage of applications declared inadmissible as "manifestly ill-founded" on this ground suggests that applicants are not according sufficient attention to it.

Section 3 examines the issue of interim measures and the procedures for expediting cases. The Court is currently receiving a large number of requests for interim measures under Rule 39 from persons who are subject to expulsion. This is partly a consequence of the stricter immigration and anti-terrorist measures adopted recently by many Council of Europe Member States. The Practice Directions in Appendix No. 3 and the sample request for an interim measure under Rule 39 in Appendix No. 15 may be consulted when reading this section.

Sections 4 through 6 set out the Court's procedure from the lodging of the application up to and including the admissibility stage. At the time of writing, Article 29 § 3 of the Convention stipulates that in principle admissibility decisions are taken separately from merits decisions. However, this is more the exception than the rule. At the present time, and in anticipation of the entry into force of Protocol No. 14,<sup>4</sup> proceedings on admissibility and merits are conducted jointly in the vast majority of cases. The Court's recent practice of joint examination has accordingly been taken into account in this *Handbook*. Relevant appendices are *inter alia*, Appendices Nos. 1, 3-6, 10, 12 - 14, 17, and 19. Relevant *Textboxes* include *Textboxes iii-x*.

Section 7 deals with the issue of just satisfaction under Article 41 of the Convention. The reader may consult the applicants' claims for just satisfaction in the case of *Akkum and Others v. Turkey* in Appendix No. 12.

Section 8 tackles the issue of friendly settlement and strike outs under Articles 37 and 38 of the Convention. Readers may consult *Textbox xi* for a concrete example of friendly settlement declarations (*Sakı v. Turkey*, no. 29359/95, 30 October 2001).

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4 See Article 9 of Protocol No. 14.

In Section 9, the form and content of judgments, referrals to the Grand Chamber, and the execution of judgments are examined.

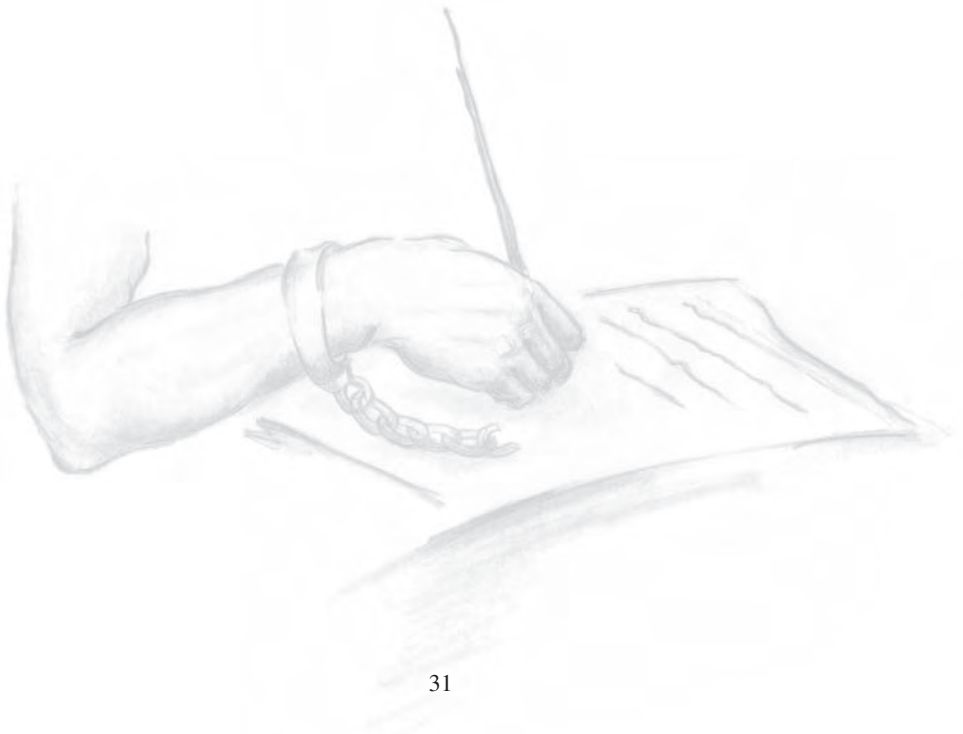
Section 10 provides an analysis of the obligations inherent in Article 3 of the Convention. Annex 1 of the Istanbul Protocol, i.e. the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, includes the principles applicable to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. This may be consulted in Appendix No. 7 when formulating complaints concerning the effectiveness of investigations. Appendix No. 10 contains an analysis and discussion of the Court's Article 3 jurisprudence.

Section 11 deals with the establishment of facts and other evidential issues, such as the admissibility of evidence and the burden and standard of proof that are applied in the Court's proceedings. Annex 2 of the Istanbul Protocol, mentioned above, may be found in Appendix No. 8 of the present *Handbook*. This Annex should be consulted in conjunction with Section 11 for a review of advanced medical techniques used in the diagnoses of the effects of ill-treatment.



## PART I

### OVERVIEW OF THE COUNCIL OF EUROPE, THE COURT, AND ITS PROCEEDINGS



## OVERVIEW

### 1.1 The Council of Europe

*Map of Council of Europe Member States*

### 1.2 The European Court of Human Rights

*Textbox i Dates of Ratification of European Convention on Human Rights and Additional Protocols as of 31 January 2006*

### 1.3 Protocol No. 14

### 1.4 The Judges and the Registry of the Court

1.4.1 The Judges

1.4.2 The Registry

### 1.5 Structure of the Court

1.5.1 The Grand Chamber

1.5.2 The Sections and the Chambers

1.5.3 The Committees

### 1.6 Instruments of the Court

1.6.1 The European Convention on Human Rights

1.6.2 The Protocols

1.6.3 The Rules of Court

1.6.4 Practice Directions

1.6.5 Decisions and Reports of the Commission and Decisions and Judgments of the Court

### 1.7 Summary of Proceedings Before the Court

1.7.1 First Examination of the Application

1.7.2 Applications Declared Inadmissible by a Committee

1.7.3 Examination by a Chamber

*Textbox ii Case-processing Flowchart*

### 1.8 Legal Representation

*Textbox iii Form of Authority*

### 1.9 Legal Aid

*Textbox iv Legal Aid Fees (applicable as from 1 January 2006)*

*Textbox v Declaration of Applicant's Means*

### 1.10 The Languages Used in the Court's Proceedings

### 1.11 Written Pleadings

### 1.12 Third Party Interventions (*Amicus Curiae*)

### 1.13 Costs

### 1.14 Hearings

### 1.15 Effects of the Court's Judgments

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## 1.1 The Council of Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly referred to as the “European Convention on Human Rights” and hereinafter as “the Convention”, was drafted under the auspices of the Council of Europe, an inter-governmental body set up by the Treaty of London on 5 May 1949.<sup>5</sup>

According to Article 1 of the Statute of the Council of Europe, the aim of the organisation “is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”. In pursuit of this aim, each Member State<sup>6</sup> resolved, in Article 3 of the same Statute, to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”. This special importance which the Member States accorded to human rights – a newly emerging concept at a time when the majority of the world’s States jealously guarded the sovereign privilege to deal with their citizens as they wished – was subsequently taken to a new level with the opening for signature in Rome on 4 November 1950 of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention, which was the first international legal instrument to safeguard human rights through an enforcement mechanism, entered into force on 3 September 1953.

At the time of writing, the Council of Europe has 46 Member States and is considering the membership application of Belarus.<sup>7</sup> Membership in the Council of Europe is contingent on ratification of the Convention and its Protocols. The Council of Europe’s headquarters is located in Strasbourg, France.

The Statute of the Council of Europe established two organs – the Committee of Ministers and the Parliamentary Assembly. The Committee of Ministers, which consists of the Ministers of Foreign Affairs of the Member States, is the decision-making body of the Council of Europe. Its functions include, in

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5 The treaty was signed by ten European States, i.e. Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. In August 1949, Greece and Turkey joined the Council, increasing the number of its members to twelve. Subsequent ratifications have brought the number of Member States to 46. The Council of Europe has granted observer status to the Holy See, the United States, Canada, Japan and Mexico.

6 In this *Handbook*, the term “Member State” is used for a country which is a member of the Council of Europe, whereas the term “Contracting Party” refers to a State that has ratified the Convention.

7 A current list of the Council of Europe’s Member States may be consulted at [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/default.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp)

particular, supervising the execution of judgments of the European Court of Human Rights. The Parliamentary Assembly is the parliamentary organ of the Council of Europe. It consists of a number of members of national Parliaments from each Member State, with a President elected each year from amongst them. The Parliamentary Assembly's functions include the election of the judges of the European Court of Human Rights from a list of three candidates submitted by each Contracting Party. Furthermore, the Parliamentary Assembly is responsible for the adoption of Conventions and additional Protocols. Another important function of the Parliamentary Assembly is to examine whether a candidate State has fulfilled the criteria for accession to the Council of Europe.

The Council of Europe is headed by a Secretary General who is appointed by the Parliamentary Assembly on the recommendation of the Committee of Ministers, for a period of five years. The Secretary General has the overall responsibility for the strategic management of the Council of Europe's work programme and budget and oversees the day-to-day running of the organisation and Secretariat. The Secretary General also has the power, under Article 52 of the Convention, to request that a Contracting Party furnish explanations relating to the manner in which its internal law ensures the effective implementation of the Convention.<sup>8</sup>

The office of the Council of Europe's Commissioner for Human Rights was established on 7 May 1999 by a resolution of the Committee of Ministers. That Resolution requires the Commissioner to:

- promote education in, and awareness of, human rights in the Member States;
- identify possible shortcomings in the law and practice of Member States with regard to compliance with human rights; and,
- help promote the effective observance and full enjoyment of human rights, as embodied in the various Council of Europe instruments.

The Office of the Commissioner is a non-judicial institution which does not take up individual complaints. The Commissioner cannot, therefore, accept

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8 For example, the Secretary General exercised his powers under this Article in his request of 25 November 2005 to the Contracting Parties for information concerning allegations of CIA abductions of terror suspects involving the use of 'Council of Europe' airspace or airports. Specifically, the Secretary General asked the Contracting Parties to provide information on whether "any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission – in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency".

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any requests to present individual complaints before national or international courts, nor before national administrations of Member States of the Council of Europe. Nevertheless, he or she can draw conclusions and take initiatives of a general nature that are based on individual complaints.<sup>9</sup>

During discussions on the drafting of Protocol No. 14, it was agreed that the Commissioner should play a more active role in assisting the European Court of Human Rights on certain questions, particularly in cases that reveal structural or systematic weaknesses in the Contracting Parties' institutions which lead to repetitive violations of the Convention. It was thus decided to amend Article 36 of the Convention so as to enable the Commissioner to intervene as a third party in cases before the European Court of Human Rights through the submission of written comments and by taking part in hearings.<sup>10</sup>

### *Council of Europe Member States<sup>11</sup>*



9 For further information see [http://www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/)

10 See Article 13 of Protocol No. 14.

11 Source: [http://www.coe.int/T/e/com/about\\_coe/member\\_states/default.asp](http://www.coe.int/T/e/com/about_coe/member_states/default.asp)

## 1.2 The European Court of Human Rights

The European Court of Human Rights is the oldest, most well established and effective of the three regional human rights systems in existence today. Its judgments are binding and have the force of law in the Member States of the Council of Europe. Failure to abide by the judgments of the Court can in theory have significant political consequences for the concerned Member State, including exclusion from the Council of Europe. In reality, such sanctions have never been applied because Contracting Parties generally have a good record of compliance with the Court's judgments.

The European human rights system went through several stages of development before crystallizing in its current form as a single permanent court with its seat in Strasbourg. Initially, a three-fold mechanism was established to enforce the obligations entered into by the Contracting Parties under the Convention. Pursuant to former Article 19 of the Convention, a European Commission of Human Rights (hereinafter referred to as "the Commission") and a European Court of Human Rights were established. These two entities – together often referred to as the "Convention institutions" or "Strasbourg institutions" – were complemented by the Committee of Ministers which was entrusted with adjudicative as well as executive powers, including the power to execute the Court's judgments.

The main function of the Commission, which consisted of a number of members equal to that of the Contracting Parties, was to act as a filtering mechanism by determining the admissibility of applications brought by individuals. When the Commission found an application admissible, it placed itself at the parties' disposal with a view to reaching a friendly settlement. If no settlement was reached, the Commission would draw up a report under former Article 31 of the Convention in which it would establish the facts of the case and express an opinion on the merits. This report would be transmitted to the Committee of Ministers. Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission, and/or any Contracting Party concerned had a period of three months following the transmission of the report to the Committee of Ministers within which to bring the case before the Court for a final and binding adjudication.

Originally, individuals were not entitled to bring their cases directly to the Court; former Article 25 of the Convention enabled individuals to apply directly to the Commission only. Protocol No. 9 to the Convention, which entered into force on 1 October 1994, did provide a limited possibility for individual applicants to have their cases examined by the Court. If a case was not referred to the Court, the Committee of Ministers would exercise its

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quasi-judicial powers to decide whether there had been a violation of the Convention, generally adopting the conclusion reached by the Commission in its report.<sup>12</sup>

From 1980 onwards, the steady growth in the number of cases brought before the Convention institutions – a development caused partly by the accession of new Member States to the Council of Europe – made it difficult for the Convention system to cope, and a restructuring became necessary. In order to reform the Convention system, Protocol No. 11 was drafted and opened for signature on 11 May 1994. The aim of this Protocol was to simplify the structure of the Convention organs with a view to shortening the length of Convention proceedings and strengthening their judicial character by, *inter alia*, abolishing the Committee of Ministers’ adjudicative role.<sup>13</sup>

Following the entry into force on 1 November 1998 of Protocol No. 11, the part-time Commission and Court were replaced by a single, permanent Court, established pursuant to Article 19 of the Convention. As will be seen below, individuals can now bring their Convention complaints directly before the Court.

The Court is presided over by its President, who is also one of the judges of the Court. The functions of the President include representing the Court and issuing practice directions.<sup>14</sup> The President is assisted by two Vice Presidents,<sup>15</sup> who are also judges. The President and his or her deputies are elected by the plenary Court for a period of three years; they may be re-elected.<sup>16</sup> The expression “plenary Court” means “the European Court of Human Rights sitting in plenary session”,<sup>17</sup> i.e. a meeting attended by all the judges. The plenary Court meets at least once a year to discuss administrative matters but it does not perform judicial functions. It deals with internal administrative matters which include, *inter alia*, the adoption of the Rules of Court,<sup>18</sup> the election of the President and the Vice Presidents of the Court, the setting up of the Sections, and the election of the Presidents of Sections and the Registrar and his or her deputy/ies. At this stage, it is important to know that

12 More information on the historical background of the Convention institutions can be found at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>

For a review of the practice and procedure of the Commission, see D.J. Harris, M. O’Boyle and C. Warbrick “*Law of the European Convention on Human Rights*”, Butterworths, 1995, (hereinafter referred to as “Harris, O’Boyle and Warbrick”), p. 571 *et seq.* See also M. Janis, R. Kay, A. Bradley, *European Human Rights Law Text and Materials*, Oxford University Press, 1995, p. 30.

13 More history of the reform can be found in the Explanatory Report to Protocol No. 11 at <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm>

14 For information on practice directions see Section 1.6.4 below.

15 Rule 8 § 1 of the Rules of Court.

16 Article 26 of the Convention. See also Rule 8 § 1 of the Rules of Court.

17 Rule 1 (b) of the Rules of Court.

18 For information on the Rules of Court see Section 1.6.3 below.

the Court is divided into five Sections.<sup>19</sup> When a Section examines an application, it does so either in a formation of seven judges (a “Chamber”), or in a formation of three judges (a “Committee”).<sup>20</sup>

The Court’s powers and duties are best described by the Court itself in its case-law:

“...its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.”<sup>21</sup>

Although the Court does not have the powers to examine *ex officio* the legislation or the functioning of the judiciary in the Contracting Parties, it can examine such issues as part of its examination of a case before it.

One of the most widely held misconceptions about the Court is that it is a court of appeal with powers to review and quash decisions and judgments of domestic courts of the Contracting Parties. The Court has no such powers; it cannot quash or revise decisions and judgments of domestic courts.<sup>22</sup> The reason why the Court is perceived by many as a court of appeal may be due to the fact that the Court can only examine allegations of breaches of the Convention after those allegations have first been examined by domestic courts. In other words, and as described in detail below,<sup>23</sup> a potential applicant must first give an opportunity to national authorities – usually its domestic court system – to remedy his or her Convention grievances by exhausting domestic remedies in the Contracting Party against which he or she wishes to lodge an application with the Court. The requirement to exhaust domestic remedies is also a logical consequence of the Convention’s main aspiration to achieve a “collective enforcement” of the rights guaranteed in the Convention.<sup>24</sup>

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19 The fifth Section was created on 1 April 2006.

20 See Section 1.5 below.

21 See *P.G. and J.H. v. the United Kingdom*, no. 44787/98, 25 September 2001, § 76.

22 See Myjer, E., Mol, N., Kempees, P., van Steijn, A., and Bockwinkel, J. “Introduire une plainte auprès de la Cour européenne des Droits de l’Homme: onze malentendus fréquents” in *Annales du droit luxembourgeois*, volume 14-2004, p. 11 *et seq.* (Bruylant, Bruxelles, 2005); see Appendix No. 5 for a copy of this article in English.

23 See Section 2.4 below.

24 See the Preamble to the Convention.



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*Textbox i*                      **Dates of Ratification of the European Convention on Human Rights and Additional Protocols as of 26 June 2006<sup>25</sup>**

**Dates of entry into force**

States	Convention CETS No. 005	Protocol No. 1 CETS No. 009	Protocol No. 4 CETS No. 046	Protocol No. 6 CETS No. 114	Protocol No. 7 CETS No. 117	Protocol No. 12 CETS No. 177	Protocol No. 13 CETS No. 187
Albania	02/10/96	02/10/96	02/10/96	01/10/00	01/01/97	01/04/05	
Andorra	22/01/96			01/02/96			01/07/03
Armenia	26/04/02	26/04/02	26/04/02	01/10/03	01/07/02	01/04/05	
Austria	03/09/58	03/09/58	18/09/69	01/03/85	01/11/88		01/05/04
Azerbaijan	15/04/02	15/04/02	15/04/02	01/05/02	01/07/02		
Belgium	14/06/55	14/06/55	21/09/70	01/01/99			01/10/03
Bosnia and Herzegovina	12/07/02	12/07/02	12/07/02	01/08/02	01/10/02	01/04/05	01/11/03
Bulgaria	07/09/92	07/09/92	04/11/00	01/10/99	01/02/01		01/07/03
Croatia	05/11/97	05/11/97	05/11/97	01/12/97	01/02/98	01/04/05	01/07/03
Cyprus	06/10/62	06/10/62	03/10/89	01/02/00	01/12/00	01/04/05	01/07/03
Czech Republic	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		01/11/04
Denmark	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/07/03
Estonia	16/04/96	16/04/96	16/04/96	01/05/98	01/07/96		01/06/04
Finland	10/05/90	10/05/90	10/05/90	01/06/90	01/08/90	01/04/05	01/03/05
France	03/05/74	03/05/74	03/05/74	01/03/86	01/11/88		
Georgia	20/05/99	07/06/02	13/04/00	01/05/00	01/07/00	01/04/05	01/09/03
Germany	03/09/53	13/02/57	01/06/68	01/08/89			01/02/05
Greece	28/11/74	28/11/74		01/10/98	01/11/88		01/06/05
Hungary	05/11/92	05/11/92	05/11/92	01/12/92	01/02/93		01/11/03
Iceland	03/09/53	18/05/54	02/05/68	01/06/87	01/11/88		01/03/05
Ireland	03/09/53	18/05/54	29/10/68	01/07/94	01/11/01		01/07/03
Italy	26/10/55	26/10/55	27/05/82	01/01/89	01/02/92		
Latvia	27/06/97	27/06/97	27/06/97	01/06/99	01/09/97		

25 Source:  
<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>

ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS  
A PRACTITIONER'S HANDBOOK

States	Convention CETS No. 005	Protocol No. 1 CETS No. 009	Protocol No. 4 CETS No. 046	Protocol No. 6 CETS No. 114	Protocol No. 7 CETS No. 117	Protocol No. 12 CETS No. 177	Protocol No. 13 CETS No. 187
Liechtenstein	08/09/82	14/11/95		01/12/90	01/05/05		01/07/03
Lithuania	20/06/95	24/05/96	20/06/95	01/08/99	01/09/95		01/05/04
Luxembourg	03/09/53	18/05/54	02/05/68	01/03/85	01/07/89		
Malta	23/01/67	23/01/67	05/06/02	01/04/91	01/04/03		01/07/03
Moldova	12/09/97	12/09/97	12/09/97	01/10/97	01/12/97		
Monaco	30/11/05		30/11/05	01/12/05	01/02/05		01/03/06
Netherlands	31/08/54	31/08/54	23/06/82	01/05/86		01/04/05	
Norway	03/09/53	18/05/54	02/05/68	01/11/88	01/01/89		01/12/05
Poland	19/01/93	10/10/94	10/10/94	01/11/00	01/03/03		
Portugal	09/11/78	09/11/78	09/11/78	01/11/86			01/02/04
Romania	20/06/94	20/06/94	20/06/94	01/07/94	01/09/94		01/08/03
Russia	05/05/98	05/05/98	05/05/98		01/08/98		
San Marino	22/03/89	22/03/89	22/03/89	01/04/89	01/06/89	01/04/05	01/08/03
Serbia	03/03/04	03/03/04	03/03/04	01/04/04	01/06/04	01/04/05	01/07/04
Slovakia	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		01/12/05
Slovenia	28/06/94	28/06/94	28/06/94	01/07/94	01/09/94		01/04/04
Spain	04/10/79	27/11/90		01/03/85			
Sweden	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/08/03
Switzerland	28/11/74			01/11/87	01/11/88		01/07/03
The former Yugoslav Republic of Macedonia	10/04/97	10/04/97	10/04/97	01/05/97	01/07/97		01/11/04
Turkey	18/05/54	18/05/54		01/12/03			
Ukraine	11/09/97	11/09/97	11/09/97	01/05/00	01/12/97		01/07/03
United Kingdom	03/09/53	18/05/54		01/06/99			01/02/04

### 1.3 Protocol No. 14

Despite the changes brought about by Protocol No. 11, by the beginning of the 21<sup>st</sup> century the Court had already become unable to deal satisfactorily with its increasing case load. At the end of 2003, some 65,000 applications were pending before the Court. Moreover, the percentage of applications terminated without a ruling on the merits, usually because they were declared inadmissible, stood at more than 90%.

The second largest group of cases concerned so-called repetitive or clone cases, i.e. cases that derive from the same structural cause which has led the Court in earlier judgments to find a breach of the Convention. A typical repetitive case, for instance, concerns complaints under Article 6 regarding excessive length of domestic court proceedings. Some 60% of the 703 judgments adopted by the Court in 2003, and 35% of the 718 judgments adopted in 2004 concerned such cases.

In order to guarantee the long-term effectiveness of the Court, the European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the Convention, called on the Committee of Ministers to "...initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court...".<sup>26</sup> Subsequently, the Steering Committee for Human Rights (CDDH, *le Comité directeur pour les droits de l'homme*), which was entrusted by the Committee of Ministers with the drafting of a new Protocol to help the Court overcome the difficulties it was facing, set up its own Reflection Group on the Reinforcement of the Human Rights Protection Mechanism (GDR, *Groupe de réflexion sur le renforcement du mécanisme de protection des droits de l'homme*). The CDDH sent the Committee of Ministers its final activity report in April 2004 containing the draft amending protocol to the Convention. Subsequently, the Committee of Ministers, at the 114<sup>th</sup> ministerial session in May 2004, adopted the amending protocol as well as a declaration on "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels". In that declaration, Member States recognised the urgency of the reform, and committed themselves to ratifying Protocol No. 14 within two years. The text of the amending protocol was opened for signature by Council of Europe Member States, signatory to the European Convention on Human Rights, on 13 May 2004. At the time of writing, Protocol No. 14 had been signed by all

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26 For a fuller history of Protocol No. 14 see the Explanatory Report to that Protocol in Appendix No. 18. It can also be accessed at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>

the Contracting Parties and ratified by 41.<sup>27</sup> As it is an amending protocol, it needs to be ratified by all the Contracting Parties before it can enter into force. Protocol No. 14 can be consulted in Appendix No. 2.<sup>28</sup>

Unlike Protocol No. 11, Protocol No. 14 makes no radical changes to the control system of the Convention. Rather, its main purpose is to improve the functioning of the existing system by giving the Court the procedural means and flexibility it needs to process applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination. To achieve these ends, it introduces amendments in three main areas:

- reinforcement of the Court's filtering capacity in respect of the mass of unmeritorious applications;
- a new admissibility criterion (containing two safeguard clauses) concerning cases in which the applicant has not suffered a significant disadvantage; and
- measures for dealing with repetitive cases.<sup>29</sup>

The changes brought about by Protocol No. 14, in so far as they fall within the scope of the present *Handbook*, will be dealt with in subsequent sections.

## 1.4 The Judges and the Registry of the Court

### 1.4.1 The Judges

The Court consists of a number of judges equal to the number of the Contracting Parties.<sup>30</sup> Currently there are 45 judges.<sup>31</sup> There is no restriction on the number of judges of the same nationality.<sup>32</sup> The judges sit on the Court

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27 A *Chart of Signatures and Ratifications* is available on the Council of Europe's Web site at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=6/5/2006&CL=ENG>

28 Protocol No. 14 can also be consulted at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=194&CM=8&DF=22/08/2005&CL=ENG>

29 Paragraphs 35-36 of the Explanatory Report.

30 Article 20 of the Convention.

31 A current list of judges may be consulted at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Plenary+Court/>

32 For example, the present judge elected in respect of Liechtenstein is a national of Austria.

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in their personal capacity and do not represent the State Party of which they are a national, or any other State.

Judges are elected by the Parliamentary Assembly of the Council of Europe to sit for a period of six years and may be re-elected. They retire when they reach the age of 70. Following the entry into force of Protocol No. 14, however, new judges will be elected for a non-renewable term of nine years.

Pursuant to Rules 24 § 2 (b) and 26 § 1 (a) of the Rules of Court, judges are required to attend Grand Chamber and Chamber deliberations in cases introduced against the Contracting Party in respect of which they are elected.<sup>33</sup> In case a judge is unable to sit on the case, for reasons set out in Rule 28 of the Rules of Court, the judge in question is required to give notice to the President of the Chamber. The President of the Chamber will then invite the Contracting Party to indicate whether it wishes to appoint another judge of the Court or an *ad hoc* judge.<sup>34</sup>

Judges also act as judge rapporteurs and, with the assistance of Registry lawyers, examine the applications introduced with the Court.<sup>35</sup> The President of the Section to which the case has been assigned designates judge rapporteurs.<sup>36</sup> The identity of a judge rapporteur in a particular case is never disclosed to the parties.

### 1.4.2 The Registry

The Registry of the Court is staffed by lawyers (“legal secretaries”<sup>37</sup>), administrative and technical staff and translators. The task of the Registry is to provide legal and administrative support to the Court in the exercise of its judicial functions. Within the Registry there are 20 legal divisions. At the present time there are approximately 220 lawyers and 130 other support staff<sup>38</sup> in the legal divisions.

All Registry lawyers are employees of the Council of Europe who have been recruited on the basis of open competitions and appointed by the Secretary

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33 For the purposes of this *Handbook*, such judges will be referred to as “national judges”.

34 Rule 29 of the Rules of Court. Following the entry into force of Protocol No. 14, the President of the Court will choose a person from a list submitted by the relevant Contracting Party to sit in the capacity of judge; see Article 6 of Protocol No. 14.

35 See Section 1.7 below.

36 Rule 49 §§ 2-3 of the Rules of Court.

37 Article 25 of the Convention.

38 The organisation chart of the Registry can be consulted at <http://www.echr.coe.int/NR/rdonlyres/F213BF94-1A48-41CE-8A43-70D0EDDD4EE2/0/OrganisationChart.pdf>

General of the Council of Europe. Their knowledge of the national law and the language of the Contracting Party as well as their knowledge of the official languages of the Council of Europe, i.e. English and French, play a central role in their recruitment. Members of the Registry do not represent any State and they are expected to adhere to strict conditions of independence and impartiality.

The Registry lawyers are responsible for preparing case files for examination by the Court. Their responsibilities therefore include handling all communication with the applicants relating to the complaints. Most of their time, however, is spent drafting the Court's decisions and judgments under the instructions of the judge rapporteurs. Registry lawyers are also responsible for carrying out research – mostly relating to the domestic law of the Contracting Parties – on behalf of the judges and attending deliberations.

At the Head of the Registry stands the Registrar of the Court who functions under the authority of the President of the Court. The Registrar is assisted by two Deputy Registrars. They are elected by the plenary Court.<sup>39</sup>

## **1.5 Structure of the Court**

Each application introduced with the Court is dealt with by one of three formations:<sup>40</sup> the Grand Chamber, a Chamber or a Committee. These are the so-called decision bodies of the Court.

### **1.5.1 The Grand Chamber**

The Grand Chamber consists of 17 judges and at least three substitute judges.<sup>41</sup> It includes the President and the Vice Presidents of the Court, the Presidents of the Sections, and the national judge. In cases referred to the Grand Chamber pursuant to Article 30, the Grand Chamber also includes members of the Chamber that relinquished jurisdiction. However, in cases referred to the Grand Chamber under Article 43, the Grand Chamber does not include any judge who participated in the original Chamber's deliberations on the admissibility or merits of the case, except for the President of that Chamber and the national judge. The judges and the substitute judges who

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39 Rules 15 and 16 of the Rules of Court.

40 Article 27 of the Convention.

41 Rule 24 § 1 of the Rules of Court.

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are to complete the Grand Chamber in each case referred to it are designated from among the remaining judges by a drawing of lots. In the performance of its duties, the Grand Chamber is assisted by the Registrar or a Deputy Registrar of the Court.

The Grand Chamber may deal with an application in two situations. Firstly, if a case which is pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber in question may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects within one month of notification of the Chamber's intention.<sup>42</sup> Such cases may, for example, concern issues which have not been dealt with by the Court previously. They also include cases in which the Court is considering reversing earlier case-law.

The second situation where the Grand Chamber may consider an application is when one of the parties to the case (or indeed both Parties) requests, within a period of three months from the date of delivery of the judgment, that the case be referred to the Grand Chamber.<sup>43</sup> Roughly speaking, this may be compared to an "appeal" in a national jurisdiction.

Finally, the Grand Chamber is also empowered to give advisory opinions on questions concerning the interpretation of the Convention and its Protocols.<sup>44</sup> However, at the time of writing, only one request for an advisory opinion has ever been made. It was rejected unanimously by the Grand Chamber on 2 June 2004 on the grounds that the request did not come within the Court's advisory competence.<sup>45</sup>

Given the fact that only cases of a rather extraordinary nature can come before the Grand Chamber, it deals with far fewer cases than the Court's Sections. For example, in 2005 the four Sections adopted a total of 1,093 judgments whereas the Grand Chamber adopted only 12. In the same period, the Grand Chamber adopted 2 admissibility decisions whereas the Sections adopted 1,420 such decisions.<sup>46</sup>

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42 See Article 30 of the Convention and Rule 72 of the Rules of Court.

43 See Section 9.2 below.

44 See Articles 47-49 of the Convention.

45 For the press release concerning the Grand Chamber's decision and the links to the decision, consult <http://www.echr.coe.int/Eng/Press/2004/June/DecisiononAdvisoryopinion.htm>

46 See the Court's Survey of Activities 2005 at <http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf>

## 1.5.2 The Sections and the Chambers

As mentioned above, the Court is divided into five Sections. Each judge is a member of a Section. The Sections, which are set up by the plenary Court for a period of three years, are geographically and gender balanced and they reflect the different legal systems of the Contracting Parties.<sup>47</sup> Each Section has its own President, assisted or replaced where necessary, by a Vice President. Section Presidents are elected by the plenary Court whereas Vice Presidents are elected by the Sections themselves.<sup>48</sup>

However, a case brought before a Section is not dealt with by the full Section but by a Chamber of seven judges<sup>49</sup> formed from among the judges in the Section.<sup>50</sup> Each Chamber includes the Section President and the national judge concerned. The other five members of the Chamber are designated from among the remaining members of the Section. The remaining judges who are not designated as members of the Chamber sit in the case as substitute judges. Thus, depending on the parties to the cases on the agenda of a particular Section meeting, a number of different Chambers will be constituted during that meeting.

Where possible – depending on the case load of the Section – an application introduced against a particular Contracting Party will be assigned to the Section which includes among its members the judge elected in respect of that Contracting Party, i.e. the national judge. If such a course of action has not been taken, the national judge in question sits as an *ex officio* member of the Chamber.<sup>51</sup>

In the performance of its duties, each Section is assisted by a senior member of the Registry, i.e. the Section Registrar. Section Registrars are assisted by Deputy Section Registrars.

Sections deal with Inter-State cases<sup>52</sup> and cases lodged by individuals which are not clearly inadmissible.<sup>53</sup> They meet once a week to deliberate on the cases assigned to them. Section deliberations are confidential and are not attended by anyone other than the judges and members of the Registry.

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47 A list showing the compositions of the five Sections may be consulted at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Sections/>

48 Rule 8 §§ 1-2 of the Rules of Court.

49 After the entry into force of Protocol No. 14, and at the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers. See Article 6 of Protocol No. 14 amending Article 27 of the Convention.

50 Article 27 of the Convention. See also Rule 26 of the Rules of Court.

51 Rule 26 § 1 (a) of the Rules of Court.

52 I.e. cases introduced by a Contracting Party against another Contracting Party pursuant to Article 33 of the Convention. Such applications are very rare; at the time of writing, there had only been 20 such applications.

53 For admissibility and related issues, see Section 2 below.



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**1.5.3 The Committees**

Under Article 27 § 1, Committees of three judges are established within each Section for a period of twelve months, by rotation among its members.<sup>54</sup> Committees deal with cases that are clearly inadmissible under one or more of the grounds set out in Article 35 and which do not require further examination. Committees cannot deal with Inter-State cases. Committees are also empowered to strike out applications pursuant to Article 37. A case can be declared inadmissible if the applicant is found to have failed to satisfy the grounds of admissibility which are set out in Article 35 of the Convention, whereas a case can be struck out of the Court's list of cases pursuant to Article 37 of the Convention if the applicant does not intend to pursue his or her application, if the matter has been resolved, or if for any other reason established by the Court it considers that it is no longer justified to continue the examination of the application.<sup>55</sup> Committee decisions are final and cannot be appealed. Such decisions must however be taken unanimously; if there is no unanimity amongst the three judges, the Committee will refer the case to a Chamber to decide on admissibility and, if applicable, to rule on the merits. Committees deal with the vast majority of applications lodged with the Court. In 2005 a total of 26,360 applications were declared inadmissible by Committees. During the same period, Committees also decided to strike out a total number of 416 applications.

Protocol No. 14 will bring two important changes to the composition and powers of the Committees. Single-judge formations, as well as Committees of three judges, will be authorized to deal with the type of cases currently handled by Committees of three judges, i.e. cases that appear to be clearly inadmissible.<sup>56</sup> Furthermore, Committees of three judges will be empowered to render merits judgments in cases where the underlying issue is already the subject of well-established case-law of the Court,<sup>57</sup> i.e. repetitive cases. The purpose of empowering Committees to deal with repetitive cases is to enable the Chambers to devote more time to cases that warrant in-depth examination.

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<sup>54</sup> See also Rule 27 § 2 of the Rules of Court.

<sup>55</sup> For strike out related issues see Section 8.2 below.

<sup>56</sup> When sitting in a single-judge formation, however, a judge will not examine any application against the Contracting Party in respect of which he or she has been elected; see Article 6 of Protocol No. 14.

<sup>57</sup> Article 8 of Protocol No. 14.

## 1.6 Instruments of the Court

### 1.6.1 The European Convention on Human Rights

As pointed out earlier, the Convention entered into force on 3 September 1953. It "...represents the minimum human rights standards which could be agreed by European states more than 50 years ago" and is primarily concerned with protecting civil and political rights, rather than economic, social, or cultural rights.<sup>58</sup>

The Convention consists of three Sections and a total of 59 Articles. The rights and freedoms are listed in Section 1 (Articles 1-18); Section 2 (Articles 19-51) deals with the establishment of the Court as well as its duties and powers; Section 3 (Articles 52-59) contains miscellaneous provisions concerning such issues as territorial application, reservations, denunciations, signature, and ratification. The Convention is included as Appendix No. 1 of this *Handbook* and can also be accessed online.<sup>59</sup>

The substantive rights and freedoms guaranteed by the Convention are set out in Articles 2-14 of the Convention. They are:

Article 2 Right to life

Article 3 Prohibition of torture

Article 4 Prohibition of slavery and forced labour

Article 5 Right to liberty and security

Article 6 Right to a fair trial

Article 7 No punishment without law

Article 8 Right to respect for private and family life

Article 9 Freedom of thought, conscience and religion

Article 10 Freedom of expression

Article 11 Freedom of assembly and association

Article 12 Right to marry

Article 13 Right to an effective remedy

Article 14 Prohibition of discrimination.

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58 P. Leach, *Taking a Case to the European Court of Human Rights*, 2nd edition, Oxford University Press, 2005 (hereinafter referred to as "Leach"), p. 5 *et seq.*

59 The Convention and its Protocols can be accessed at:  
<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/>

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These Articles are declaratory in the sense that they do not, on their own, impose any obligations on the Contracting Parties. For example, Article 3 of the Convention simply states that “No one shall be subjected to torture or to inhuman and degrading treatment or punishment”; it does not expressly bestow on the Contracting Parties an obligation to ensure, for example, that no one is subjected to torture. Rather, as some commentators have stated, “[i]t is Article 1 which transforms this declaration of rights into a set of obligations for the States which ratify the Convention”.<sup>60</sup> Pursuant to Article 1 of the Convention, Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. Difficulties which have arisen in establishing the boundaries of the Contracting Parties’ “jurisdiction” within the meaning of this Article have been resolved by the Court in its case-law.<sup>61</sup>

Under Article 32, the Court’s jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols. Because the Court regards the Convention as a “living instrument”,<sup>62</sup> it interprets and defines Convention rights in light of present-day conditions, not conditions obtaining when it was drafted more than 50 years ago. In the same vein, the Court strives to interpret and apply the Convention “in a manner which renders its rights practical and effective, not theoretical and illusory”.<sup>63</sup>

For instance, the Court held the following in its judgment in the case of *Christine Goodwin v. the United Kingdom*:

“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”.<sup>64</sup>

The *Goodwin* case provides a good example of what is meant by *interpretation in light of present day conditions*. *Goodwin* concerned the legal status of transsexuals in the United Kingdom. It was the increased acceptance among Contracting Parties in respect of transsexuality which had a direct bearing on the Court’s finding of a violation of Article 8 on a matter which had previously not been found to breach the Convention. Naturally, the

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60 See C. Ovey & R. C.A. White, *Jacobs & White: The European Convention on Human Rights*, 3rd edition, Oxford University Press, 2002 (hereinafter referred to as “Jacobs & White”) at p. 14 *et seq.*

61 The issue of jurisdiction within the meaning of Article 1 of the Convention will be examined in Section 2.3.2 (b) below.

62 See, among other authorities, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005, § 121.

63 *Ibid.*

64 *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, § 74, and the cases cited therein.

evolving ethical and legal standards of the Council of Europe will have an equal bearing on Article 3. For instance, it is possible that official conduct that was formerly not considered to be severe enough to reach the threshold for a finding of a violation of Article 3 might in light of current standards be considered to constitute ill-treatment in breach of this Article. Similarly, conduct that was formerly considered to constitute merely inhuman or degrading treatment might under current standards be regarded by the Court as torture, the most severe type of breach of the Article.<sup>65</sup> Applicants should keep this in mind when assessing the merits of their cases, and of course, in arguing them before the Court.

### 1.6.2 The Protocols

Following the entry into force of the Convention in 1953, a number of Protocols have been adopted within the Council of Europe by virtue of which some of the Contracting Parties have undertaken to protect a number of additional rights and freedoms within their jurisdictions. Protocol Nos. 2, 3, 5, 8, 9, 10, 11, and 14 are Protocols which amend Convention proceedings and do not include any additional rights or freedoms. The remaining Protocols, and the rights and freedoms they guarantee, are as follows:

- Protocol No.1, which entered into force on 18 May 1954: protection of property, the right to education, and the right to free elections.
- Protocol No. 4, which entered into force on 2 May 1968: prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, and the prohibition of collective expulsion of aliens.
- Protocol No. 6, which entered into force on 1 March 1985, provides for the abolition of the death penalty but includes a provision to allow the Contracting Parties to prescribe the death penalty in their legislation in time of war or of imminent threat of war.
- Protocol No. 7, which entered into force on 1 November 1988: procedural safeguards relating to expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice for the same offence, and equality between spouses.

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<sup>65</sup> The types of treatment prohibited by Article 3 of the Convention are examined in detail in Appendix No. 10.

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- Protocol No. 12, which entered into force on 1 April 2005: created a free-standing prohibition of discrimination. Unlike Article 14 of the Convention, which prohibits discrimination in the enjoyment of “the rights and freedoms set forth in the Convention”, Protocol No. 12 prohibits discrimination in the enjoyment of “any right set forth by law” and not just those rights guaranteed under the Convention.
- Protocol No. 13, which entered into force on 1 July 2003: abolished the death penalty in all circumstances.

Applicants should note that the Protocols mentioned above have not been ratified by all the Contracting Parties. It follows that a complaint made under an Article of one of the Protocols against a State which has not ratified that Protocol will be declared inadmissible.<sup>66</sup> The table of *Dates of Entry into Force of the Convention and its Protocols*, reproduced in *Textbox i* above, should be consulted. Also, this table is regularly updated on the Council of Europe’s website.<sup>67</sup>

### 1.6.3 The Rules of Court

The Rules of Court, which are frequently referred to throughout this *Handbook*, set out in greater detail than the Convention itself the organisation and the functioning of the Court as well as the Court’s procedure. They are indispensable for any applicant or lawyer wishing to make an application to the Court and must be consulted before making the application and throughout the course of the proceedings. The Rules of Court are found in Appendix No. 19 and they can also be accessed online.<sup>68</sup>

The Rules of Court are prepared by the Court and they enter into force after their adoption by the plenary Court. The Rules of Court which are in force at the time of writing were adopted by the plenary Court on 7 November 2005 and entered into force on 1 December 2005. It must be noted that the Rules of Court are continually revised in the light of the Court’s evolving practice and it is expected that they will be subjected to substantial amendments in order to facilitate the entry into force of Protocol No. 14.

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66 The compatibility of applications with the provisions of the Convention and the Protocols will be dealt with in Section 2.3 below.

67 <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+rati+fication+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>

68 The Rules of Court may be accessed at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>

## 1.6.4 Practice Directions

The President of the Court has the power to issue practice directions in relation to such issues as the appearance of parties at hearings and the filing of pleadings and other documents.<sup>69</sup> Practice directions, which supplement the Rules of Court, are described by the Registry of the Court as documents “to provide guidance to the parties on various aspects of their contacts with the Court and at the same time to introduce more standardised procedures with a view to facilitating the Court’s processing of the cases”. Observance by applicants and their legal representatives of the practice directions will speed up the examination of their applications by avoiding unnecessary and time consuming correspondence with the Court and will prevent an application from being rejected for failure to comply with procedural requirements. These practice directions are reprinted in Appendix No. 3.<sup>70</sup>

To date, three practice directions have been issued. They are:

- i. the practice direction on “Requests for Interim Measures”, issued on 5 March 2003;
- ii. the practice direction on “Institution of Proceedings”, issued on 1 November 2003; and finally,
- iii. the practice direction on “Written Pleadings”, issued on 1 November 2003.

## 1.6.5 Decisions and Reports of the Commission and Decisions and Judgments of the Court<sup>71</sup>

As one commentator has suggested:

“There is no formal doctrine of precedent as such within the Convention system. The Court does not consider itself to be bound by its previous judgments, although it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases”.<sup>72</sup>

However, the fact remains that the Court speaks through its judgments. The development of the Court’s case-law has parallels with the development of the common law in Anglo-Saxon legal systems; in formulating its judgments,

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69 Rule 32 of the Rules of Court.

70 The practice directions are available on the Council of Europe’s Web site at: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Practice+directions/>

71 Although, strictly speaking, Decisions and Reports of the Commission and Decisions and Judgments of the Court are not “Instruments of the Court”, it is appropriate to deal with them in this sub-section.

72 See Leach, p. 165. See also, *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, § 81.

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the Court – very much like a court in a common law system – reviews its previous decisions and judgments as well as the decisions of the Commission and applies them to similar situations.

Furthermore, as pointed out above, pursuant to Article 32 of the Convention, the Court’s jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols in the course of which it takes into account present day conditions. As will be seen in subsequent parts of this *Handbook*, there is a very large body of case-law on Article 3 of the Convention. For example, the Court has read into this Article a positive obligation – which is not apparent from the wording of the Article itself – obliging Contracting Parties to carry out effective investigations into allegations of ill-treatment.<sup>73</sup> At first sight, Article 3 appears only to contain an obligation that a State ensure that its authorities refrain from inflicting ill-treatment, i.e. a negative obligation. Likewise, what constitutes torture, inhuman or degrading treatment or punishment can only be gathered from the case-law. Indeed, it would have been practically impossible for Article 3 to contain an exhaustive list of every conceivable form of treatment it prohibits.

For the reasons mentioned above, in every decision and judgment adopted by the Court, there will be references to, and quotations from, previous decisions and judgments of the Convention institutions. It is imperative, therefore, that practitioners acquaint themselves with the Convention case-law in order to be able to refer to pertinent decisions and judgments in support of their applications. The case-law of the Court and of the Commission can be searched with the help of the HUDOC database which is available on the Court’s website.<sup>74</sup> In a number of Council of Europe Member States, important decisions and judgments are translated into the national language. Also, important decisions and judgments are published in English and French in the “Reports of Judgments and Decisions”.<sup>75</sup>

Finally, it should be noted that the Court occasionally refers to decisions and judgments of other international human rights mechanisms and benefits from their experience. For example, in its judgments in the cases of *Timurtas v. Turkey* and *Issa v. Turkey* the Court made extensive references to the jurisprudence of the Inter-American Court of Human Rights on the issue of forced disappearances and on the issue of jurisdiction, respectively.<sup>76</sup> Similarly, the Court’s judgments also make references to the International

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73 See Section 10.2.2 below.

74 [www.echr.coe.int/echr](http://www.echr.coe.int/echr). HUDOC is also available on CD-ROM and DVD format.

75 Published by Carl Heymanns Verlag KG.

76 See *Timurtas v. Turkey*, no. 23531/94, 13 June 2000 § 80; *Issa v. Turkey*, no. 31821/96, 16 November 2004 § 71.

Covenant on Civil and Political Rights and the Human Rights Committee.<sup>77</sup> Of relevance for the purposes of the present *Handbook* is the fact that the Court also relies on reports prepared by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and reports prepared by non-governmental organisations (NGOs)<sup>78</sup> when establishing the facts of cases. For example, in cases concerning allegations of unsatisfactory prison conditions, the Court regularly relies on reports prepared by the CPT following that organisation's visits to prisons in the territory of the respondent Contracting Party.<sup>79</sup> Appendix No. 11 should be consulted for detailed information about the CPT.

## 1.7 Summary of Proceedings Before the Court

Each stage of the Convention proceedings will be dealt with in greater detail in subsequent sections of this *Handbook*. The purpose of the present section is to give the reader a general overview of these proceedings in outline form. It should be noted at the outset that although the Convention stipulates in Article 29 § 3 that, in principle, the decision on the admissibility of an application is taken separately from the decision on the merits, this is at present more the exception than the rule. At the present time and in anticipation of the entry into force of Protocol No. 14,<sup>80</sup> proceedings on admissibility and merits are conducted jointly in the vast majority of cases, thus saving time by omitting a separate decision on admissibility. When the Court decides to apply this "joint procedure", the parties are informed of the decision. The overview of the Court's procedure set out below takes this new practice into account.

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<sup>77</sup> See, most recently, *Hirst v. the United Kingdom (no.2)* [GC], no. 74025/01, 6 October 2005, § 27.

<sup>78</sup> See, *inter alia*, *Van der Ven v. the Netherlands*, no. 50901/99, 4 February 2003.

<sup>79</sup> See *Said v. the Netherlands*, no. 2345/02, 5 July 2005.

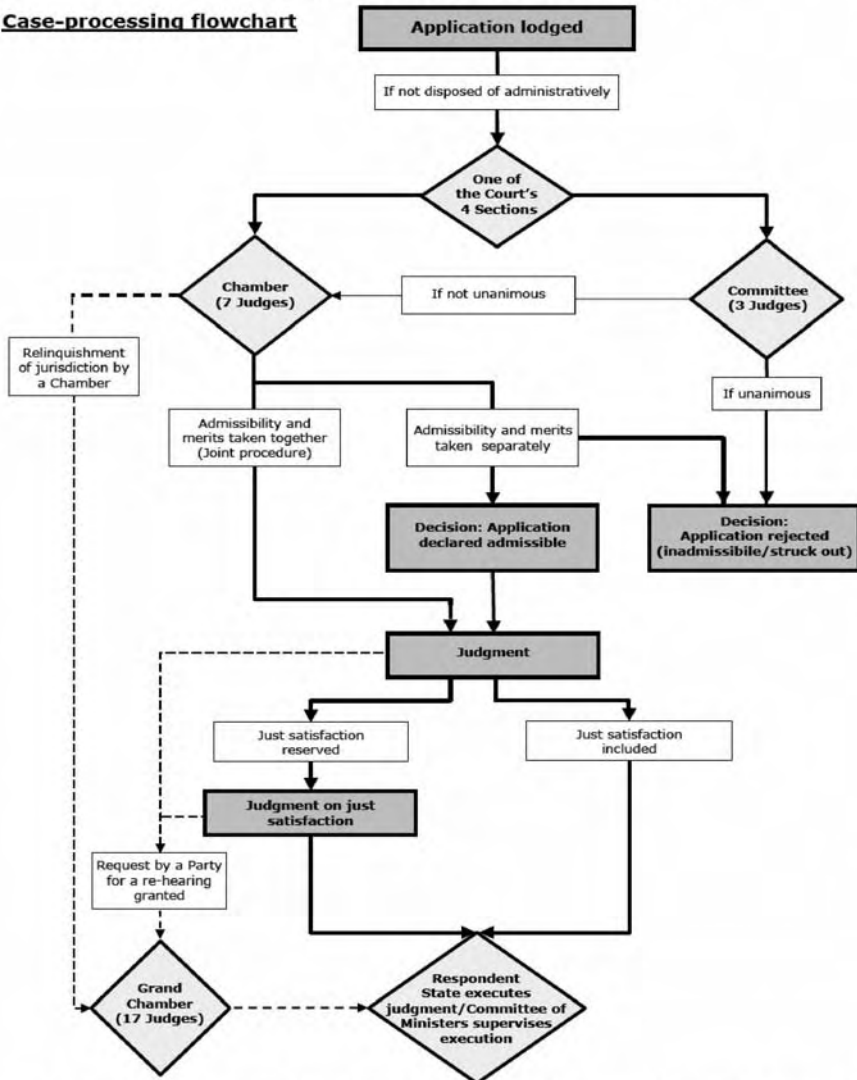
<sup>80</sup> See Article 9 of Protocol No. 14.



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*Textbox ii*<sup>81</sup>

EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Case-processing flowchart**

This flowchart indicates the progress of a case through the different judicial formations. In the interests of readability, it does not include certain stages in the procedure – such as communication of an application to the respondent State, consideration of a re-hearing request by the Panel of the Grand Chamber and friendly settlement negotiations.

81 Source: [http://www.echr.coe.int/NR/rdonlyres/BA3F06A3-133C-4699-A25D-35E3C6A3D6F5/0/MicrosoftWordPROGRESS\\_OF\\_A\\_CASE.pdf](http://www.echr.coe.int/NR/rdonlyres/BA3F06A3-133C-4699-A25D-35E3C6A3D6F5/0/MicrosoftWordPROGRESS_OF_A_CASE.pdf)

### 1.7.1 First Examination of the Application

Applications must be lodged using the Court's standard application form.<sup>82</sup> However, if there is a risk that the application cannot be prepared or completed before the end of the six-month period, it is important to note that an application may also be introduced by means of an introductory letter.<sup>83</sup> If an application is lodged in a document other than the Registry's standard application form and does not contain all the information required by that form, the Court will ask the applicant<sup>84</sup> to fill in the standard application form and send it to the Registry within six weeks together with the supporting documents. At this stage the application will also be given a number. The first digits in the application number before the forward-slash indicate the position of the application amongst the applications lodged in the same year. The digits after the forward-slash indicate the year in which the application was lodged. For example, application no. 123/05 is the 123<sup>rd</sup> application lodged in the year 2005.

If the applicant does not comply with the Court's request for a completed form and/or more information, the file will be destroyed by the Registry, i.e. it will be disposed of administratively within a year of the date of the Registry's letter because the Court will consider that the applicant has lost interest in pursuing the application. In the first six months of 2005, 9,448 applications were disposed of in this way.

Once the application is complete, it will be forwarded to the legal division of the Registry in which the lawyers who handle cases against the relevant Contracting Party are working. The application is then assigned to one of the Registry's lawyers who will be working as the case lawyer for that application. An examination of the application file will then be carried out and the application will be assigned to a decision body in one of the five Sections. In cases where the material submitted by the applicant on its own is sufficient to disclose that the application is inadmissible or should be struck out of the list<sup>85</sup> and also where such action can be taken "without further examination",<sup>86</sup> it will be registered as a "Committee case".<sup>87</sup> Otherwise the application will be registered as a "Chamber case", and a judge rapporteur will be appointed.<sup>88</sup>

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82 Application forms may be downloaded at

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Application+form/>

83 See Section 4.1 below for information on introductory letters and *Textbox vii* for a model hypothetical letter.

84 Or the applicant's lawyer if he or she is represented.

85 Rule 49 § 1 of the Rules of Court.

86 Article 28 of the Convention.

87 On 1 May 2006, 38,500 Committee cases were pending before the Court.

88 On 1 May 2006, 20,900 Chamber cases were pending before the Court. Also on 1 May 2006, 24,850 applications had not yet been allocated to a judicial formation.

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### 1.7.2 Applications Declared Inadmissible by a Committee

If the application is registered as a Committee case, it will be dealt with by a Committee of three judges<sup>89</sup> who will in most cases declare the application inadmissible by a unanimous decision. The applicant will be informed of the decision by means of a letter which contains the briefest of indications as to the reasons.<sup>90</sup> Decisions on inadmissibility are final. If there is no unanimity amongst the judges, the application will be referred to a Chamber of seven judges within the same Section.

### 1.7.3 Examination by a Chamber

If the application is registered as a Chamber case, or if it is referred to the Chamber by a Committee as described above, the case will be examined by a Chamber.<sup>91</sup> Chamber decisions are taken by majority. The judge rapporteur assigned to the case may propose to the Chamber or to its President that notice of the application be given to the respondent Contracting Party<sup>92</sup> (more commonly referred to as “communication”). On average, an application may be expected to be communicated within 12 months after its introduction.<sup>93</sup>

If the Chamber or its President agrees to communicate the case, the Government of the State concerned will be invited to submit to the Court, usually within a period of twelve weeks, its written observations on the admissibility and merits of the case and to answer any questions which may be put to it. At the same time, the Government may also be invited to inform the Court of its position as to a possible friendly settlement of the case.<sup>94</sup>

Instead of communicating the case, the Chamber can also decide to declare the case inadmissible. That decision, which generally contains considerably more reasoning than the letter informing the applicant that his or her application was rejected by a Committee, will be communicated to the applicant and is final, i.e. it cannot be referred to the Grand Chamber.

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89 As pointed out earlier, following the entry into force of Protocol No. 14, single-judge formations will deliberate and adopt such decisions. However, national judges will not have powers to deliberate such cases introduced against the Contracting Parties in respect of which they were elected.

90 See *Textbox x* for a sample letter informing the applicant of the decision of the Committee.

91 Article 29 § 1 of the Convention.

92 Rule 54 § 2 (b) of the Rules of Court.

93 See K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 2nd edn., Sweet and Maxwell, 2004 (hereinafter referred to as “Reid”), at p. 17 *et seq.*

94 See Section 8.1 below.

If the case is communicated, the Court will forward the observations received from the Government to the applicant and will invite him or her to respond to the Government's arguments as well as to the Government's position on the issue of friendly settlement, if such a position was expressed. In addition, the applicant will be invited to submit his or her claims for just satisfaction under Article 41 of the Convention.<sup>95</sup> At this stage the applicant may also apply for free legal aid from the Court to cover his or her expenses or a part of them.<sup>96</sup>

Following the receipt of the parties' observations, the Chamber will deliberate on the case. If no friendly settlement is reached and the Chamber is of the view that the application is inadmissible, it will discontinue the joint procedure and issue a decision declaring the case inadmissible. Since such decisions are final, the parties cannot request the referral of the case to the Grand Chamber.

If, on the other hand, the Chamber considers that the application is admissible it will, under the joint procedure, immediately move on to the judgment stage. It will be presented with a draft judgment prepared on the instructions of the judge rapporteur in which the application will be declared admissible and where the Chamber concludes whether or not there has been a violation of the Articles of the Convention invoked by the applicant. Following the adoption of the judgment, the parties will have a period of three months within which to request a referral of the case to the Grand Chamber.<sup>97</sup> Any such request will be examined by the Panel of the Grand Chamber, whose decisions are final.

If no request for referral to the Grand Chamber has been made, the Government will be expected to pay the applicant, within three months of the date of the judgment, any amounts of just satisfaction awarded in respect of the applicant's costs and expenses and pecuniary and non-pecuniary damage. The Committee of Ministers will be responsible for the execution of the judgment.<sup>98</sup>

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95 Rule 60 of the Rules of Court. See also Section 7 below.

96 Rule 91 of the Rules of Court. See also Section 1.9 below.

97 Article 43 of the Convention. See also Section 9.2 below.

98 See Section 9.3 below.

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## 1.8 Legal Representation

The application form may be completed and submitted to the Court by the applicant him- or herself; in other words, an applicant does not have to be represented by a lawyer at this early stage of the proceedings. Legal representation will be required, however, “following notification of the application to the respondent Contracting Party”,<sup>99</sup> i.e. after the application has been communicated. For example, in *Grimaylo v. Ukraine*,<sup>100</sup> the Court struck out the application from its list of cases because of the applicant’s refusal to appoint a lawyer to represent him in the proceedings before the Court following the communication of the application to the respondent Government. Although Mr. Grimaylo insisted on representing himself or appointing his wife to represent him, the Court was of the opinion that a lawyer’s participation was essential, given the complexity of the case from a legal and factual point of view.

As a general rule, the representative should be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them.<sup>101</sup> However, permission may be sought from the President of the Chamber allowing the applicant to represent him- or herself or for the appointment of a person other than an advocate.

Although legal representation is not required at the time of lodging the application, it is strongly recommended for a number of reasons. The most important reason, as pointed out above, is the risk that an application may be declared inadmissible by a Committee solely on the basis of the contents of the application form. Although the case lawyer in the Registry of the Court will usually give the applicant adequate opportunity to support his or her case with the necessary documentation, he or she cannot re-draft the application or the arguments set out in the application form – that is, if there are any. Indeed, it is not uncommon that application forms are submitted containing little or even no legal argumentation. Similarly, a legal representative who is retained at a later stage, after the application form has already been submitted to the Court, cannot re-draft the application or the arguments set out in the application form. As will be seen below in the section on admissibility, one of the grounds for inadmissibility is the “manifestly ill-founded” test applied to applicants’ complaints.<sup>102</sup> An application may be deemed to be manifestly ill-founded, *inter alia*, if it is not supported by legal argumentation and/or

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99 Rule 36 § 2 of the Rules of Court.

100 *Grimaylo v. Ukraine* (dec.), no. 69364/01, 7 February 2006

101 Rule 36 § 4 of the Rules of Court.

102 See Section 2.6 below.

sufficient evidence. A person without legal training may not be able to provide this. It must be emphasised here that once an application is declared inadmissible, there is virtually *nothing* an applicant can do to overturn that decision.<sup>103</sup>

In most countries that are parties to the Convention, a potential applicant without financial means will be able to obtain the services of a lawyer free of charge, to assist him or her with the application. Alternatively, in certain countries it may be possible to obtain legal aid from the national authorities. Furthermore, domestic legislation of some Contracting Parties allows lawyers to practise on a no-win, no-fee basis. Also in some countries, potential applicants may enter into agreements with their lawyers whereby they undertake to pay a percentage of any award made by the Court by way of just satisfaction pursuant to Article 41. Applicants may also be able to obtain legal assistance from non-governmental organisations (NGOs) with experience in human rights litigation.

In order to represent his or her client in Convention proceedings, the representative must submit to the Court a written authority or power of attorney. The Court's own standard authority form, a copy of which is reproduced below in *Textbox iii*,<sup>104</sup> is the most appropriate and practical one to use, but a power of attorney prepared by a notary public is also acceptable provided it expressly indicates that the advocate is authorised to represent his or her client in proceedings before the European Court of Human Rights.

If the applicant is represented, the Court will correspond with the representative and not with the applicant. Furthermore, it is the Court's policy to correspond with only one representative, even if the applicant is represented by more than one lawyer.

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103 In some circumstances, if the reason for inadmissibility is the applicant's failure to exhaust domestic remedies, he or she may submit another application to the Court after having exhausted the relevant domestic remedy. This will only be possible, however, if the applicant does not, in the meantime, miss the deadline in domestic law to avail him or herself of that remedy. See also Section 2.4.2 (e) below.

104 It may be downloaded at <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Authority+Form/>

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**Textbox iii**      **Form of Authority**<sup>105</sup>

## EUROPEAN COURT OF HUMAN RIGHTS

**AUTHORITY\***  
(Rule 36 of the Rules of Court)

I, .....

(name and address of applicant)

hereby authorise .....

(name, address and occupation of representative)

to represent me in the proceedings before the Europe and Court of Human Rights,  
and in any subsequent proceedings under the European Convention on Human  
Rights, concerning my application intorduced under Article 34 of the Convention  
against.....  
(respondent State)

on .....

(date of letter of introduction)

.....  
(place and date).....  
(signature of applicant)

I hereby accept the above appointment

.....  
(signature of representative)**\* This form must be competed and signed by any applicant wishing to be represented  
before the Court and by the lawyer or other person appointed.**105 Source: <http://www.echr.coe.int/NR/rdonlyres/001F1ADA-0F5A-4975-8B10-25D0C239865B/0/English.pdf>

## 1.9 Legal Aid

If a decision has been taken to communicate the case, the Court will inform the applicant that he or she can apply for free legal aid under the Court's legal aid scheme for applicants who have insufficient means to pay for legal representation. The applicant will be invited to inform the Court as soon as possible whether an application for legal aid will be made, in which case the necessary forms will be sent to him or her. Requests for legal aid must be supported by a declaration of means, certified by the relevant domestic authorities, which will be indicated by the Court. The Court's *Declaration of Applicant's Means* form is reproduced below in *Textbox v*.

Legal aid will be granted to an applicant only where the President of the Chamber is satisfied:

- (a) that it is necessary for the proper conduct of the case before the Chamber;
- (b) that the applicant has insufficient means to meet all or part of the costs entailed.<sup>106</sup>

Legal aid may be granted to an unrepresented applicant only to cover reasonable expenses associated with the case, e.g. translation, postage, fax, stationery, etc. If the applicant is represented, the Court will also grant a specified sum in respect of the representative's fees. The Court's scale of *Legal Aid Fees* is reproduced below in *Textbox iv*.


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106 Rule 92 of the Rules of Court; see also Rules 91, 93-96 of the Rules of Court.



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**Textbox iv**      **Legal Aid Rates<sup>107</sup>**

<b>Legal aid rates</b>	
<b>applicable as from 1 January 2006</b>	
<b><u>A. FEES AND EXPENSES</u></b>	Lump sum per case
Preparation of the case	
<ul style="list-style-type: none"> <li>• Filing written pleadings at the request of the Court on the admissibility or merits of the case</li> <li>• Supplementary observations at the request of the Court (on the admissibility or merits of the case)</li> <li>• Submissions on just satisfaction or friendly settlement</li> <li>• Normal secretarial expenses (for example telephone, postage, photocopies)</li> </ul>	
<b><u>B. OTHER</u></b>	
1. Appearance at an oral hearing before the Court or attending the hearing of witnesses (including preparation)	€ 300
2. Assisting in friendly settlement negotiations	€ 200
3. Travelling costs incurred in connection with appearance at an oral hearing or hearing of witnesses or with friendly-settlement negotiations	according to receipts
4. Subsistence allowance in connection with appearance at an oral hearing or hearing of witnesses or with friendly-settlement negotiations	€ 169 per diem

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107 Source: Council of Europe.

*Textbox v*                      ***Declaration of Applicant's Means***<sup>108</sup>

**DECLARATION OF APPLICANT'S MEANS**

1. Name of applicant and case number:
2. Are you married, divorced or single?
3. Nature of your employment, name of employer:  
(if not at present employed, give details of your last employment)
4. Details of net salary and other net income (e.g. interest from loans and investments, allowances, pensions, insurance benefits, etc.) after deduction of tax:
5. List and value of capital assets owned by you:
  - (a) Immovable property (e.g. land, house, business premises)
  - (b) Movable property and nature thereof (e.g. bank balance, savings account, motor-car, valuables)
6. List your financial commitments:
  - (a) Rent, mortgage and other charges
  - (b) Loans and interest payable thereon
  - (c) Maintenance of dependants
  - (d) Any other financial obligations
7. What contribution can you make towards your legal representation before the European Court of Human Rights?
8. The name of the person whom you propose to assist you:  
(see Rule 94 in conjunction with Rule 36 §§ 4 and 5 of the Rules of Court)  
I certify that the above information is correct and complete.

Signed:

Dated:

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108 Source: Council of Europe.

## 1.10 The Languages Used in the Court's Proceedings

The official languages of the Court are English and French.<sup>109</sup> However, applicants may fill in the application form in one of the official languages of the Contracting Parties and may continue to correspond with the Court in that language until the communication of the application to the Contracting Party. After reaching that point all correspondence with the Court should be conducted in English or in French. Applicants may, however, seek leave from the President of the Chamber to continue to use the official language of a Contracting Party when communicating with the Court, when appearing before it at a hearing, or in drafting their observations.<sup>110</sup>

As a general rule, the Contracting Parties are required to communicate with the Court and to submit their observations in English or French. They may seek leave from the President of the Chamber to use their official national languages for their oral or written submissions, in which case they will be required to submit also an English or French translation of those submissions, such as observations. However, as stated above, Contracting Parties usually do submit their observations in English or French and if the applicant does not understand English or French, he or she may arrange for the translation of the observations into his or her own national language and include the expenses in the claim for just satisfaction.<sup>111</sup> In the alternative, he or she may ask the President of the Chamber to invite the respondent Contracting Party to provide a translation of the observations into an official language of the Contracting Party which he or she understands.<sup>112</sup>

Judgments and decisions of the Chambers and the Grand Chamber are handed down in English or French, and it is not the responsibility of the responding Contracting Party or of the Court to arrange for their translation.

## 1.11 Written Pleadings

As described in Section 1.14 below, hearings are held in only very few cases. It is for this reason that the importance of written pleadings must be highlighted since they will, in the great majority of cases, represent the only

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109 Rule 34 § 1 of the Rules of Court.

110 Rule 34 § 3 of the Rules of Court.

111 See Section 7.2.1 (c) below.

112 Rule 34 § 5 of the Rules of Court.

opportunity for applicants to convey their arguments to the Court and to rebut the Government's counter-arguments. The first written pleading is the application, which will form the basis of the Court's consideration of the case. If the Court proceeds to communicate the application to the respondent Government, the applicant will have the opportunity to submit additional written pleadings, including the "observations" (sometimes referred to as "memorial") in reply to the respondent Government's observations on the admissibility and merits of the case.<sup>113</sup> The applicant may have a further opportunity to submit observations if the case is declared (partially) admissible in a separate decision. In such circumstances the Court will generally either request the parties to respond to specific questions or to submit observations on a particular issue, or it will inform the parties that it does not require any further information or observations but that it is nevertheless open to the parties to submit any additional evidence or observations they wish.<sup>114</sup> Although the issue of observations is discussed in subsequent parts of this *Handbook*, the present sub-section will summarise the general rules and strategic points to be kept in mind. The applicants' observations in the cases of *Akkum and Others v. Turkey*<sup>115</sup> and *Kişmir v. Turkey*,<sup>116</sup> and the respondent Government's observations in the case of *Van der Ven v. the Netherlands*<sup>117</sup> in Appendices Nos. 12-14, will give an idea of the form and the contents of observations submitted in the course of the Strasbourg proceedings.

It must be stressed at the outset that in preparing their observations, applicants should refer to the "Practice Direction on Written Pleadings"<sup>118</sup> and follow the recommendations set out therein. The time limits indicated by the Registry must always be observed. It is possible to seek an extension of the time limit and the first such request is usually granted provided that it is made within the time limit and that it is duly reasoned.

As a general rule, observations must be drafted in one of the official languages of the Court, i.e. English or French. However, as mentioned above, an applicant who has completed the application form in another language may seek leave from the President of the relevant Chamber for the continued use of that language, provided it is an official language of one of the Contracting Parties.<sup>119</sup> Such leave is usually given without any difficulty.

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113 Such observations are discussed in detail in Section 5.2 below.

114 See Section 6.4 below for further information.

115 No. 21894/93, 24 March 2005.

116 No. 27306/95, 31 May 2005.

117 Cited above.

118 See Appendix No. 3.

119 Rule 34 § 3 (a) of the Rules of Court.

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It is imperative that the arguments set out in observations are well structured; an unstructured, free flowing set of observations, no matter how strong the legal arguments contained therein, will frustrate the opportunity to support the case. If the applicant does not contest the facts as summarised by the Court, there is no need to set them out once more in the observations; a simple statement to the effect that the applicant agrees with the statement of facts as set out by the Court will be sufficient. Obviously, if there have been any developments (such as a new domestic court decision, a new step in the domestic investigation, or a new witness comes forward, etc.) these need to be mentioned in the observations. Furthermore, if the respondent Government has disputed the facts, the applicant should add further information and evidence to support the facts as alleged by him or herself, and further argumentation to show that his or her version of the events is more credible than that of the Government. Obviously, as the applicant will already have submitted to the Court all the evidence in support of the case, he or she may adduce further material corroborating the evidence previously submitted. For example, if the Government has disputed the accuracy or the contents of medical reports detailing injuries, the applicant should consider obtaining an independent medical opinion to counter the Government's arguments.<sup>120</sup>

## 1.12 Third Party Interventions (*Amicus Curiae*)

Persons or organisations who are not parties to a case before the Court may, in the discretion of the President of the Court, intervene in the proceedings as third parties. Such third party interventions are usually made by means of *amicus curie* briefs providing additional arguments in support of one of the parties to the case. Article 36 of the Convention provides the authority for such interventions:

“[t]he President of the Court may, in the interest of the proper administration of justice, invite ... any person concerned who is not the applicant to submit written comments or take part in hearings”.

Rule 44 of the Rules of Court governs procedures relating to third party interventions. According to this Rule, once the case has been communicated to the respondent Government, the President of the Chamber may invite or grant leave to any person concerned who is not the applicant to submit written comments or, in exceptional cases, to take part in a hearing. Requests for

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120 See the applicant's observations in the case of *Kişmir v. Turkey*, cited above, which include a copy of an independent medical report, Appendix No. 13.

leave to intervene as a third party must be duly reasoned and submitted in writing in one of the official languages of the Court *not later than twelve weeks* after notice of the application has been given to the respondent Contracting Party. In cases before the Grand Chamber, the twelve-week period starts running from the date of notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber<sup>121</sup> or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.<sup>122</sup> The time-limits may, in exceptional circumstances, be extended by the President of the Chamber if sufficient cause is shown. Written comments submitted under this Rule must be drafted in one of the official languages of the Court.<sup>123</sup> They will be forwarded to the parties to the case, who will be entitled, subject to any conditions, including time-limits set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

The purpose of an *amicus* intervention is to assist the Court in its deliberations on a case, or a specific issue in a case. In this connection, many NGOs have expertise or specialist information on specific human rights issues relevant to the case in which they seek to intervene, and in practice, most third party interventions are submitted by NGOs. Such information or expertise may not always be within the reach of an applicant, his or her legal representative, or indeed of the Court. A prospective third party must specify in the request for leave to intervene what added value its intervention will have for the Court's examination of the case. For example, an NGO with experience in the subject matter pertinent to the case in which it seeks to intervene could emphasise that experience. Similarly, an NGO with specialised knowledge of other human rights mechanisms may try to persuade the Court of the utility of a comparative legal analysis of a particular issue relevant to the case. In this connection it must be pointed out that the Court is frequently prepared to take account of case-law of other international and domestic courts (occasionally even of courts of countries not parties to the Convention<sup>124</sup>) which may serve as guidance on issues which it has not yet had occasion to consider in its own jurisprudence.<sup>125</sup> However, third party interventions which only discuss the jurisprudence of the European Court have marginal utility, as this is the speciality of the Court itself.

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121 For issues relating to the relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber see Section 1.5.1 above.

122 For issues relating to referral to the Grand Chamber see Section 9.2 below.

123 I.e. English and French; see Section 1.10 above.

124 See *Hirst v. the United Kingdom (No. 2)* [GC], cited above, §§ 35-39.

125 See Section 1.6.5 above.

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An example of a case in which third party interventions played a role is *Nachova and Others v. Bulgaria*; *amicus* briefs were received from three non-governmental organisations, the European Roma Rights Centre (ERRC), INTERIGHTS, and Open Society Justice Initiative (OSJI).<sup>126</sup> The ERRC's *amicus* brief informed the Court of incidents of ill-treatment and killing of Roma by law enforcement agents and private individuals. INTERIGHTS criticised the Court's standard of beyond reasonable doubt as erecting insurmountable obstacles to establishing discrimination. The OSJI, for their part, commented on the obligation of States, in international and comparative law, to investigate racial discrimination and violence. The information and the arguments submitted by these NGOs were summarised in the judgment.<sup>127</sup> Whereas the information submitted by the ERRC provided background information for the Court about the problems facing Roma in Bulgaria, the arguments submitted by INTERIGHTS led the Court to explain its reliance on the standard of proof beyond reasonable doubt and to address – for the first time in its history – the criticisms which have been levelled against the Court for its insistence on this high standard of proof.<sup>128</sup> Finally, it cannot be excluded that the OSJI's *amicus* brief had some bearing on the Court's conclusion that “the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.”<sup>129</sup>

### 1.13 Costs

The Court does not require applicants to pay any fees at any stage of the Convention proceedings. If an applicant is successful with his or her application and the Court finds that there has been a violation of the Convention, the Court may order the respondent State to reimburse the expenses incurred by the applicant in connection with the examination of his or her Convention complaints, pursuant to Article 41 of the Convention, including lawyer's fees, translation and postage costs, and costs of attending any possible hearings in Strasbourg. In the course of the Convention proceedings, applicants

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126 *Nachova and Others v. Bulgaria* [GC], nos. 43577/98, 43579/98, 6 July 2005, § 8.

127 See §§ 55-59 and 138-143.

128 See 11.6 for issues relating to the standard of proof in the Court's proceedings,

129 § 163.

may also apply for legal aid from the Court to cover – at least partially – their costs.<sup>130</sup>

## 1.14 Hearings

The Chamber and the Grand Chamber may hold hearings on the admissibility and/or the merits of cases in Strasbourg. Such hearings require the attendance of the parties or their representatives and sometimes also the attendance of witnesses and experts. During a hearing, the parties will present their case and arguments and answer any questions that may be put to them by the judges. However, hearings are held in only very few cases.<sup>131</sup> The parties are informed of the Court's decision at a subsequent date and not on the day of the hearing. Although such hearings are open to the public, the (Grand) Chamber may, of its own motion or at the request of a party or any other person concerned, decide to exclude the public and the press from all or part of a hearing in the interests of, *inter alia*, morals, public order and protection of the private life.<sup>132</sup>

The Court also has powers to appoint one or more of its judges to conduct an inquiry, carry out an on-site investigation, or take evidence in some other manner within the territory of the respondent Contracting Parties.<sup>133</sup> Although the Court uses these powers rarely, it has done so in a number of cases in order to establish the facts through the hearing of applicants, witnesses, experts, and other persons connected with the complaint.<sup>134</sup>

## 1.15 Effects of the Court's Judgments

After the Court has found a violation of the Convention and awarded just satisfaction to the injured party, it transmits its judgment to the Committee of Ministers to supervise the execution of that judgment by the respondent State in accordance with Article 46 § 2 of the Convention. The Court does not interfere with the execution process thereafter. Thus, aside from awarding monetary compensation, the Court has consistently declined to assume juris-

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130 See Section 1.9 above and Section 7 below.

131 In 2005, 20 hearings were held by the Sections and 25 by the Grand Chamber.

132 For other reasons see Rule 63 § 2 of the Rules of Court.

133 Rule A1 of the Annex to the Rules of Court.

134 See also Section 11.3 below.



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diction to order a State to carry out particular measures of reparation or to change its law or practice in any particular way so as to prevent similar violations from recurring in the future.<sup>135</sup>

Yet in numerous cases the Court has held that in the context of the execution of judgments pursuant to Article 46 of the Convention, 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 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.<sup>136</sup> In this connection the individual measure most commonly required for *restitutio in integrum* is the reopening of domestic legal proceedings. The need for such a measure arises primarily in respect of criminal proceedings since problems with civil proceedings can frequently be remedied through financial compensation. But a criminal conviction may need to be quashed or a retrial ordered to remedy the violation in question. For example, where an applicant has been tried and convicted by a court which is not independent within the meaning of Article 6 § 1 of the Convention,<sup>137</sup> or his or her right to freedom of expression under Article 10 of the Convention has been unjustifiably restricted by national law,<sup>138</sup> the Committee of Ministers interprets the judgments of the Court and, if necessary, exerts pressure on the respondent State with a view to forcing it to remedy the situation giving rise to a violation.

However, despite the declaratory nature of its judgments and its lack of jurisdiction to order consequential measures against a State, recent practice indicates that the Court is willing to assist the Committee of Ministers in the execution process by providing certain guidelines to the respondent States on how the consequences of a particular violation of the Convention may be

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135 *Philis v. Greece*, nos. 12750/87, 13780/88 and 14003/88, 27 August 1991, § 79. In *Selmouni v. France*, the Court found violations of Articles 3 and 6 of the Convention on the grounds that the applicant had been subjected to acts of torture in the hands of the French police during his detention in police custody in Paris and that the proceedings in respect of his complaint against the police officers had not been conducted within a reasonable time. The Court awarded the applicant a substantial sum to cover both personal injury and non-pecuniary damage. However, it dismissed the applicant's requests concerning an order for transfer to the Netherlands (of which country he was a national) to serve the remainder of his sentence there and to specify in its judgment that the sums awarded under Article 41 should be exempt from attachment. The Court held that Article 41 did not give it jurisdiction to make such orders against a Contracting Party; see *Selmouni v. France* [GC], no. 25803/94, 28 July 1999, § 126.

136 See, for example, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, 13 July 2000, § 249; *Menteş and Others v. Turkey* (Article 50), no. 23186/94, 24 July 1998, § 24; *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004, § 47.

137 See, for example, *Incal v. Turkey*, no. 22678/93, 9 June 1998.

138 See, for example, *Süreker v. Turkey (no. 2)* [GC], no. 24122/94, 8 July 1999.

remedied. For example, in its judgment in the case of *Üküñç and Güneş v. Turkey* the Court, having concluded that the applicant had not received a fair trial within the meaning of Article 6 of the Convention, stated that in principle the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial.<sup>139</sup> In its judgment in the case of *Assanidze v. Georgia*, where the applicant was not released by the authorities of the Ajarian autonomous republic in Georgia despite his acquittal by the Supreme Court, the Court held that Georgia had to secure the applicant's release at the earliest possible date in order to put an end to the violations of the applicant's rights under Articles 5 and 6 of the Convention.<sup>140</sup>

Likewise, in the case of *Ilaşcu and Others v. Moldova and Russia*,<sup>141</sup> four Moldovan citizens brought a complaint about their treatment in the Moldovan Republic of Transnistria. They complained, *inter alia*, that they had not received a fair trial and that they were subjected to ill-treatment and inhuman prison conditions. The Court found a breach of Article 3 of the Convention on account of the ill-treatment inflicted on the applicants. It also found that the continued detention of Mr Ilaşcu by Russia and of the other three applicants by Moldova was in violation of Article 5 of the Convention. In addition to awarding the applicants a certain amount of money for pecuniary and non pecuniary damages, the Court held that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.

Coming to the cases concerning allegations of ill-treatment, there is no judgment where the Court specifically indicated, as part of just satisfaction under Article 41, a type of measure that might be taken by the respondent State to remedy the suffering of the victim of torture or other forms of ill-treatment. But, in some cases, the Court did point to certain defects in the legislation or practice of States giving rise to a systemic violation of Article 3 of the Convention. As an example, in the case of *Abdülsamet Yaman v. Turkey*,<sup>142</sup> which concerned the alleged torture inflicted on the applicant during his detention in police custody and where the criminal proceedings against the accused police were discontinued on the ground that the prosecution was time-barred, the Court pointed out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and

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139 *Üküñç and Güneş v. Turkey*, no. 42775/98, 18 December 2003, § 32.

140 *Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, § 203.

141 *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, § 490.

142 *Abdülsamet Yaman v. Turkey*, no. 32446/96, 2 November 2004, § 55.

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sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlined the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted.

Similarly, in its judgment in the case of *Güngör v. Turkey*, which concerned the criminal investigation into the killing of the son of a member of the Turkish Parliament, the Court found that Turkey must take appropriate measures without delay to discharge, in accordance with the Court's judgment, its obligations to ensure that its legislation was clarified so that parliamentary immunity could no longer operate in practice to prevent prosecutions for ordinary criminal offences in cases in which members of parliament or their families were involved as possible witnesses or suspects.<sup>143</sup>

Mention should further be made of the fact that in some cases involving allegations of ill-treatment or other serious violations of the Convention, the parties agreed to settle their cases on the basis of friendly settlement declarations proposed by the Registry of the Court. In these declarations, the respondent Governments accepted responsibility for the alleged violation of the Convention and undertook to take necessary measures to prevent similar violations in the future and pay compensation to the victims of the violations in question.<sup>144</sup>

Thus, although the Court is not empowered under the Convention to order a State to carry out particular measures of reparation or to change its law or practice in any particular way, it has managed to get States to undertake these measures by way of friendly settlement judgments containing the aforementioned type of declarations. Such a situation can be illustrated by the case of *Kalm, Gezer and Ötebay v. Turkey*,<sup>145</sup> which concerned alleged ill-treatment inflicted on the applicants during their detention in police custody. With the assistance of the Registry of the Court, the parties respectively submitted formal declarations accepting a friendly settlement of the case. For their part, the Turkish Government accepted in the declaration that the treatment suffered by the applicants gave rise to a violation of Article 3 of the Convention. The Government also undertook to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such acts and the obligation to carry out effective investigations would be respected in the future. It further offered to each of the applicants certain amounts of money. Following acceptance of the Government's declaration the applicants agreed

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143 *Güngör v. Turkey*, no. 28290/95, 22 March 2005, § 111.

144 See, for example, *Sak v. Turkey*, no. 29359/95, 30 October 2001. The parties' friendly declarations in this case may be consulted in *Textbox xi*.

145 *Kalm, Gezer and Ötebay v. Turkey*, nos. 24849/94, 24850/94 and 24941/94, 28 October 2003.

to settle their case and it was subsequently struck out of the list of the Court's cases.

It is considered that serious violations of the Convention, such as violations of Articles 2 and 3, are by their very nature irreparable. Any remedy, including pecuniary compensation, will fail to be truly proportional to the gravity of the injury inflicted on the victim, particularly when the perpetrators have not been held to account for their wrongdoing. Having regard to the recent practice of the Court to provide certain guidelines to respondent States as described above, it is hoped that in its future judgments the Court will not merely award damages to victims of ill-treatment but also indicate the specific measures that might be taken by respondent States to remedy the situation giving rise to the violation, such as the (re-)opening of criminal proceedings against the perpetrators of ill-treatment.

## PART II

### ADMISSIBILITY



## ADMISSIBILITY

### 2.1 Introduction

### 2.2 Victim Status (Article 34)

#### 2.2.1 Summary

#### 2.2.2 Discussion

- a) The General Rule
- b) Standing of Next of Kin in Article 2 and 3 Cases
- c) Indirect Victims
- d) Adoption of Applications of Deceased Applicants

### 2.3 Compatibility of the Application (Article 35 § 3)

#### 2.3.1 Summary

#### 2.3.2 Discussion

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**2.7 Abuse of the Right of Application (Article 35 § 3)****2.8 Anonymous Applications (Article 35 § 2 (a))****2.9 Applications Substantially the Same (Article 35 § 2 (b))****2.10 The New Admissibility Criterion in Protocol No. 14**

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### *Article 34*

#### *Individual applications*

*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right”.*

### *Article 35*

#### *Admissibility criteria*

- 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*
- 2. The Court shall not deal with any application submitted under Article 34 that:*
  - a. is anonymous; or*
  - b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.*
- 3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.*
- 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.*



## 2.1 Introduction

Before lodging an application with the Court, the applicant must satisfy him or herself that the complaint is admissible. The Court's standing and admissibility rules are contained in Articles 34 and 35 of the Convention respectively. These rules constitute a formidable filtering mechanism by means of which the Court weeds out a large number of cases from its heavily overburdened docket. From the standpoint of the applicant, the admissibility rules therefore constitute the main hurdle to having a case heard in Strasbourg. A total of 26,360 applications were declared inadmissible by Committees of three judges in 2005; this figure represents almost 94% of the cases which were disposed of judicially (i.e. it does not even include cases disposed of administratively before reaching the admissibility stage). Most of the inadmissible cases were declared inadmissible because they did not comply with the exhaustion rule, the six-month rule, or both taken together. A large number of applications were also dismissed as "manifestly ill-founded" because the applicant had failed properly to substantiate his or her allegations. Therefore, the importance of strictly adhering to the Court's admissibility criteria cannot be overemphasised. In this regard, prospective applicants should pay careful attention to the Court's practice and jurisprudence on admissibility issues. Applicants should also consult and comply conscientiously with the Rules of Court<sup>146</sup> and pay careful attention to the Court's Practice Directions,<sup>147</sup> the "Notes for the guidance of persons wishing to apply to the ECHR",<sup>148</sup> and the "Explanatory note for persons completing the application form"<sup>149</sup>

In a nutshell, the Court's rules of admissibility can be expressed as follows: for an application to be considered admissible, the applicant must convince the Court that 1) he or she is a "victim", 2) that the application is "compatible" with the Convention (*ratione temporis*, *ratione loci*, *ratione materie*, and *ratione persone*), 3) that he or she has exhausted domestic remedies, 4) that the application complies with the six-month rule, 5) that the complaints are sufficiently "substantiated" on their face to disclose a violation of the Convention, and finally that the application is not 6) "abusive", 7) "anonymous", or 8) "substantially the same" as one that has been or is being considered by another international procedure of investigation or settlement.

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146 See Appendix No. 19.

147 See Appendix No. 3.

148 See Appendix No.17.

149 See Appendix No. 4.

Virtually all of these criteria have been subject of considerable interpretation by the Court and some of them have important exceptions. Some of these exceptions apply specifically in the context of violations of Articles 2 and 3. Because the issue of admissibility is an important and complex one it is treated in some detail in this section.

The Court, through its rules of admissibility, imposes a very high standard of diligence on applicants wishing to have their “day in court” in Strasbourg. However, it is important to note that the obligation of due diligence starts well before proceedings commence in Strasbourg. In fact, due diligence needs to be exercised from the very inception of the case in the national system if it is to have a chance of succeeding before the Court: an applicant who has not presented properly documented complaints to the relevant domestic authorities on a timely basis and in compliance with domestic rules of procedure will have a difficult time convincing the European Court that his or her application merits consideration. To be sure, the principle of subsidiarity *requires* that Contracting Parties be given a proper opportunity to redress complaints through their own domestic system before being held to account internationally.

## 2.2 Victim Status (Article 34)

### 2.2.1 Summary

For purposes of the Convention, a “victim” is a natural or legal person whose Convention rights are *personally or directly affected* by a measure or act of a Contracting Party. A person who is not affected in this manner does not have standing as a victim. A person may lose his or her victim status if the violation is appropriately remedied by the Contracting Party.<sup>151</sup> In certain circumstances arising in the context of violations of Articles 2 and 3, the close relatives of the person affected by an act may have the requisite standing to introduce an application on behalf of that person.<sup>152</sup> Also, in certain circumstances, close relatives can claim to be indirect victims.<sup>153</sup> Subject to the

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151 See *Eckle v. Germany*, no. 8130/78, 15 July 1982, § 66.

152 See, for example, *Salman v. Turkey* [GC], no. 21986/93, 27 June 2000, in which the wife of a man killed in police custody was able to bring an application.

153 See, for example, *İpek v. Turkey*, no. 25760/94, 17 February 2004, in which the father of two disappeared men was held by the Court to be an indirect victim on account of the disappearance of his sons. The Court found a violation of Article 3 of the Convention on account of, *inter alia*, the suffering caused to him by the disappearance.

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discretion of the Court, the application of a person who dies during the pendency of Strasbourg proceedings can be adopted by a close relative.<sup>154</sup> The Court will not entertain abstract challenges to legislation or governmental measures (*actio popularis*); however, applicants may have standing to challenge legislation or measures which have not been applied to them if they can show that the mere existence of such legislation has a direct effect on the exercise of their Convention rights.<sup>155</sup>

## 2.2.2 Discussion

### a) The General Rule

Article 34 governs the question of standing before the Court. It states that the Court may receive applications from:

“any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention or the protocols thereto”.

The term “person” covers not only natural persons but also legal persons, such as trade unions,<sup>156</sup> political parties,<sup>157</sup> companies<sup>158</sup> or other associations.<sup>159</sup> However, governmental organisations or State-owned companies cannot bring an application to the Court under the theory that a Contracting Party cannot complain about itself before the Court.<sup>160</sup>

The term “victim” denotes a person who is directly affected by a governmental act or omission. To take a clear hypothetical example: a Contracting Party that fails to provide medical assistance to a detainee who is ill, resulting in the deterioration of the detainee’s health, has directly affected his or her rights under the Convention. However, there are situations where it is more difficult to establish and prove the relationship between the governmental act

154 See *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 7, in which the father of a victim of ill-treatment continued the application lodged by his son who died in the course of the Court’s proceedings.

155 See, for example, *Dudgeon v. the United Kingdom* (no. 7525/76, 22 October 1981) and *Norris v. Ireland* (no. 10581/83, 26 October 1988) in which the applicants were able to persuade the Court that the mere existence of legislation criminalising adult homosexual relations caused them to live in constant fear that they would one day be prosecuted and that under such circumstances, they could reasonably claim to be directly affected by the legislation and therefore be considered victims within the meaning of Article 34 of the Convention.

156 *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002.

157 *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

158 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, 30 June 2005.

159 *The Holy Monasteries v. Greece*, nos. 13092/87;13984/88, 9 December 1994.

160 *RENE v. Spain*, no. 35216/97, Commission decision of 8 September 1997.

and the resultant harm. For instance, in the case of *Tauira and 18 others v. France*, the applicants complained of the decision of the French Government to resume a series of nuclear tests in French Polynesia and alleged a violation of their rights under Articles 2, 3, and 8 of the Convention and Article 1 of Protocol No. 1. The Commission dismissed the applicants' complaints on the grounds that they could not claim to be victims of a violation of the provisions invoked by them because the consequences, if any, of the resumption of the nuclear tests were too remote to affect the applicants' personal situation.<sup>161</sup>

The Convention does not provide for an “*actio popularis*”. In other words, individuals cannot complain in the abstract about legislation or governmental acts which have not been applied to them personally through a measure of implementation, for instance, a prosecution. Therefore, if applicants wish to challenge legislation which has not been applied to them, they must be able to prove that the mere existence of the legislation has a direct effect on the exercise of their Convention rights. In *Dudgeon v. the United Kingdom*<sup>162</sup> and *Norris v. Ireland*<sup>163</sup> the applicants, who were homosexuals, complained of the legislation in force in their respective countries which criminalised adult homosexual relations. The respondent Governments disputed the applicants' victim status arguing that no criminal prosecution had in fact been brought against them under the impugned legislation and that the applicants could consequently not claim to have been directly affected by the legislation. However, the Court found that the mere existence of this legislation had such a direct effect on the applicants' private lives – not least because the applicants had to live in constant fear that they might one day be prosecuted – and that under such circumstances they could reasonably claim to be directly affected by the legislation. The Court therefore considered them to be victims within the meaning of Article 25 (now Article 34).

The applicant may lose status as a “victim” if he or she has succeeded in obtaining a favourable decision from the domestic courts in respect of his or her Convention complaints. However, a decision or measure favourable to the applicant is not always sufficient to deprive him or her of “victim” status; in order for this to happen, the national authorities must have acknowledged the breach, either expressly or in substance, and then afforded redress for it.<sup>164</sup>

In the context of Article 3 violations, adequate redress will normally include an effective official investigation capable of leading to the identification and

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161 *Tauira and 18 others v. France*, no. 28204/95, Commission decision of 4 December 1995.

162 *Dudgeon v. the United Kingdom*, cited above.

163 *Norris v. Ireland*, cited above.

164 *Eckle v. Germany*, cited above, § 66.

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punishment of those responsible.<sup>165</sup> Notwithstanding this requirement, there may be situations in which the prosecution and punishment of the perpetrators is insufficient in the eyes of the Court to establish that the applicant has lost victim status. This point is well illustrated by the Court’s judgment in the case of *Mikheyev v. Russia*. In *Mikheyev*, the respondent Government notified the Court – after the case had been pending before the Court for a number of years – that the police officers who ill-treated the applicant had been convicted by a domestic court of abuse of official power and sentenced to four years’ imprisonment. The Strasbourg Court noted, however, that that domestic decision did not, in the circumstances of the case, affect the applicant’s victim status for the following reasons:

“In the present case, the Court notes firstly that the judgment of 30 November 2005 is not yet final, and may be reversed on appeal. Secondly, although the fact of ill-treatment was recognised by the first-instance court, the applicant has not been afforded any redress in this respect. Thirdly, the judgment of 30 November 2005 dealt only with the ill-treatment itself and did not examine the alleged flaws in the investigation, which is one of the main concerns of the applicant in the present case.”<sup>166</sup>

#### **b) Standing of Next of Kin in Article 2 and 3 Cases**

The Court stated in *İlhan v. Turkey* that “complaints must be brought *by or on behalf of* persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were ‘directly affected’ by the measure complained of” (emphasis added).<sup>167</sup> It follows, therefore, that an application can be introduced, for example, by a close relative of the deceased or a close relative of the disappeared. The applicant in such a case will have the requisite standing to bring complaints concerning the events which led to, or which are related to, the disappearance or the death of his or her relative. Indeed, if this was not the case, the protection provided in Article 2 of the Convention would be ineffective because, for obvious reasons, persons who are deceased or disappeared are themselves not capable of bringing complaints to the attention of the Court. Examples of Article 2 and 3 cases brought by family members include *Salman v. Turkey*, where the Court examined the application of the wife of Mr Agit Salman, who died as a result of torture during his detention in police custody.<sup>168</sup> Similarly, in *Timurtaş v. Turkey* the applicant father complained of the disappearance of his son who was taken away by soldiers, and invoked Articles 2,

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<sup>165</sup> See Section 2.4.2 (d) below.

<sup>166</sup> *Mikheyev v. Russia*, no. 77617/01, 30 January 2006, §§ 61 and 89-90.

<sup>167</sup> *İlhan v. Turkey* [GC], no. 22277/93, 27 June 2000, § 52.

<sup>168</sup> *Salman v. Turkey* [GC], cited above.

5, 13, and 18 of the Convention in respect of his son and Article 3 of the Convention in respect of himself.<sup>169</sup>

Close relatives of deceased persons whom the Court held to have the requisite standing in Article 2 cases have included a wife,<sup>170</sup> a father,<sup>171</sup> a brother,<sup>172</sup> a son,<sup>173</sup> and a nephew.<sup>174</sup>

On the other hand, a close relative of a deceased person will not have the requisite standing to bring an application concerning the deceased person's right to release pending trial under Article 5 § 3 of the Convention, or right to a fair trial under Article 6 of the Convention.<sup>175</sup> According to the Court, the rights guaranteed by Article 5 of the Convention belong to a category of rights which are non-transferable.<sup>176</sup> It must be stressed, however, that complaints under Article 5 of the Convention can be brought on behalf of disappeared persons on account of their disappearance.

In ill-treatment cases, a close relative of the victim may have the requisite standing if the victim is in a particularly vulnerable position as a result of the ill-treatment. In the case of *İlhan v. Turkey*, the brother of the applicant had suffered brain damage and a long-term impairment of function as a result of being severely beaten by Turkish law enforcement officers. The applicant made it clear that he was complaining on behalf of his brother who, considering his state of health, was not in a position to pursue the application himself. The Court held that "it would generally be appropriate for an application to name the injured person as the applicant and for a letter of authority to be provided allowing another member of the family to act on his or her behalf. This would ensure that the application was brought with the consent of the victim of the alleged breach and would avoid *actio popularis* applications".<sup>177</sup> However, having regard to the special circumstances of the case, i.e. the mental impairment of the applicant's brother, the Court concluded that the applicant could be regarded as having validly introduced the application on his brother's behalf.<sup>178</sup>

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169 See *Timurtaş v. Turkey*, cited above, § 60.

170 See *Siheyla Aydın v. Turkey*, no. 25660/94, 24 May 2005.

171 *İpek v. Turkey*, cited above.

172 *Koku v. Turkey*, no. 27305/95, 31 May 2005.

173 *Akkum and Others v. Turkey*, cited above.

174 *Yaşa v. Turkey*, no. 22495/93, 2 September 1998.

175 See *Biç v. Turkey* (dec.), no. 55955/00, 2 February 2006.

176 See *Georgia Makri and Others v. Greece* (dec.), no. 5977/03, 24 March 2005.

177 *İlhan v. Turkey* [GC], cited above, § 53.

178 *Ibid.*, § 55. The fact that an applicant is deemed to be of "unsound mind" on account of brain damage or other reasons and therefore lacks legal capacity for the purposes of national law and procedure, will not prevent him or her from exercising the right of individual application under Article 34 of the Convention; see *Winterwerp v. the Netherlands*, no. 6301/73, 24 October 1979, §§ 65-66.

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**c) Indirect Victims**

An act or an omission may, in addition to directly victimising one or more persons, also have indirect repercussions on other persons who are closely connected to the direct victim(s). This occurs primarily in cases involving persons who are disappeared by State agents and in some deportation and expulsion cases. In such circumstances, the indirectly affected persons may bring complaints as victims in their own right.

The case of *İpek v. Turkey* concerned the disappearance of the applicant's two sons who were last seen in the hands of State security forces. The applicant alleged that he had suffered acute distress and anguish as a result of his inability to find out what had happened to his sons and because of the way the authorities had responded to his enquiries. The Court held that the question of whether a family member of a "disappeared person" is a victim of treatment in breach of Article 3 depends on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which is inevitably caused to the relatives of a victim of a serious human rights violation. Relevant elements include the proximity of the family tie (a certain weight will attach to the parent-child bond), the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person, and the way in which the authorities responded to those attempts. The Court emphasised that the essence of such a violation did not so much lie in the fact of the "disappearance" of the family member but rather concerned the authorities' reactions and attitudes to the situation when it was brought to their attention. According to the Court, it was especially in respect of the latter that a relative could claim to be a victim of the authorities' conduct. Having found that the applicant had suffered, and continued to suffer distress and anguish as a result of the disappearance of his two sons and of his inability to find out what had happened to them, and in view of the manner in which his complaints had been dealt with by the authorities, the Court concluded that there had been a violation of Article 3 in respect of the applicant.<sup>179</sup>

In *Chahal v. the United Kingdom*, which concerned Mr Chahal's proposed deportation to India, his wife and children also joined the case as applicants and argued that Mr Chahal's deportation would violate their right to respect for family life under Article 8 of the Convention.<sup>180</sup>

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<sup>179</sup> *İpek v. Turkey*, cited above, §§ 178-183.

<sup>180</sup> *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996.

#### d) Adoption of Applications of Deceased Applicants

Under certain circumstances, the Court may allow a family member to “adopt” the application of an applicant who dies during the pendency of proceedings. Such a situation arose in the case of *Aksoy v. Turkey*; while the the Court was considering Mr. Aksoy’s application – in which he complained of having been tortured in police custody – he was shot and killed by unknown assailants. The Court subsequently allowed the applicant’s father to pursue the case.<sup>181</sup>

In cases where no close relative wishes to pursue the application subsequent to the applicant’s death, the Court may decide to strike the application out of its list of cases, considering that the demise of the applicant constitutes a fact “of a kind to provide a solution of the matter”.<sup>182</sup> However, where the subject matter of the case raises issues of general importance, the Court may continue to examine the case despite the absence of a family member or an heir to adopt the case.<sup>183</sup>

## 2.3 Compatibility of the Application (Article 35 § 3)

### 2.3.1 Summary

Under Article 35 § 3 of the Convention, the Court will declare a complaint inadmissible if it is not compatible with the provisions of the Convention or its Protocols. A complaint may be incompatible for one or more of the following four reasons: *ratione temporis* (time), *ratione loci* (place), *ratione personae* (person) or *ratione materiae* (subject matter). In essence, these requirements mean that a complaint must concern events which took place at the right point in “time” and in the right “place” and must be filed by, and relate to, the right “person” and involve the right “subject matter”. Thus, complaints relating to events which took place before entry into force of the Convention in the Contracting Party are inadmissible *ratione temporis*; complaints relating to events over which the Contracting Party has no jurisdiction, such as those occurring outside its territory are inadmissible *ratione loci*; complaints by persons who are not victims or which relate to the acts of entities over which the Contracting Party has no jurisdiction, or against States that are not Contracting Parties are inadmissible *ratione personae*; com-

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181 *Aksoy v. Turkey*, cited above, § 7.

182 *Scherer v. Switzerland*, no. 17116/90, 25 March 1994, § 32. See also Section 8.2. below.

183 See *Kamer v. Austria*, no. 40016/98, 24 July 2003.



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plaints relating to infringement of rights that are not protected by the Convention will be dismissed *ratione materiae*. There are a number of important exceptions to these general rules particularly concerning continuing violations<sup>184</sup> and the liability of Contracting Parties for extraterritorial acts.<sup>185</sup> They are explained below.

### 2.3.2 Discussion

#### a) Incompatibility *Ratione Temporis*

By virtue of a generally recognised rule of international law, a Contracting Party can only be required to answer to facts and events which occurred subsequent to the entry into force of the Convention and Protocols with regard to the Party in question.<sup>186</sup> Accordingly, the Court cannot examine a complaint relating to events that occurred before the ratification of the Convention and Protocols by the respondent State. The case of *Kalashnikov v. Russia*<sup>187</sup> may serve as an example. The applicant complained about his ill-treatment by Russian special forces in July 1996 while in detention on remand. Considering that the Convention entered into force with respect to Russia on 5 May 1998, the Court observed that the applicant's complaint related to a period prior to that date. It therefore declared this complaint inadmissible as being incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3.

Although the Convention can have no retroactive effect, there is an important exception to this general rule. If a complaint relates to a continuing situation, that is to say, a violation of the Convention caused by an act which was committed prior to the entry into force of the Convention in respect of a Contracting Party, but which continues after the entry into force of the Convention owing to the consequences of the original act,<sup>188</sup> then the Court will have jurisdiction to examine the complaint provided that it also complies with the other admissibility criteria. The case of *Loizidou v. Turkey*<sup>189</sup> illustrates the Court's approach to continuing situations. This case concerned the

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184 See, for example, *Loizidou v. Turkey* (preliminary objections), no.15318/89, 23 March 1995, which concerned the applicant's inability to use her property in Cyprus since 1974. For dates of entry into force of the Convention and Protocols in Contracting Parties, see *Textbox i*.

185 See, for example, *Issa v. Turkey*, cited above, which concerned the killing of a number of persons in Iraq, allegedly by members of the Turkish security forces.

186 *Nielsen v. Denmark*, judgment of 2 September 1959, Yearbook II (1958-1959), p. 412 (454).

187 *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001.

188 P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, 1998 (hereinafter referred to as "Van Dijk & van Hoof"), p. 11.

189 *Loizidou v. Turkey* (preliminary objections), cited above.

applicant's inability to access her property in Turkish controlled northern Cyprus since 1974. Upon ratification of the European Convention, the Turkish Government had accepted the jurisdiction of the Court only in relation to facts and events subsequent to 22 January 1990 and objected to the Court's jurisdiction to examine the application for this reason. But the Court decided that the continuous denial of access to the applicant's property in northern Cyprus and the ensuing loss of all control over it amounted to a continuous violation of the Convention. Therefore, the Turkish Government's objection was rejected.

Similarly, in the case of *Moldovan and Others v. Romania* the Court observed that police officers had been involved in the destruction of houses and belongings of the applicants who were Romanian citizens of Roma ethnic origin. The destruction had taken place before Romania ratified the Convention and for that reason the Court could not examine the applicants' allegations concerning the destruction of their property. However, the Court also noted that:

“following this incident, having been hounded from their village and homes, the applicants had to live, and some of them still live, in crowded and improper conditions – cellars, hen-houses, stables, etc. – and frequently changed address, moving in with friends or family in extremely overcrowded conditions”.<sup>190</sup>

Having regard to the direct repercussions of the acts of State agents on the applicants' rights, and the fact that these repercussions continued after the Convention went into effect in respect of Romania, the Court considered that the Government's responsibility was engaged and found a violation of Article 3 of the Convention.<sup>191</sup>

In *Blečić v. Croatia*, which concerned the applicant's right to respect for her home and to peaceful enjoyment of her possessions under Article 8 of the Convention and Article 1 of Protocol No. 1, a majority of the Grand Chamber (11 judges of the 17) considered that it had no jurisdiction (*ratione temporis*) to examine the case as the termination of the applicant's lease had been finalised when the Supreme Court rejected the applicant's appeal on 15 February 1996, before Croatia ratified the Convention. The applicant's appeal to the Constitutional Court had been rejected on 8 November 1999, after the ratification of the Convention by Croatia. However, the Court held that the interference giving rise to the application was the Supreme Court's judgment of 15 February 1996, and not the Constitutional Court's decision of

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190 *Moldovan and Others v. Romania*, nos. 41138/98, 64320/01, 12 July 2005, § 103.

191 *Ibid.*, §§ 104 -114.

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8 November 1999. In forceful dissenting opinions the minority judges (i.e. six of the seventeen judges) argued, *inter alia*, that:

“[a] judgment becomes *res judicata* i.e. a final, unappealable judgment, when it is legally irreversible under the domestic law. This result in the present case was brought about by the above decision of the Constitutional Court... In the present case the interference was the result of a series of judicial proceedings ending with the decision of the Constitutional Court, which was the only final, irreversible judicial decision in these proceedings. [I]t is the final Constitutional Court decision which followed that made the relevant civil action irreversible thus terminating the applicant’s tenancy and bringing the problem of the interference complained of by the applicant within the competence of our Court”.<sup>192</sup>

and

“For the sake of argument, we can also imagine the reverse order of the events. The decision of the Supreme Court could have been in favour of the applicant – say on purely non-Conventional grounds – only for the Constitutional Court to reverse it. In that case, presumably, the violation *would* have occurred after the critical date and the Convention would be applicable *ratione temporis*. The Grand Chamber would then delve into the merits of this case and perhaps find that there was a violation. Before that, however, one would have to explain why such a reverse order of events would bring the case within the temporal limits of the Convention... Will the import of this precedent be that the last decision of the national court, which does not reverse the penultimate decision – but merely permits it to “subsist” – may count as a required domestic remedy, but does not count as a real decision bringing the case within the temporal limits of the Convention?”<sup>193</sup>

As will be seen below when examining the issue of exhaustion of domestic remedies, applicants are required to exhaust all relevant domestic remedies before they introduce their applications. For this reason, it is difficult to reconcile the Grand Chamber’s judgment in *Blečić* with the Court’s established case-law concerning exhaustion of domestic remedies,<sup>194</sup> unless, of course, this judgment amounts to a finding that the constitutional remedy in Croatia is, from now on, to be regarded as an ineffective remedy, and therefore one which applicants do not need to pursue.

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192 *Blečić v. Croatia* [GC], no. 59532/00, 8 March 2006, dissenting opinion of Judge Loucaides joined by Judges Rozakis, Zupančič, Cabral Barreto, Pavlovski, and David Thór Björgvinsson.

193 Separate opinion of Judge Zupančič joined by Judge Cabral Barreto.

194 See Section 2.4 below for issues concerning exhaustion of domestic remedies.

### **b) Incompatibility *Ratione Loci***

According to Article 1 of the Convention:

“the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”.

Although this Article talks of the “Convention”, if a Contracting Party has ratified any of the Protocols Nos. 1, 4, 6, 7, 12, or 13, the obligation mentioned in Article 1 of the Convention also applies to the rights and freedoms laid down in that Protocol. Protocols are considered supplementary Articles of the Convention, to which all the provisions of the Convention apply in a similar manner.<sup>195</sup>

Article 1 is of the utmost importance because it defines the scope of the Convention and of the obligations of the Contracting Parties. These obligations apply, however, only to those within the jurisdiction of the Contracting Party. Accordingly, a person claiming to be the victim of a violation of the Convention must first demonstrate that he or she was within the jurisdiction of the respondent State at the time of the alleged violation of the Convention. It follows that the issue of jurisdiction is a threshold requirement in the Convention; the question of State responsibility or imputability will arise only after the Court is satisfied that the matters complained of are within the jurisdiction of the respondent State.<sup>196</sup>

However, the term “jurisdiction” should not be interpreted as strictly coextensive with the Contracting Parties’ “territory”. Rather, it is well established in the jurisprudence of the Convention organs that Contracting Parties may be held accountable for certain types of extraterritorial conduct. In the aforementioned *Loizidou* case,<sup>197</sup> the Court ruled that when a State exercises effective control of an area – lawfully or unlawfully – outside its national territory and regardless of whether such control was exercised directly, through its armed forces, or through a subordinate local administration, that State may be considered to be exercising jurisdiction in that area, and its obligation under Article 1 extends to securing the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified, to that area.

Similarly, a Contracting Party is considered to exercise Article 1 jurisdiction wherever its agents – military or civilian – exercise power and authority over

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195 See van Dijk and van Hoof, p. 3.

196 M. O’Boyle, “Comment on Life after Bankovic”, in F. Coomans and M.T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia Antwerp-Oxford 2004).

197 *Loizidou v. Turkey* (preliminary objections), cited above, § 62.

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persons on foreign territory. In the case of *Illich Sanchez Ramirez v. France*,<sup>198</sup> the Commission examined the French authorities' arrest and detention of the applicant in Sudan. The Commission ruled that from the moment the applicant was handed over to the French authorities in Sudan, he was effectively under their authority and therefore within the jurisdiction of France.<sup>199</sup>

In the case of *Issa v. Turkey*, which concerned the killing of a number of persons in Iraq allegedly by members of the Turkish security forces, the Court held that a State may be held:

“accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State... Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory”.<sup>200</sup>

In *Issa* the Court did not exclude the possibility that, as a consequence of a military action, a respondent State could be considered to have exercised temporarily, effective overall control of a particular portion of the territory of northern Iraq:

“Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey”.<sup>201</sup>

However, the Court concluded on the basis of all the material before it that it had not been established to the required standard of proof that the Turkish armed forces had conducted operations in the area in question.<sup>202</sup>

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198 *Ramirez Sanchez v. France*, no. 28780/95, Commission decision of 24 June 1996.

199 *Ibid.*

200 *Issa v. Turkey*, cited above, § 71 (with references omitted).

201 *Ibid.*, § 74.

202 In its examination of a case concerning the killing of six persons whose deaths had occurred as a result of the UK military operations in Iraq, the Divisional Court in the United Kingdom considered that the conclusion of the Court in *Issa v. Turkey* was *obiter*, i.e. it was not binding as a precedent; see *R. Secretary of State for Defence Ex p. Al Skeini*, 14 December 2004, unreported. However, it must be pointed out that a request for the referral of the *Issa* case to the Grand Chamber was rejected, and the judgment became final on 30 March 2005. This is to be understood as meaning, in effect, that the Panel of the Grand Chamber did not consider that the case raised a serious question affecting the interpretation or application of the Convention and that the Chamber’s conclusion was in line with the Court’s established case-law. In any event the doctrine of *obiter* is unknown in Convention proceedings. See Nuala Mole, “*Issa v. Turkey*: Delineating the Extra-territorial Effect of the European Convention on Human Rights” (2005) E.H.R.L.R. Issue 1, Sweet & Maxwell, pp. 86-91.

Finally, mention must be made of the decision in the case of *Saddam Hussein v. Albania, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom*, in which the applicant complained about his arrest, detention and transfer to the Iraqi authorities and about his ongoing trial and its outcome. According to the applicant, he was within the respondent States' jurisdiction following his transfer to the Iraqi authorities in June 2004 because the respondent States remained in *de facto* control in Iraq. The Court held, however, that the applicant had not addressed each respondent State's role and responsibilities or the division of labour/power between them and the U.S. For the Court, there was:

“no basis in the Convention's jurisprudence and the applicant had not invoked any established principle of international law which would mean that he fell within the respondent States' jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.

Accordingly, the Court does not consider it to be established that there was or is any jurisdictional link between the applicant and the respondent States or therefore that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention”.<sup>203</sup>

### **c) Incompatibility *Ratione Personae***

Article 35 § 3 of the Convention requires the Court to reject as inadmissible an application that is not compatible *ratione personae* with the provisions of the Convention or its Protocols. This requirement implies that the Court cannot examine an application against a State that is not a party to the Convention or the relevant Protocol. In the case of *Ataman v. Turkey*, the applicant complained under Article 5 of Protocol No. 7 (equality between spouses) that the authorities had refused her and her husband the right to adopt her maiden name as their family name. The Court considered that the applicant's complaint was incompatible *ratione personae* because Turkey was not a party to Protocol No. 7 and it thus rejected this complaint pursuant to Article 35 §§ 3 and 4 of the Convention.<sup>204</sup>

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203 *Saddam Hussein v. Albania, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom* (dec.), no. 23276/04, 14 March 2006.

204 *Ataman v. Turkey* (dec.), no. 47738/99, 1 June 2004.

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It should be pointed out in this connection that applications brought against States not parties to the Convention, such as the United States, are not even registered by the Court and that the applicants are merely informed by a letter that the Court has no competence to examine their application.

The Court has further declared inadmissible numerous complaints directed against persons for whom the respondent State was not responsible. In the case of *Papon v. France*, the applicant complained of the hostile media campaign to which he had been subjected and the attitude of the civil parties before and during his trial.<sup>205</sup> The Court rejected this complaint as incompatible *ratione personae* holding that the State authorities could not be held responsible for the actions of private persons.

Moreover, according to Article 34 of the Convention, the Court may receive applications

“from any person ... claiming to be the victim of a violation ... of the rights set forth in the Convention ....”.

Pursuant to this provision, the Court dismisses applications as incompatible *ratione personae* where the applicant is not a victim of the events or measures in question. It has done so in a case where one of the applicants complained of the length of proceedings to which she was not a party.<sup>206</sup>

#### **d) Incompatibility *Ratione Materiae***

The Court is only empowered to examine complaints falling within the scope of the Convention and its Protocols. If a person complains of a violation of a right not guaranteed by the Convention or Protocols, the complaint will be rejected as incompatible *ratione materiae*.

The case of *Maaouia v. France* may illustrate this. The applicant complained under Article 6 of the Convention of unfairness of expulsion proceedings. The Court ruled that decisions regarding the entry, stay, and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention, and that, therefore Article 6 did not apply.<sup>207</sup> This finding of the Court does not mean, however, that a person who is subject to expulsion from the territory of a Contracting Party cannot benefit from the protection provided for in Articles 2 and 3 of the Convention. Although domestic proceedings relating to the removal of a person from the territory of a

<sup>205</sup> *Papon v. France* (no. 2) (dec.), no. 54210/00, 15 November 2001.

<sup>206</sup> *Santos Lda and Fachatas v. Portugal* (dec.), no. 49020/99, 19 September 2000.

<sup>207</sup> *Maaouia v. France* [GC], no. 39652/98, 5 October 2000, §§ 40-41.

Contracting Party cannot attract Article 6 guarantees, they are relevant from the standpoint of Articles 2 and 3 of the Convention. Namely, the Court will scrutinise the domestic decision making process with a view to establishing whether the national authorities have adequately assessed the risks of ill-treatment or inhuman or degrading punishment in the receiving country if the applicant has raised such claims.<sup>208</sup>

The Court would also reject complaints which fall outside the scope of a particular provision. As an example, in the case of *Kaplan v. Turkey*, the applicant complained under Article 8 of the Convention that his personal reputation had been damaged on account of his being prosecuted as an alleged terrorist.<sup>209</sup> The Commission observed that Article 8 did not guarantee a right to honour and good reputation and therefore dismissed this complaint for want of subject matter jurisdiction (*ratione materiae*).

## 2.4 Exhaustion of Domestic Remedies (Article 35 § 1)

### 2.4.1 Summary

Applicants must exhaust domestic remedies before they can complain before the Strasbourg Court. This means that applicants must avail themselves of the normal avenues of judicial relief that exist in the national system and they must have appealed their case to the highest instance possible within that system.<sup>210</sup> Applicants cannot raise claims before the Court which were not previously raised with the national authorities during the exhaustion process.<sup>211</sup> In the context of Article 3 violations, the normal remedy consists of an effective official investigation into the allegations of ill-treatment followed by the prosecution and punishment of the perpetrators.<sup>212</sup> Therefore, in order to comply with the exhaustion requirement, applicants in Article 3 cases must have taken all reasonable steps to ensure that their complaints reached the appropriate national authorities, and must have shared relevant evidence with the authorities on a timely basis and diligently pursued their cases at all stages of the national proceedings.

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208 See, *mutatis mutandis*, *Said v. the Netherlands*, cited above, §§ 48-49. See also Judge Thomassen's concurring opinion in the same judgment where she argued that the lack of rigorous scrutiny of the applicant's allegations by the domestic courts justified the Strasbourg Court's decision not to follow their assessment.

209 *Kaplan v. Turkey*, no. 31830/96, Commission decision of 20 May 1998.

210 See *Akdvar and Others v. Turkey*, 21893/93, 16 September 1996, § 66.

211 See *Cardot v. France*, no. 11069/84, 19 March 1991, § 34.

212 See *Assenov v. Bulgaria*, no. 24760/94, 28 September 1998, § 102.



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A mere doubt as to the effectiveness of domestic remedies, even in circumstances where the national authorities systematically fail to act on complaints of ill-treatment, does not absolve the applicant of the requirement of exhausting remedies.<sup>213</sup> Generally, civil or administrative remedies which are only aimed at monetary compensation of the victim but which are not capable of identifying the perpetrator or establishing individual criminal responsibility are not considered “effective” for purposes of Article 3 and do not need to be exhausted.<sup>214</sup>

As a procedural matter, the applicant has the initial burden of proving exhaustion. If the Court is satisfied that an applicant has made out a *prima facie* case showing that he or she has complied with the exhaustion requirement, then the burden shifts to the Contracting Party to show that an effective remedy was available and not exhausted by the applicant.<sup>215</sup> The applicant will then have an opportunity to comment further on the respondent Government’s submission. After this point the Government is estopped from making further arguments on exhaustion or any other admissibility issues.<sup>216</sup> The Court can, however, declare a case inadmissible at any stage of the proceedings.

There are several important exceptions to the exhaustion rule, such as the fact that applicants do not need to exhaust remedies that are unavailable or extraordinary.<sup>217</sup> There may also exist special circumstances absolving the applicant from the exhaustion requirement.<sup>218</sup> Finally, the rule of exhaustion interacts in important ways with the six-month rule, which is discussed in Section 2.5 below.

### 2.4.2 Discussion

According to Article 35 § 1 of the Convention:

“[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...”.

The rationale behind this rule lies in the subsidiary character of the Convention machinery: the Contracting Party ought first to be given an opportunity to put matters right through its own legal system before being

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213 See *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002.

214 See *Tepe v. Turkey* (dec.), no. 31247/96, 22 January 2002.

215 See *Akdivar and Others v. Turkey*, cited above, § 68.

216 See *Savitchi v. Moldova*, no. 11039/02, 11 October 2005, § 28.

217 See *Moyá Alvarez v. Spain* (dec.), no. 44677/98, 23 November 1999.

218 See *Akdivar and Others v. Turkey*, cited above, § 68.

called to account before the Court in Strasbourg. For example, an applicant who wishes to bring an application against a Contracting Party concerning ill-treatment will be expected to have approached the relevant national authorities and complained about the ill-treatment before lodging an application in Strasbourg. If the applicant receives adequate redress at the national level, for example, when those responsible for the ill-treatment are prosecuted and punished by the domestic authorities, he or she will no longer be able to claim to be a victim within the meaning of Article 34. If, on the other hand, the applicant is unable to obtain adequate redress from the national authorities, for example when those authorities have remained passive in the face of the applicant's allegations, he or she will be deemed to have exhausted domestic remedies as required by Article 35. The foregoing description is an over-simplification of a complex Convention requirement, and as will be seen below, there are a number of other issues that must be taken into account.

The rule of exhaustion of domestic remedies was explained in great detail by the Court in its judgment in the case of *Akdivar and Others v. Turkey*.<sup>219</sup>

“The Court recalls that the rule of exhaustion of domestic remedies ... obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights...”.

The Court further explained in the same judgment that:

“[i]n the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement...”.<sup>220</sup>

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219 *Akdivar and Others v. Turkey*, cited above, § 65.

220 *Ibid.*, § 68.

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As pointed out above, after the burden of proof shifts, respondent Government is expected to prove the existence in practice of a particular remedy as well as its effectiveness. For example, in a case which concerned the deliberate destruction of the applicants' home and possessions by members of the security forces in south-east Turkey, the Turkish Government had submitted to the Court a number of decisions of the Turkish Administrative Courts. In these decisions, the plaintiffs had been awarded compensation for the destruction of their homes and possessions in a non-fault based procedure under Article 125 of the Constitution that did not require them to establish that their property had been destroyed deliberately. Having examined the decisions, the Court found that,

“...despite the extent of the problem of village destruction, there appears to be no example of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or of prosecutions having been brought against them in respect of such allegations”.<sup>221</sup>

The Court, concluding that the remedy in question was not effective for the purposes of the Convention because it did not establish culpability and therefore it did not lead to the prosecution and punishment of those responsible for the destruction, proceeded to dismiss the Government's objection to the admissibility of the application.

The initial burden of showing that relevant domestic remedies have been exhausted rests with the applicant. In fact, the Court will examine the issue of exhaustion *ex officio* in its first examination of the complaint as contained in the application form. It is therefore imperative that the applicant demonstrate clearly, in the application form, that he or she has exhausted the relevant domestic remedies in relation to the complaints made. Failure to show exhaustion, or to explain why a nominally available remedy was not pursued – for example by providing arguments to the effect that the remedy was ineffective because it was inaccessible, or incapable of providing adequate redress, or that there existed special circumstances which absolved the applicant from exhausting domestic remedies – will most likely result in the complaint being declared inadmissible by a Committee. It must be recalled here that complaints declared inadmissible by Committees never reach the stage of communication to the respondent Government. They are final and cannot be challenged in any way by the applicant as referral to the Grand Chamber is not possible. Moreover, letters informing applicants of the decision of the Committee contain only skeletal reasoning (providing only that the Court has decided the case is inadmissible “because it did not comply

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221 *Menteş and Others v. Turkey*, no. 23186/94, 28 November 1997, § 59.

with the requirements set out in Articles 34 and 35 of the Convention”, see *Textbox x*) which may leave the applicant wondering about the specific reasons for the inadmissibility finding, unlike inadmissibility decisions taken by the Chambers in which the reasoning of the Court is laid out in greater detail.<sup>222</sup>

The Court has already developed a body of case-law in respect of most Contracting Parties which discusses the domestic remedies that are generally available in those countries. It is important for applicants to refer to this case-law when arguing exhaustion in their application forms. While taking this case-law into account, the Court will nevertheless have regard to the particular circumstances of each case in its findings on whether remedies have been exhausted. Satisfying the Court that relevant domestic remedies have been exhausted will result in the communication of the application to the respondent Contracting Party, provided of course that other grounds of admissibility have also been satisfied and the application is not manifestly ill-founded. The burden will then shift to the respondent Contracting Party to show why remedies were not exhausted.<sup>223</sup>

If the application is communicated and the respondent Government in its observations on the admissibility of the case does not claim that the applicant has failed to exhaust domestic remedies, the Court will not subsequently raise any exhaustion problems of its own motion. Furthermore, a respondent Government that fails to object to the admissibility of an application in its observations on admissibility will be estopped from doing so at subsequent stages of the proceedings.<sup>224</sup>

In *Akdivar*, the Court further emphasised that:

“the application of the rule [of exhaustion of domestic remedies] must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism.... It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case”.<sup>225</sup>

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222 See Section 1.7 above.

223 See Harris, O’Boyle and Warbrick, p. 615 *et seq.*

224 See, *Savitchi v. Moldova*, cited above, § 28. See also Rule 55 of the Rules of Court which states that any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application.

225 *Akdivar and Others v. Turkey*, cited above, § 69.

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**a) Only “Available” and “Effective” Remedies Need to be Exhausted**

According to the *Akdivar* judgment:

“...normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged...”<sup>226</sup>

For a remedy to be “available”, it must exist at the time the application is lodged and must be directly accessible to individuals. If a new and relevant remedy is introduced in the Contracting Party after the application has been lodged, applicants will not normally be required to exhaust that new remedy.<sup>227</sup> Furthermore, “[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness...”<sup>228</sup>

The answer to the question whether a particular remedy is “effective”, or, in the words of the *Akdivar* judgment, “sufficient to afford redress” – and therefore requires exhausting – is a more complex one. In the context of complaints concerning ill-treatment the general rule is that “an official investigation capable of leading to the identification and punishment of those responsible”<sup>229</sup> will be regarded by the Court to be an appropriate form of redress. It must be stressed at this juncture that a remedy does not mean “a remedy bound to succeed but simply an accessible remedy before an authority competent to examine the merits of a complaint”.<sup>230</sup> The issue of “effectiveness” of a remedy in the Article 3 context is examined below in subsections d(i)-(ii) in more detail.

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226 *Akdivar and Others v. Turkey*, cited above, § 66.

227 However, there have been exceptions, notably in Article 6 cases concerning the alleged unfairness of domestic proceedings due to their excessive length. For example, in the case of *Charzyński v. Poland* ((dec.), no. 15212/03, 1 March 2005), which had been lodged in 2003, the Court held that the possibility of filing a complaint, which had been introduced in Polish legislation in 2004, provided the applicant with an effective remedy in respect of his complaint. It therefore declared the application inadmissible for the applicant’s failure to exhaust the remedy created in 2004. Similarly, in the case of *Içyer v. Turkey* (dec.), no. 18888/02, 12 January 2006), which concerned the inability of the applicant to return to his house in his village after having been evicted from there for security reasons, the Court observed that a new remedy had been introduced since the applicant lodged his application and declared the case inadmissible for the applicant’s failure to exhaust that new remedy. The new remedy, in the Court’s opinion, was capable of providing redress for the applicant as it would compensate for the damage suffered as a result of his inability to gain access to his property. In this connection the Court stressed that the most appropriate strategy to be followed in situations where it identified structural or general deficiencies in national law or practice was to ask the respondent Government to review, and where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court. However, it is unlikely that the Court would declare an Article 3 complaint inadmissible for an applicant’s failure to exhaust a remedy newly created at the national level after the application was lodged with the Court.

228 *Akdivar and Others v. Turkey*, cited above, § 66.

229 *Assenov v. Bulgaria*, cited above, § 102. See also Section 10.3 below.

230 See *Lorsé v. the Netherlands*, no. 52750/99, 4 February 2003, § 96.

### **b) Extraordinary Remedies do Not Need to be Exhausted**

If the remedy is not directly accessible to individuals, it will normally be regarded as an “extraordinary remedy”. According to the Court, extraordinary remedies do not satisfy the requirements of “accessibility” and “effectiveness” and therefore do not require exhaustion for purposes of Article 35 § 1 of the Convention.<sup>231</sup> For example, if access to a particular domestic remedy is dependent on the discretionary power of a public authority, it will not be considered an accessible remedy.<sup>232</sup> Examples include applications to the constitutional court in Italy for purposes of challenging a law’s constitutionality, because only other courts, and not individuals, are able to refer a case to the Constitutional Court. Therefore, this particular remedy was not directly accessible to individuals.<sup>233</sup> Similarly, applications to the Ministry of Justice in Turkey for requests to issue written orders to public prosecutors requiring them to ask the Court of Cassation to set aside judgments<sup>234</sup> and applications for rectification of decisions of the Turkish Court of Cassation which can only be lodged by public prosecutors but not by individual complainants directly were also held by the Court to be extraordinary remedies.

### **c) Special Circumstances**

The Court acknowledged in *Akdivar and Others* that the existence of “special circumstances” may absolve an applicant from the requirement of exhaustion of domestic remedies. Such circumstances may exist, for example, in situations where the national authorities have remained totally passive in the face of serious allegations of misconduct by State agents, for instance where State agents have failed to undertake investigations or offer assistance<sup>235</sup> or where they have failed to execute a court order.<sup>236</sup> Furthermore, in a case which concerned the destruction of the applicants’ property by the Turkish security forces, the Court found that the indifference displayed by the investigating authorities to the applicants’ complaints, coupled with the applicants’ feelings of upheaval and insecurity following the destruction of their homes, constituted special circumstances which absolved them from the obligation to exhaust domestic remedies.<sup>237</sup>

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231 *Moyá Alvarez v. Spain* (dec.), cited above.

232 *Kutcherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999.

233 *Immobiliare Saffi v. Italy* [GC], no. 22774/93, 28 July 1999, § 42; see also Leach p. 137.

234 *Zarakolu v. Turkey* (dec.), no. 37061/97, 5 December 2002.

235 See *Selmouni v. France*, cited above, § 76.

236 *A.B. v. the Netherlands*, no. 37328/97, 29 January 2002, §§ 69 and 73.

237 *Selçuk and Asker v. Turkey*, nos. 23184/94 and 23185/94, 24 September 1998, §§ 70-71.

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In *Ayder and Others v. Turkey* the Government argued that the applicants' failure to apply for compensation before the domestic authorities in respect of the destruction of their property by members of the security forces constituted non-exhaustion. The Court, however, observed that a public assurance had been given by the Provincial Governor that all damage sustained would be compensated by the State. In the light of that unqualified undertaking by a senior public official, the Court found that property owners could have legitimately expected that compensation would be paid without the necessity of their commencing administrative proceedings. Thus, the Court concluded that special circumstances existed, absolving the applicants from the requirement of exhausting domestic remedies.<sup>238</sup>

In *Sejdovic v. Italy*, which concerned the conviction *in absentia* of the applicant – a national of the then Federal Republic of Yugoslavia – without providing him the opportunity to present his defence before the Italian courts, the Court found that the fact that the applicant had not been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy, constituted “objective obstacles” to the use of that remedy by the applicant. Taking into account “the difficulties which a person detained in a foreign country would probably have encountered in rapidly contacting a lawyer familiar with Italian law in order to enquire about the legal procedure for obtaining the reopening of his trial, while at the same time giving his counsel a precise account of the facts and detailed instructions”, the Court concluded that there were special circumstances releasing the applicant from the obligation to avail himself of the remedy in question.<sup>239</sup>

In several cases where the Court has found that the existence of special circumstances absolved the applicants from the exhaustion requirement, it has also stressed that its ruling was confined to the particular circumstances of those cases and was not to be interpreted as a general statement that remedies were ineffective in the respondent Contracting Party or that applicants were absolved from the obligation under Article 35 to have normal recourse to the

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238 *Ayder v. Turkey*, no. 23656/94, 8 January 2004, §§ 101-102.

239 *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, §§ 54 -55. This case can be contrasted with the case of *Bahaddar v. the Netherlands* (no. 25894/94, 19 February 1998), which concerned the applicant's proposed expulsion to Bangladesh where, according to the applicant, he would be exposed to a serious risk of being killed or ill-treated. In its admissibility decision the Commission found that the merits of the applicant's case had not been considered by any Netherlands authority in the light of new documentary evidence. Although this evidence had been submitted out of time, the national authorities were not prevented from taking cognisance of it. There were accordingly, in the Commission's view, special circumstances absolving the applicant from exhausting domestic remedies according to the established procedures. However the Court, noting in particular the failure of the applicant's lawyer to ask for an extension of the time limit from the domestic courts to submit the documentary evidence, upheld the Government's preliminary objection and held that, as domestic remedies had not been exhausted, it could not consider the merits of the case.

system of remedies.<sup>240</sup> Furthermore, according to the Court, it is only in exceptional circumstances that it could accept that applicants seek relief before the Court without first having made any attempt to seek redress before the local courts.<sup>241</sup>

Indeed, although the Court has acknowledged in a number of judgments that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to establish and that the rule must be applied with some degree of flexibility and without excessive formalism,<sup>242</sup> the fact remains that a mere doubt as to the effectiveness of domestic remedies does not absolve the applicant of the requirement of exhausting remedies.

#### **d) “Effective” Remedies in the Context of Article 3 Violations**

The issue of the “effectiveness” of domestic remedies is examined below under separate headings for criminal, civil, and administrative remedies.

##### *i. Criminal Remedies*

As the Court expressly stated in its *Akdivar and Others* judgment, the rule of exhaustion of domestic remedies is based on the assumption reflected in Article 13 of the Convention, that effective remedies are in fact available in the domestic systems of Contracting Parties in respect of alleged breaches of Convention rights and that this is the case regardless of the specific manner in which the provisions of the Convention have been incorporated into national law. Thus, the issue of effectiveness of criminal remedies in respect of complaints of ill-treatment is closely linked to the Contracting Parties’ positive obligation under Article 3 and their obligation under Article 13 to provide an effective remedy.<sup>243</sup> As pointed out earlier, in the context of Article 3 violations adequate redress will include an effective official investigation capable of leading to the identification and punishment of those responsible. Whereas certain rights and freedoms guaranteed in the Convention may not have been incorporated into the national laws of all Contracting Parties, most types of ill-treatment nevertheless constitute criminal offences in all Contracting Parties. Furthermore, in most Contracting

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240 See, *inter alia*, *Selçuk and Asker v. Turkey*, cited above, § 71 and *Akdivar and Others v. Turkey*, cited above, § 77.

241 *Akdivar and Others v. Turkey*, cited above, § 77.

242 See, *inter alia*, *Ayder v. Turkey*, cited above, § 92.

243 See Sections 6.2 and 10 below; see also *Buldan v. Turkey* (dec.) no. 28298/95, 4 June 2002.



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Parties, ill-treatment inflicted by State agents is either classified as a criminal offence separate from the offence of ill-treatment inflicted by private persons, or is considered an aggravating element of ill-treatment offences.

At first sight it would therefore appear that the national laws of the Contracting Parties themselves provide for an effective remedy – as required by Article 13 of the Convention – in respect of complaints of ill-treatment. However, the mere existence of national legislation criminalising acts of ill-treatment is not sufficient in and of itself to guarantee a remedy for victims, and problems often arise in the context of the enforcement of those national laws. One of the most common problems is the reluctance of investigating authorities to investigate allegations of ill-treatment by State agents.<sup>244</sup> In such circumstances, an applicant who has brought his or her complaint of ill-treatment before the relevant investigating authority, which remains passive in the face of those allegations, will be expected to submit his or her application to the Court as soon as he or she becomes aware of the ineffectiveness of the remedy. Failure to do so may result in the application being declared inadmissible for non-compliance with the six-month rule.<sup>245</sup>

The Court has also dealt with applications introduced when criminal investigations continued for long periods of time without yielding any tangible results. In such cases, the respondent Government, who will in all likelihood object to the admissibility of the application on the basis of the applicant's failure to await the conclusion of the proceedings, will be expected to prove that the proceedings in question are being conducted diligently and that they are capable of providing redress to the applicant. For example, in the case of *Batı and others v. Turkey*, the applicants introduced their application with the Court while the criminal proceedings against the police officers suspected of having inflicted ill-treatment on them were still pending. Observing that the proceedings in question – a criminal trial – had continued for eight years during which time the judicial authorities had failed to take a number of important steps such as summoning and questioning the defendants directly and ensuring that the injuries of the applicants were medically examined, the Court held that the applicants had satisfied the obligation to exhaust the relevant remedies and were not required to await the conclusion of the criminal trial.<sup>246</sup>

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244 See for example, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57045/00, 24 February 2005, § 145, in which the Court observed that although the domestic courts had found that the killings of the first applicant's relatives had been perpetrated by servicemen and awarded the first applicant damages against the State, they did not prosecute those servicemen. In the same judgment the Court also found a violation of Article 3 of the Convention on account of a lack of thorough and effective investigation into the applicants' allegations of ill-treatment, see § 180.

245 For further information, see Section 2.5.2 (c) below.

246 *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, § 148. On the basis of those failures the Court also found a violation of Article 13 of the Convention.

According to the Court's established case-law, a mere doubt as to the prospect of success of a particular remedy is not sufficient to exempt an applicant from the requirement of exhausting that remedy.<sup>247</sup> The Court's decision on admissibility in *Epözdemir v. Turkey*<sup>248</sup> provides a good example of this point. The *Epözdemir* case concerned the killing of the applicant's husband by a group of four village guards. An autopsy was carried out and the body was buried. The family of the deceased were not informed of the death of Mr Epözdemir – despite the fact that the applicant had already informed the relevant prosecutor that her husband was missing – and no action was taken by the investigating authorities to investigate the circumstances of the killing notwithstanding an *ex officio* obligation under domestic law to do so. The applicant subsequently – by pure coincidence – found out that her husband had been killed by the village guards and asked the prosecutor to mount a prosecution. Her request was rejected, the prosecutor stating that although it was established that her husband had been killed by the village guards, it was not possible to establish which one of the four village guards had fired the fatal shot. The applicant did not avail herself of the opportunity to appeal the prosecutor's decision and instead applied directly to the Court in Strasbourg. In its decision declaring the application inadmissible, the Court held by a majority, that although the decision not to prosecute the four named village guards suggested that the clear wording of domestic legislation on joint enterprises in the commission of the offence of homicide had been disregarded by the prosecutor, the applicant could have brought this issue to the attention of the appeal judge and thus could have substantially increased her prospects of success. The applicant had not shown, therefore, that an appeal would have been devoid of any chance of success.<sup>249</sup>

In jurisdictions where the commission of the offence of ill-treatment gives rise to an *ex officio* duty of the investigating authorities to investigate the incident without waiting for the victim to lodge a formal complaint, the victim may be required to co-operate with the authorities by assisting them, for example, in identifying and locating eye-witnesses. The conduct of the applicant in exhausting domestic remedies may therefore also play a role in the Court's examination of the question as to whether those remedies have been exhausted.

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247 *Whiteside v. the United Kingdom*, no. 20357/92, Commission decision of 7 March 1994.

248 See *Epözdemir v. Turkey* (dec.), cited above.

249 Compare to *İlhan v. Turkey* [GC], cited above, § 63, where the investigating authorities had remained totally passive in investigating the circumstances of the severe ill-treatment to which soldiers had subjected the applicant's brother. The Grand Chamber, in rejecting the Government's objection to the admissibility of the case, held that the matter had been sufficiently brought to the attention of the relevant domestic authority, which had an *ex officio* obligation to investigate the circumstances of the ill-treatment without waiting for a formal complaint from the applicant.

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*ii. Civil and Administrative Remedies*

In its judgment in the case of *Assenov and Others v. Bulgaria* the Court found that the applicant had exhausted all the possibilities available to him within the criminal justice system, as he had made numerous appeals to the prosecuting authorities at all levels, requesting a full criminal investigation into the allegations of ill-treatment carried out by police and requesting that the officers concerned be prosecuted. In the absence of a criminal prosecution in connection with his complaints, the applicant was therefore not required to embark upon another attempt to obtain redress by bringing a civil action for damages.<sup>250</sup> In reaching this conclusion, the Court also considered the fact that under Bulgarian law it was not possible for a complainant to initiate a criminal prosecution in respect of offences allegedly committed by agents of the State in the performance of their duties. The Court went on to state in paragraph 102 of its judgment that:

“where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity”.

It follows, therefore, that in the context of Article 3 complaints, a civil or an administrative action in respect of illegal acts attributable to a State or its agents may only be regarded as an effective remedy where that remedy is capable of establishing the circumstances of the ill-treatment and of leading to the identification and punishment of those responsible. Civil or administrative proceedings aimed solely at awarding damages rather than identifying and punishing those responsible will not be regarded as effective remedies in the context of Article 3 complaints.<sup>251</sup>

**e) Compliance With Rules of Domestic Procedure**

When exhausting domestic remedies, applicants are expected to comply with the relevant procedural rules in their domestic jurisdiction. Thus, when an

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<sup>250</sup> See, *Assenov and Others v. Bulgaria*, cited above, § 86.

<sup>251</sup> See *Tepe v. Turkey* (dec.), cited above.

appeal is dismissed without the national court having examined the substance of the appeal because, for example, the applicant failed to lodge it within the applicable time limit, that applicant will be deemed by the Court not to have complied with the rule of exhaustion of domestic remedies.

The Court further requires that in order for an application to be admissible, complaints made therein must have been raised, at least in substance, before the domestic courts.<sup>252</sup> It is not strictly necessary to refer to the Convention Article(s) in domestic proceedings, provided that the substance of the Convention complaint is adequately brought to the attention of the relevant national authorities.<sup>253</sup>

### 2.4.3 Concluding Remarks

As described above, applicants are expected to show in their application forms that they have exhausted relevant domestic remedies and that in doing so they have complied with the relevant domestic rules of procedure and invoked the substance of the Convention complaint in the course of the domestic proceedings. Readers are referred to the *Model Article 3 Application* in Appendix No. 6 for an example of how this can be done.

In the context of Article 3, identifying the relevant domestic remedy is perhaps easier than is the case with other Articles of the Convention. As pointed out above, the most appropriate domestic remedy for allegations of ill-treatment will be a criminal investigation since such an investigation will be the best means to establish the accuracy of the allegations as well as being potentially capable of leading to the identification and punishment of those responsible. Furthermore, any decision which is not favourable to the applicant, such as a decision to discontinue the investigation or to acquit those responsible for the ill-treatment must be appealed against if and when the national legislation provides for such a course of action. It must be reiterated that according to the Court's established case-law, a mere doubt as to the prospect of success of a particular remedy is not sufficient to exempt an applicant from the requirement of exhausting that remedy.

If the applicant has not exhausted a particular remedy, he or she must explain in the application form the reasons for his or her decision not to do so. Such explanations may include, for example, the fact that the particular remedy has

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252 *Cardot v. France*, cited above, § 34.

253 See, for example, *Hudson v. former Yugoslav Republic of Macedonia* (dec.), no. 67128/01, 24 March 2005, in which the applicant's complaint under Article 3 of the Convention arising from the conditions of his detention in prison was declared inadmissible by the Court because of the applicant's failure to bring those complaints to the attention of the national authorities.

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already been examined by the Court itself in another case which concerned similar facts and the Court has concluded that the remedy is indeed ineffective. If the remedy in question has not yet been examined by the Court, on the other hand, and if it is the applicant's belief that the particular remedy is not capable of providing redress, he or she should consider providing examples of domestic court decisions demonstrating the ineffectiveness of that remedy. This may be done by showing that the remedy in question has been tried in the past under similar circumstances and provided no relief.

In case of any doubts about the effectiveness of a particular domestic remedy, the applicant should consider exhausting the remedy in question while at the same time introducing his or her application with the Court.<sup>254</sup> Finally, it should be noted that the rule of exhaustion interacts in important ways with the six-month rule. Therefore, applicants are advised to read this section on exhaustion together with the following section describing the six-month rule.

## 2.5 The Six-Month Rule (Article 35 §1)

### 2.5.1 Summary

A complaint must be filed with the Court within six months of the date on which the final domestic decision was taken in the case. The six-month period starts running from 1) the date the domestic judgment is rendered orally in public,<sup>255</sup> 2) the date of service of the written decision if the applicant is entitled to such service<sup>256</sup>, or 3) the date when the decision was finalised and signed in situations where judgments are not rendered orally or served.<sup>257</sup> If no domestic remedies are available, the six-month period starts running from the date of the incident or act of which the applicant complains.<sup>258</sup> Where domestic remedies turn out to be ineffective, the period starts running from the moment the applicant became aware, or should have become aware, that remedies were ineffective.<sup>259</sup> For continuing situations the six-month period does not start to run until after the situation ends, but a complaint can be filed prior to the end of the situation.

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254 See the Concluding Remarks in Section 2.5.3 below.

255 See *Loveridge v. the United Kingdom* (dec.), no. 39641/98, 23 October 2001.

256 *Worm v. Austria*, no. 2714/93, 29 August 1997, §§ 32-33.

257 *Papachelas v. Greece* [GC], no. 31423/96, 25 March 1999, § 30.

258 See, *inter alia*, *Vayıç v. Turkey* (dec.), no. 18078/02, 28 June 2005.

259 See, *inter alia*, *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002.

The date of introduction of an application with the Court is the date on the letter introducing the application or on the application form itself, unless there is a difference of more than one day between the date of the letter or application form and the date of the postal stamp on the envelope.<sup>260</sup> If there is a risk of missing the six-month deadline, applicants should fax the introductory letter to the registry. Such faxes must be followed up with a signed original within five days.

## 2.5.2 Discussion

### a) The General Rule

An application must be lodged with the Court within a period of six months from the date on which the final domestic decision was taken in the case concerned (Article 35 § 1 of the Convention). A survey of the Court's case-law reveals a number of reasons for this rule. For instance:

“[t]he object of the six-month time limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised”.<sup>261</sup>

The Court has also explained that the rule is:

“designed to facilitate establishment of the facts of the case; otherwise, with the passage of time, this would become more and more difficult, and a fair examination of the issue raised under the Convention would thus become problematic”.<sup>262</sup>

Finally,

“in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, the rule marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible”.<sup>263</sup>

The six-month period includes weekends and national holidays; e.g. if the starting date of the six-month period is 1 January 2005 the application must

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260 *Arslan v. Turkey* (dec.), no. 36747/02, 21 November 2002.

261 *Finucane v. the United Kingdom* (dec.), no. 29178/95, 2 July 2002; see also *Worm v. Austria*, cited above, §§ 32-33.

262 *Alzery v. Sweden* (dec.), no. 10786/04, 26 October 2004.

263 *Walker v. the United Kingdom*, (dec.), no. 34979/97, 25 January 2000.

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be introduced by 1 July 2005. If there is a risk of running out of time, an application can be introduced by letter or by fax message<sup>264</sup> provided that certain criteria are complied with in such communications.<sup>265</sup>

### b) The Date of Introduction

The date of introduction of an application will be the date on the letter introducing the application or the application form, unless it differs by more than one day from the date of the postal stamp on the envelope. In the case of *Arslan v. Turkey*, the application form was dated 12 April 2002, however, it had not been posted until 19 April 2002.<sup>266</sup> The Court stated that, assuming that the applicant had completed the form on 12 April, he should have posted it at the latest on the following day, i.e. 13 April 2002. Noting that the applicant had not provided an explanation for the six-day interval between the date on the application form and the date on which it was posted, the Court declared the application inadmissible for failure to observe the six-month time limit which had started to run on 13 October 2001. This case illustrates that the rule is applied strictly by the Court and makes clear that where there is a difference of more than one day between the date on the letter by which the application is introduced and the date of the postal stamp, the date of the postal stamp will be taken as the date of introduction.

If the letter or the application form is not dated, the date of the introduction will in any event be taken as the date of the postal stamp; if that stamp is illegible, the date of receipt at the Court will be considered to be the date of introduction.

It must also be stressed that the six-month rule, together with the rule of exhaustion of domestic remedies, is probably the most frequently used formal ground of inadmissibility; the Court applies it of its own motion<sup>267</sup> and a respondent Government cannot waive it.<sup>268</sup>

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264 If sent by fax message a signed original should also be sent to the Court within 5 days by surface mail. See Article 5 of the Practice Direction on the Institution of Proceedings.

265 See Section 4.1 below. Also, the sample letter drafted on the basis of hypothetical facts, which can be found in *Textbox vii*, may be taken as a starting point.

266 *Arslan v. Turkey* (dec.), cited above.

267 *Soto Sanchez v. Spain* (dec.), no. 66990/01, 20 May 2003.

268 *Walker v. the United Kingdom* (dec), cited above; see also Jacobs & White, p. 411.

### c) The Starting Point of the Six-Month Period

The six-month rule is closely connected with the rule of exhaustion of domestic remedies, and the moment on which the six-month period starts to run depends on the existence, or the lack thereof, of domestic remedies. As a general rule, a complaint must be submitted to the Court within six months from the day following the final domestic court decision rendered in relation to that complaint.<sup>269</sup> However, different practices of the domestic courts in the Contracting Parties – and, indeed, varying practices between different courts within the same Contracting Party – have made it impossible to apply a uniform rule in every case and have led the Commission and the Court to devise the following rules in relation to each scenario with which they have been confronted.

#### *i. Where Domestic Remedies Exist*

The Commission's view,<sup>270</sup> which was also adopted by the Court,<sup>271</sup> was that the six-month period starts to run from the day on which the judgment was rendered orally in public, meaning that the following day is the first day of the six-month period. However, where an applicant is entitled to be served *ex officio* with a written copy of the final domestic decision, the six-month period starts to run on the date of service of the written judgment,<sup>272</sup> irrespective of whether the judgment concerned, or parts thereof, were previously pronounced orally.<sup>273</sup> As seen above, one of the principles underlying the rule is to allow a prospective applicant to refer to the full reasoning set out in the domestic court decision when formulating the complaints he or she wishes to lodge with the Court in Strasbourg. An applicant will obviously be better able to do so when he or she has been provided with the written copy of the judgment.

If domestic law does not provide for oral pronouncement or service – or if it is not the practice of the domestic courts to serve their decisions notwithstanding legislation to the contrary<sup>274</sup> – the Court will take as the starting point the date on which the decision was finalised and signed, that being the

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269 In calculating the six-month time limit, regard must also be had to the explanations in Section 2.4.2 above; the time spent on exhausting an ineffective remedy may result in the six-month time limit being missed.

270 *K.C.M. v. the Netherlands*, no. 21034/92, Commission decision of 9 January 1995.

271 *Loveridge v. the United Kingdom* (dec.), cited above.

272 *Worm v. Austria*, cited above, §§ 32-33.

273 *Worm v. Austria*, no. 22714/93, Commission decision of 27 November 1995.

274 As is the situation in Turkey where decisions of the Criminal Division of the Court of Cassation are not served on defendants despite the clear wording of the domestic legislation requiring the Court of Cassation to serve them; see *Caralan v. Turkey* (dec.), no. 27529/95, 14 November 2002.



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date when the parties or their legal representatives were definitely able to discover its content.<sup>275</sup>

*ii. Where There are no Domestic Remedies*

In cases where there are no domestic remedies, an applicant will be expected to introduce his or her application within six months from the date of the incident or act of which the applicant complains. For example, an applicant who complains about the excessive length of his or her pre-trial detention which is lawful under domestic legislation, will be expected to lodge an application, at the latest, within six months from the date of release, since he or she cannot challenge the lawfulness of the detention before the domestic authorities.<sup>276</sup> Obviously, it is open to an applicant in such a situation to bring the application before he or she is released.

Similarly, where an applicant argues that existing domestic remedies are ineffective or that there are special circumstances which absolve him or her from the obligation to exhaust those remedies, he or she will be expected to introduce the application within six months of the date of the incident complained of, or of the date when he or she first became aware of the ineffectiveness of the remedy or the special circumstances in question.

*iii. Where Domestic Remedies Turn Out to be Ineffective*

Difficulties arise in the determination of the starting point of the six-month period in cases where domestic authorities remain inactive in the face of complaints of ill-treatment or where domestic criminal investigations continue for long periods of time without yielding any tangible results. According to the Court, if the domestic remedy invoked by the applicant is adequate in theory, but in the course of time proved to be ineffective, the applicant is no longer obliged to exhaust it.<sup>277</sup> The challenge for the applicant is to determine the point in time when it becomes apparent that the remedy is “ineffective” for purposes of the Convention. As described below, the Court imposes a high burden of due diligence on the applicant in this respect: the Court will declare a case inadmissible for non-respect of the six-month rule if it finds that the applicant continued to pursue a domestic remedy for more than six months when it should have been clear to him or her that the remedy was ineffective.

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<sup>275</sup> *Papachelas v. Greece* [GC], cited above, § 30.

<sup>276</sup> See, *inter alia*, *Vayıç v. Turkey* (dec.), cited above. See also “Continuing Situations” in Section 2.5.2 (c) (iv) below.

<sup>277</sup> See *Mikheyev v. Russia*, cited above, § 86.

The Commission addressed the issue of the starting point of the six-month period in such circumstances in the case of *Laçın v. Turkey* where it held the following:<sup>278</sup>

“[s]pecial considerations could apply in exceptional cases where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances”.<sup>279</sup>

The Court has followed the Commission’s approach in a number of cases<sup>280</sup> and further added in *Bayram and Yıldırım v. Turkey* that if the applicants did not become aware of the ineffectiveness of the domestic remedies for a long period, this “was due to their own negligence”.<sup>281</sup>

According to the Court, “the six-month rule is autonomous and must be construed and applied according to the facts of each individual case, so as to ensure the effective exercise of the right to individual application”.<sup>282</sup> Nevertheless, the cases in which the Court has expected applicants to have “become aware” of the ineffectiveness of an ongoing domestic remedy at an earlier stage than they did, do not provide uniform guidance from which a potential applicant, in the midst of exhausting a doubtful remedy, may benefit.

It appears from a number of cases introduced against Turkey, for example, that the applicants should not have awaited the outcome of criminal investigations that were marked by long periods of inactivity on the part of the investigating authorities. Thus, in the case of *Bulut and Yavuz v. Turkey*, concerning the killing on 29 July 1994 of the applicants’ husband and father allegedly by persons acting with the connivance of the State, the applicants claimed in their application form – submitted to the Court on 1 March 2001 – that they had applied to the office of the public prosecutor in order to obtain information on numerous occasions. On each occasion they had been told that no one had yet been prosecuted for the killing. The final time they checked with the investigating authorities was on 26 October 2000, when they were once again informed that no one had yet been prosecuted for the

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278 *Laçın v. Turkey*, no. 23654/94, Commission decision of 15 May 1995.

279 See also *Çelik v. Turkey*, no. 23655/94, Commission decision of 15 May 1995.

280 See, *inter alia*, *Ekinci v. Turkey* (dec.), no. 27602/95, 8 June 1999; *Gündüz v. Turkey* (dec.), no. 36212/97, 12 October 1999; *Hazar and Others v. Turkey* (dec.), nos. 62566/00-62577/00 and 62579-62581/00, 10 January 2002; *Camberrow MMS AD v. Bulgaria* (dec.), no. 50357/99, 1 April 2004 and *Gongadze v. Ukraine* (dec.), no. 34056/02, 22 March 2005.

281 See *Bayram and Yıldırım v. Turkey*, (dec.) no. 38587/97, 29 January 2002.

282 *Fernandez-Molina and Others v. Spain* (dec.), no. 64359/01, 8 October 2002.

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killing. The applicants argued that the domestic authorities were, nominally at least, still investigating the killing and this investigation would, pursuant to Article 102 of the Turkish Criminal Code, continue until 20 years had elapsed from the date of the killing. They submitted that the six-month time limit did not apply in their case given that there had as yet not been a domestic decision to discontinue the investigation. The Court rejected these arguments holding that the applicants should have displayed greater diligence and initiative in staying abreast of the progress of the investigation, and if, as they alleged, they had not become aware of the ineffectiveness of the investigation until October 2000, that was due to their own negligence.<sup>283</sup>

Reference can similarly be made to the case of *Şikran Aydın and Others v. Turkey*,<sup>284</sup> which concerned the ill-treatment and killing of the first applicant's husband Vedat Aydın following his abduction allegedly by undercover agents of the State in July 1991. The applicants had joined the criminal investigation as an intervening party. On 23 February 1998 they alerted the investigating prosecutor to the conclusion, published in a report,<sup>285</sup> that agents of the State had killed Vedat Aydın. They asked the prosecutor to investigate this fresh information and to inform the family of the results of that investigation. Following a reminder sent to the prosecutor in October 1998, the applicants received a reply in which the prosecutor simply stated that the investigation into the killing was still pending. In their application to the Court, which was introduced on 3 November 1998, the applicants claimed that they had become aware of the ineffectiveness of the domestic remedies following the unsatisfactory reply of the prosecutor. Nevertheless, the Court declared the application inadmissible for non-respect of the six-month rule and held that the applicants must be considered to have been aware of the lack of any effective criminal investigation long before they petitioned the public prosecutor on 23 February 1998. In its decision the Court made no reference to the evidence which had only been made public a month before the applicants brought it to the attention of the investigating authorities. This case illustrates that a long period of inactivity may result in an inadmissibility finding, despite an applicant's demonstrated diligence in assisting the investigating authorities by means of alerting them to fresh evidence.

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283 *Bulut and Yavuz v. Turkey* (dec.), cited above.

284 *Şikran Aydın and Others v. Turkey* (dec.), no. 46231/99, 26 May 2005.

285 The Susurluk Report. In another case (*Buldan v. Turkey*, no. 28298/95, 20 April 2004, § 80), the Court considered that that Report, which was drawn up at the request of the Turkish Prime Minister in January 1998 and which he decided should be made public, could not be solely relied upon to meet the required standard of proof that State officials were implicated in any particular incident but that it had to be regarded as a serious attempt to provide information on, and analyse problems associated with, the fight against terrorism from a general perspective and to recommend preventive and investigative measures.

By contrast to the cases discussed above, in the case of *Paul and Audrey Edwards v. the United Kingdom*,<sup>286</sup> the Court held that it was reasonable for the applicants to have awaited for a long period for the outcome of a non-statutory inquiry set up to investigate the circumstances of the death on 29 November 1994 of their son in prison. Although in this case the applicants had waited for a period of over four years before introducing their application they were found by the Court to have been justified in doing so. Had the applicants chosen to introduce their application prior to the publication of the Inquiry Report, there would have been a strong argument for finding that their complaints concerning the substantive and procedural aspects of Article 2 of the Convention were premature. The Court further considered that:

“the findings reached by the Inquiry could have potentially affected the existence of remedies whether by providing the basis for a criminal prosecution or disclosing facts supporting an action for damages in the civil courts. In those circumstances, it may be considered that the non-availability of any effective remedies finally became apparent on publication of the Inquiry Report on 15 June 1998 and that this date must be regarded as the final decision for the purposes of Article 35 § 1 of the Convention. The application, introduced on 14 December 1998, was therefore introduced within the requisite six months and cannot be rejected pursuant to Article 35 § 4 of the Convention”.<sup>287</sup>

Time spent on exhausting a remedy which, according to the Court's case-law, is considered an extraordinary remedy and which therefore need not be exhausted, may result in the application being declared inadmissible for non-respect of the six-month rule. The Court stated in the case of *Berdzenishvili v. Russia* that applications for a retrial made to domestic courts or authorities, or similar extraordinary remedies, cannot, as a general rule, be taken into account for the purposes of Article 35 of the Convention. The proceedings which were held to be extraordinary in *Berdzenishvili* were supervisory reviews of judgments which could be brought at any time after a judgment became enforceable, even years later. The Court considered that if the supervisory-review procedure was considered a remedy to be exhausted, the uncertainty thereby created would have rendered nugatory the six-month rule. In the light of the above, the Court held that the applicant, who had sought a supervisory review of the Supreme Court's judgment convicting him, should have introduced his application with the Court within six months of the Supreme Court judgment.<sup>288</sup>

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286 *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 21 February 2002.

287 *Ibid.*

288 *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004. See also Leach pp. 148-151.

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*iv. Continuing Situations*

The six-month time limit does not start to run if the Convention complaint stems from a continuing situation. Examples of continuing situations include complaints concerning length of domestic court proceedings, detention, and an inability to enjoy possessions.<sup>289</sup> Such situations are continuing because of the absence of a domestic remedy capable of putting an end to them or because of the ineffectiveness of existing remedies. It follows, therefore, that the six-month time limit will not start running until the end of the situation. As pointed out earlier, this does not mean that an application cannot be lodged before the situation comes to an end. For example, the case of *Assanidze v. Georgia*,<sup>290</sup> concerning the continuing detention of the applicant despite his acquittal by the Supreme Court of Georgia on 29 January 2001 and the order issued by that court for his immediate release, illustrates how absurd it would be if the Court expected a person to continue to suffer indefinitely before he or she is allowed to introduce an application. In *Assanidze*, the Grand Chamber of the Court explained that:

“to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty ... and arbitrary, and runs counter to the fundamental aspects of the rule of law”.

Having regard to the fact that the applicant was still in prison when the Court adopted its judgment on 24 March 2004 and “having regard to the particular circumstances of the case and the urgent need to put an end to the violation”<sup>291</sup> the Court considered that the respondent State must secure the applicant’s release at the earliest possible date.

### 2.5.3 Concluding Remarks

It is for the applicant to provide the Court with information that enables it to establish whether he or she has complied with the six-month rule. Failure to provide such information may result in the application being declared inadmissible. For this reason, it is recommended that applicants enclose with the application a photocopy of the envelope – with a legible postal stamp – in which the final domestic court decision was sent to them or any other document showing the date of service of the final domestic court decision.

In case of doubt about the effectiveness of a particular remedy, the decisions and the judgments of the Commission and the Court should be consulted to

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289 *Loizidou v. Turkey* (preliminary objections), cited above.

290 *Assanidze v. Georgia* [GC], cited above, § 175.

291 *Ibid.*, § 203.

check whether the remedy in question has been examined before. Another possible course of action is to introduce the application while at the same time exhausting the doubtful remedy and keeping the Court informed of developments. Obviously, if the remedy in question has been exhausted before the Court examines the application, it should be informed about the outcome in order to eliminate the risk of the application being declared inadmissible for non-exhaustion.<sup>292</sup> If, on the other hand, the Court examines the application before the remedy is exhausted and declares the case inadmissible for non-exhaustion of that remedy, the applicant may bring a new application once he or she has exhausted the remedy, since the domestic decision obtained will be regarded as relevant new information within the meaning of Article 35 § 2 (b) of the Convention. If an applicant waits to lodge the application until a doubtful remedy has been exhausted, and if the Court subsequently rules that the remedy was in fact an ineffective one which did not require exhaustion, the application may well be declared inadmissible for non-respect of the six-month rule, with no possibility for the applicant to lodge a new application based on the same facts. Proceeding to exhaust the domestic remedy, doubtful though its effectiveness may be, at the same time as introducing an application with the Court will also eliminate the risk that the domestic time limit in respect of that remedy will have expired should the Court consider that the remedy at issue does require exhaustion.

## **2.6 “Well-Foundedness” of the Application (Article 35 § 3)**

### **2.6.1 Summary**

An application is “well-founded” if the Court is satisfied that there is a case to answer. If the application on its face does not disclose a violation of the Convention, either because 1) the allegations are not sufficiently substantiated by the evidence, or 2) because the complaint, even if substantiated, does not fall within the scope of Convention rights because, for instance, the ill-treatment complained of is not sufficiently severe to constitute a violation of Article 3, then the application will be dismissed as “manifestly ill-founded”.

Applications relating to Article 3 violations should be 1) supported by evidence of the ill-treatment such as medical reports, eye-witness affidavits,

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<sup>292</sup> Obviously, if appropriate redress is obtained from the “doubtful remedy”, the applicant can inform the Court of his or her intention to withdraw the application. See Section 8.2 below for further information.

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custody records, court transcripts, domestic complaints, and any other documents showing that the ill-treatment occurred *and* that the complaints and relevant evidence were brought to the attention of the national authorities, and 2) applicants must show that the alleged ill-treatment was severe enough to cross the threshold of the Article 3 prohibition. Regarding the latter, the applicant should consult the Court’s considerable jurisprudence on the definition of torture and inhuman or degrading treatment or punishment outlined in this section and discussed in more detail in Appendix No. 10.

### 2.6.2 Discussion I: Evidentiary Requirements

According to Article 35 § 3 of the Convention, the Court may declare any individual application inadmissible if it considers it to be “manifestly ill-founded”. Applications can be declared inadmissible on this ground both by Committees – i.e. without the application being communicated to the respondent Government – or by Chambers. A Chamber may do so either before or after communication of the case to the respondent Government. This ground of admissibility constitutes an important means for the Court to weed out unmeritorious – indeed also frivolous – applications.

If an application is declared inadmissible by a Committee of three judges<sup>293</sup> as being manifestly ill-founded, the applicant will be informed in a letter which states only that “in the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that they did not establish a violation of the rights and freedoms set out in the Convention or its Protocols”.<sup>294</sup>

There are numerous and diverse grounds on which an application may be declared inadmissible as being manifestly ill-founded, but for purposes of the present *Handbook* two of them are of particular relevance: failure to substantiate allegations, and situations where the ill-treatment complained of is not sufficiently severe to amount to a breach of Article 3.

#### a) Substantiation of Allegations<sup>295</sup>

Before the Court can establish whether there has been a violation of the Convention, it must first establish the facts at issue. According to the Court,

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293 If the case is declared inadmissible on this ground by a Chamber, on the other hand, a copy of the Chamber’s decision, which sets out the reasons for inadmissibility, will be sent to the applicant.

294 See *Textbox x*. The applicant will receive a letter with the same wording if the application has been declared inadmissible on more than one ground; e.g. if the applicant has neither complied with the six-month rule nor exhausted the relevant domestic remedies.

295 See also Section 11 below for evidential issues and for establishment of facts.

Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation).<sup>296</sup> In the cases referred to it, the Court will examine all the material before it, whether originating from the parties or other sources, and if necessary, will obtain material *proprio motu*.<sup>297</sup> Nevertheless, according to the established case-law of the Court, an applicant does bear the initial burden of producing evidence in support of his or her complaints at the time the application is lodged. Once this burden has been discharged and the Court is satisfied that there is a case to answer, the Court will communicate the application – provided, of course, that the other requirements of admissibility are also met. The Court's attitude towards the distribution of the burden of proof is a corollary of the fact that Convention proceedings are distinct from criminal proceedings where the principle of *affirmanti incumbit probatio* does apply and where, therefore, the prosecution bears the legal burden of proving the guilt of the accused party.

The required standard of proof to convince the Court that there is a case to answer – i.e. that the allegations are not manifestly ill-founded – depends on the nature of the allegation. In cases concerning ill-treatment for example, it appears from the case-law of the Court that an applicant is required to make out a *prima facie* case at the time of introduction of the application in order to discharge this initial burden.<sup>298</sup> In the context of Article 3 of the Convention, a *prima facie* case may be loosely defined as an arguable case or a case in which there is some evidence in support of the allegations. Such evidence may include medical records and other medical documents such as x-rays, photographs, eye-witness accounts, custody records and any documents showing that the complaints have been brought to the attention of the national authorities.

In order to avoid any risk of an inadmissibility finding at the initial stages, it is imperative that allegations of ill-treatment be adequately supported by documents and argumentation at the time the application is lodged.<sup>299</sup> Where an applicant is not in a position to provide such documentation, for example because the documents are in the possession of the national authorities or because the applicant is unable to obtain the evidence without the assistance of the national authorities, the Court should be informed of this. Depending on the persuasiveness of the explanations and other material submitted by the applicant, the Court may seek to obtain the documents from the national

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296 See, *inter alia*, *Timurtaş v. Turkey*, cited above, § 66.

297 *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, § 160.

298 See, *inter alia*, *Birutis and Others v. Lithuania* (dec.), nos. 47698/99, 48115/99, 7 November 2000; see also *Artico v. Italy*, no. 6694/74, 13 May 1980, § 30; Harris, O'Boyle and Warbrick, pp. 627-628.

299 See also Leach, p. 35.



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authorities with the help of the respondent Government. It may do so either by communicating the application to the respondent Government or by requesting the Government, pursuant to Rule 54 § 2 (a) of the Rules of Court, to submit the documents in question.<sup>300</sup>

### b) Special Evidential Considerations in Expulsion Cases

According to the well established case-law of the Court, expulsion by a Contracting Party may give rise to an issue under Articles 2 or 3, or both, and hence engage the responsibility of that State where substantial grounds have been shown for believing that the person, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 or would be deprived of his or her life in violation of Article 2 in the receiving country (for example, by falling victim to an extrajudicial killing). In these circumstances, Articles 2 and 3 imply the obligation not to expel the applicant to that country.<sup>301</sup>

The Court has developed the following standard in expulsion cases: the applicant must show that “substantial grounds” exist for believing that, if expelled, he or she would face “a real risk of being subject to treatment contrary to Article 3”.<sup>302</sup> It is evident from this language that the applicant must show more than a *mere possibility* of ill-treatment.<sup>303</sup>

Applicants may face particular evidential challenges in expulsion cases. Although the general conditions in the country of destination constitute a relevant factor in the Court’s risk assessment, it is insufficient to show that the general situation in the country of destination is dangerous; rather, an applicant must also establish that he or she personally runs a real risk of being subjected to treatment contrary to Articles 2 and 3 of the Convention, for example by showing that he or she has previously been subjected to ill-treatment, or that he or she is a member of a group which is known to be targeted by the authorities of the country of destination,<sup>304</sup> or that he or she is actively being sought by the authorities.<sup>305</sup>

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300 See Section 5 below.

301 See, *inter alia*, *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, §§ 90-91; *Cruz Varas and Others v. Sweden*, no. 15576/89, 20 March 1991, §§ 69-70; and, *Chahal v. the United Kingdom*, cited above, §§ 73-74.

302 See, *inter alia*, *Chahal v. the United Kingdom*, cited above, § 74.

303 See *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87, 30 October 1991, §§ 107 and 111; *H.L.R. v. France*, no. 24573/94, 29 April 1997, § 37; *Hilal v. the United Kingdom*, no. 45276/99, 6 March 2001, § 60.

304 See, *mutatis mutandis*, *N. v. Finland*, no. 38885/02, 26 July 2005, §§ 161-167.

305 See “Short Survey of Cases Examined by the Court in 2004” at <http://www.echr.coe.int/NR/rdonlyres/94484030-2547-4FFC-9F91-8E96A87C7D74/0/2004analysisof-caselaw.pdf>

In assessing whether “substantial grounds” exist, the Court will examine all the circumstances of the case.<sup>306</sup> The types of evidence that may be adduced to prove such substantial grounds can vary from one case to another; they will be examined in more detail in Section 11 below. However, it suffices to say here that the Court acknowledges the difficulties that applicants in this type of case will face in submitting evidence. It should be noted that if the receiving country is not a Contracting Party to the Convention,<sup>307</sup> the Court has no powers to ask that receiving country to submit any material that may be in the possession of that country’s national authorities and which supports the applicant’s allegations.

Aware of the difficulties of proving the existence of a real risk of ill-treatment in receiving countries, the Court has expressed its readiness to lower the high standard of proof in such cases. In its decision in the case of *Mawajedi Shikpokht and Mahkamat Shole v. the Netherlands*, the Court noted the following:

“the case hinges on whether there is a real risk that the applicants will suffer treatment contrary to Article 3 if forced to return to Iran. Neither applicant has submitted any direct documentary evidence proving that they themselves are wanted for any reason by the Iranian authorities. That, however, cannot be decisive *per se*: the Court has recognised that in cases of this nature such evidence may well be difficult to obtain (*Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 263, § 45). To demand proof to such a high standard may well present even an applicant whose fears are well-founded with a *probatio diabolica*”.<sup>308</sup>

It then added:

“[e]ven so, as regards Ms Mahkamat Sholeh, it would have been helpful had the Court been provided with, for example, the written threat that caused her to go into hiding – or at least, plausible information which would enable the Court to assess *prima facie* the nature and seriousness of the threat which it represented to Ms Mahkamat Sholeh herself”.<sup>309</sup>

Whether the Court will follow this reasoning in similar cases is an open question. For a discussion of the standard and burden of proof in expulsion cases, applicants may find it useful to look at the *amicus* brief in the case of *Ramzy v. The Netherlands* (no. 25424/05) in Appendix No. 9. This *amicus*, submitted by a coalition of NGOs, contains a comparative examination of the

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306 See *D. v. the United Kingdom*, no. 30240/96, 2 May 1997, § 49.

307 If the receiving country is a Contracting Party, on the other hand, the Court may, pursuant to Rule 44A of the Rules of Court, ask that Party to cooperate fully in the proceedings and to take such action within its power as the Court considers necessary for the proper administration of justice. This duty applies also to a Contracting Party not party to the proceedings where such cooperation is necessary.

308 See *Mawajedi Shikpokht and Mahkamat Shole v. the Netherlands* (dec.), no. 39349/03, 27 January 2005.

309 *Ibid.*

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standard and burden of proof on applicants in expulsion cases in the jurisprudence of international bodies, primarily the European Court and the United Nations Committee against Torture.

Another challenge applicants might face in the expulsion context is the use of so-called “diplomatic assurances” (variously referred to as “diplomatic guarantees”, “diplomatic contacts”, “memoranda of understanding”). These concern assurances that the country of destination provides to the expelling respondent Government that the applicant will not be subjected to ill-treatment if expelled. The use of such assurances to expel persons in the face of a risk of torture or other ill-treatment has become increasingly common albeit also increasingly controversial. In numerous instances since September 11, States have relied on diplomatic assurances asserting that they effectively mitigated the risk of torture and ill-treatment to the expelled person. However, applicants faced with this issue should note that a growing number of international authorities have explicitly rejected the use of diplomatic assurances including, in particular, the Parliamentary Assembly of the Council of Europe,<sup>309bis</sup> the Council of Europe Commissioner for Human Rights,<sup>310</sup> United Nations Special Rapporteur on Torture,<sup>311</sup> and the United Nations High Commissioner for Human Rights.<sup>312</sup>

The UN Committee against Torture has also explicitly rejected the use of diplomatic assurances in its case-law. Specifically, in *Agiza v. Sweden* the Committee against Torture considered the issue in relation to the expulsion by Sweden of an Egyptian national and found that “... the State party’s expulsion of the complainant was in breach of Article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”<sup>313</sup> Indeed, in *Chahal v. the United Kingdom*, the European Court itself found that the diplomatic assurances provided by the Government of India were not sufficient to mitigate the risk of ill-treatment to the applicant and that his expulsion would therefore put the UK in breach of its obligations under Article 3.

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309bis Relevant parts of Article 20 of the Parliamentary Assembly Resolution, adopted on 27 June 2006, provides as follows: “The Assembly also calls on the United States of America, which is an Observer State to the Council of Europe and Europe’s long-standing ally in resisting tyranny and defending human rights and the rule of law, to prohibit the extralegal transfer of persons suspected of involvement in terrorism and all forcible transfers of persons from any country to countries that practise torture or that fail to guarantee the right to a fair trial, regardless of any assurances received”

310 Report of Mr. Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004) 13, para.19.

311 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/60/316, 30 August 2005.

312 Protection of human rights and fundamental freedoms while countering terrorism, Report of the High Commissioner for Human Rights, E/CN.4/2006/94, 16 February 2006.

313 *Agiza v. Sweden*, CAT/C/34/D/233/2003, para. 13.4.

Regarding diplomatic assurances, the United Nations Special Rapporteur on Torture has stated the following:

“[D]iplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and cruel, inhuman or degrading treatment or punishment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon return.”<sup>314</sup>

NGOs have also argued that reliance on diplomatic assurances is incompatible with States’ obligations to prevent torture,<sup>315</sup> and that there is a growing body of evidence that such assurances are ineffective in practice, are not capable of being monitored adequately, and have actually resulted in the torture and ill-treatment of persons subject to expulsion.<sup>316</sup>

### c) Concluding Remarks on Substantiation

The Court uses the following standard text when declaring an application admissible:

“The Court considers, in the light of the parties’ submissions, that this complaint raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that [the application] or [this part of the application] is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established”.

However, although an admissible complaint implies that the applicant has proved his or her allegations with adequate evidence to the extent necessary to show that his or her complaint is not manifestly ill-founded, it does not necessarily follow that the same evidence will be sufficient to establish a violation of the Convention. This is because of the different standards of proof

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314 A/60/316, para. 51.

315 See for instance, *Reject rather than regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment*. Amnesty International, Human Rights Watch and the International Commission of Jurists, 2 December 2005.

316 See Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, April 2005; *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, April 2004; See also, Amnesty International, *Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights*, 19 February 2006.

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required by the Court at different stages of the proceedings. For example, the Court unanimously concluded in its decision on admissibility in the case of *Bensaid v. the United Kingdom* that the applicant's complaint under Article 3 of the Convention was not manifestly ill-founded. However, in its judgment in the same case the Court was also unanimous in deciding that there had not been a violation of Article 3.<sup>317</sup>

An admissible Article 3 complaint which is not manifestly ill-founded but which ultimately does not lead to a finding of a violation of that Article, is not necessarily devoid of substance. It may still, if the applicant is held to have had an arguable claim<sup>318</sup> of a violation of that provision, give rise to a breach of Article 13 of the Convention<sup>319</sup> if the applicant was not afforded an effective remedy at the national level in respect of that complaint. Support for this can be found in the judgment in the case of *D.P. and J.C. v. the United Kingdom* in which the Court held the following:

“The Court has not found it established in this case that there has been a violation of Article 3, or Article 8, of the Convention in respect of the applicants' claims that the authorities failed in a positive obligation to protect them from the abuse of their stepfather, N.C. This does not however mean, for the purposes of Article 13, that their complaints fall outside the scope of its protection. These complaints were not declared inadmissible as manifestly ill-founded and necessitated an examination on the merits”.<sup>320</sup>

### 2.6.3 Discussion II: Severity of Ill-Treatment

Substantiation of the accuracy and veracity of allegations of ill-treatment is not on its own sufficient for the Court to conclude that the complaint is “well founded” (or, if the complaint gets beyond the admissibility stage, that there has been a violation of Article 3). This is because Article 3 does not prohibit every form of ill-treatment but only ill-treatment that crosses a minimum level of severity. In its judgment in the inter-state case of *Ireland v. the United Kingdom*, adopted in 1978, the Court established a test to determine whether a particular form of ill-treatment violated Article 3. According to this test:

“ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of

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317 *Bensaid v. the United Kingdom* (dec.), no. 44599/98, 25 January 2000, and *Bensaid v. the United Kingdom*, no. 44599/98, 6 February 2001.

318 See *Boyle and Rice v. the United Kingdom*, nos. 9659/82 and 9658/82, 27 April 1998, §§ 54-55.

319 And sometimes to a procedural violation of Article 3 of the Convention; see Section 10.2.2 (a) below.

320 *D.P. and J.C. v. the United Kingdom*, no. 38719/97, 10 October 2002, § 136; see also *Çelik and İmret v. Turkey*, 44093/98, 26 October 2004, § 57.

things, relative; it depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".<sup>321</sup>

This threshold, which was set by the Court in 1978, is a difficult one to attain and was perhaps set high because of a "sentiment that to find a State in violation of [Article 3 of the Convention] was particularly serious and not to be taken lightly".<sup>322</sup> Nevertheless, since the Convention is a living instrument which must be interpreted in the light of present-day conditions, certain acts previously falling outside the scope of Article 3 might today (or in future) attain the required level of severity to be considered a violation of the article.<sup>323</sup> The Court explained in *Selmouni* that:

"the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".<sup>324</sup>

Some examples are given below to illustrate the Court's examination of, and its approach to, the question of what minimum level of severity is required in order for the Court to find a violation of Article 3. The examples given below are drawn from a series of situations which have been examined by the Court and which involve typical "severity threshold" questions. It should be noted, however, that this list of categories is not exhaustive but merely illustrative. For a more extensive discussion of the Court's jurisprudence, readers are referred to Appendix No. 10.

#### **a) Inhuman or Degrading Treatment or Punishment**

The Convention prohibits both inhuman or degrading *treatment* and inhuman or degrading *punishment*. As regards the latter, the Court has held that in order for a judicially sanctioned punishment to violate Article 3, it must be a type of punishment which causes suffering and humiliation which *go beyond* the inevitable element of suffering and humiliation which is inherent in any form of legitimate criminal punishment. Examples of punishment which violate this prong of the prohibition include flogging, stoning, etc. For instance, Article 3 has been invoked in the *non-refoulement* context where the applicant faces *Sharia* punishment in his or her country of origin. In *Jabari v. Turkey*, the applicant had committed adultery in Iran, a crime under Iranian law for which she was liable to be sentenced to death by stoning. The Court

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321 *Ireland v. the United Kingdom*, cited above, § 162.

322 See Reid p. 518.

323 See *Henaf v. France*, no. 65436/01, 27 November 2003, § 55.

324 *Selmouni v. France*, cited above, § 100.

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found that type of punishment to be clearly contrary to Article 3 and found that her return would therefore constitute a violation of that article.<sup>325</sup>

In addition to the severity and proportionality of the punishment, the Court will also consider the purpose of the punishment and whether such a purpose involves the gratuitous humiliation or debasement of the victim. This was a factor in *Tyrer v. the United Kingdom* where the Court found that the judicial corporal punishment which the applicant complained of (in this case, birching) amounted to inhuman and degrading punishment.<sup>326</sup> In its judgment, the Court stated in relevant part that:

“... although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity”.<sup>327</sup>

The Court will also look to the purpose of the acts complained of in determining whether there is a violation of the prohibition of inhuman or degrading treatment.<sup>328</sup> *T. v. the United Kingdom* affords an illustration in this regard. This case concerned an applicant who, at the age of ten, was convicted of the killing of a two year old boy. The applicant argued that the cumulative effect of a number of factors associated with his criminal trial amounted to inhuman and degrading treatment contrary to Article 3, including the following: the low age of criminal responsibility, the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial, the jury of twelve adult strangers, the physical layout of the courtroom, the overwhelming presence of the media and public, the attacks by the public on the prison van which brought him to court, and the disclosure of his identity, together with a number of other factors linked to his sentence. The Court found, however, that the criminal proceedings against the applicant had not been motivated by any intention on the part of the State authorities to humiliate him or cause him suffering.<sup>329</sup> Furthermore, while the public nature of the proceedings may have exacerbated to a certain extent the applicant’s feelings of guilt, distress, anguish and fear, the Court was not convinced that the particular features of the trial process as applied to the applicant caused, to a significant degree, suffering beyond that which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following his commission of the offence in question.<sup>330</sup>

325 *Jabari v. Turkey*, no. 40035/98, 11 July 2000, §§ 33 - 42

326 *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978.

327 *Ibid.*, § 33.

328 See, for example, *Raninen v. Finland*, no. 20972/92, 16 December 1997, § 55.

329 *T. v. the United Kingdom* [GC], 24724/94, 16 December 1999, § 69.

330 *Ibid.*, § 77.

However, it must be stressed that although the question whether the purpose of the treatment or punishment was to humiliate or debase the victim is a factor to be taken into account, the absence of such a purpose cannot conclusively rule out a finding that Article 3 was violated.<sup>331</sup>

### **b) Prison Conditions**

Virtually any form of lawful detention (arrest, pre-trial detention, imprisonment, administrative custody, etc.) involves an inevitable element of suffering or humiliation. According to the Court, the imposition of a sentence of detention in itself does not raise issues under Article 3 of the Convention. Furthermore, Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him or her in a civil hospital to enable the detainee to obtain a particular kind of medical treatment.<sup>332</sup> Nevertheless, the Court requires the State to ensure that any person who is detained is held under conditions that are compatible with respect for human dignity, that the manner and method of the detention do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that given the practical demands of imprisonment, the detainee's health and well-being are adequately secured by, among other things, providing him or her with the requisite medical assistance.<sup>333</sup>

When examining complaints of prison conditions that are alleged to constitute ill-treatment, the Court refers to reports published by the CPT. Furthermore, the Court will take into account the cumulative effects of those conditions, as well as the specific allegations made by the applicant.<sup>334</sup> For example, in the case of *Labzov v. Russia*, the Court observed that the applicant was detained at a remand facility where he was afforded less than 1 square metre of personal space and shared a sleeping place with other inmates, taking turns with them to rest. Except for one hour of daily outside exercise, the applicant was confined to his cell for 23 hours a day. The Court considered that the conditions in the prison cell were:

“sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in [the applicant] the feelings of fear, anguish and inferiority capable of humiliating and debasing him”.<sup>335</sup>

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331 See, for example, *Van der Ven v. the Netherlands*, cited above, § 48.

332 *Kudła v. Poland* [GC], no. 30210/96, 26 October 2000, § 93.

333 *Ibid.*, § 94 and the cases cited therein.

334 *Dougoz v. Greece*, no. 40907/98, 6 March 2001, § 46.

335 *Labzov v. Russia*, no. 62208/00, 28 February 2002, § 46.



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By contrast, in its judgment in the case of *Valašinas v. Lithuania*,<sup>336</sup> in which the applicant complained of the conditions in the two prison cells where he was detained and which measured between 2.7 and 3.2 square metres, the Court found that the conditions of the applicant's detention did not attain the minimum level of severity because the restricted space in the sleeping facilities was compensated for by the freedom of movement enjoyed by the detainees during the daytime.

Therefore, applicants arguing a violation of Article 3 based on conditions of detention are advised to consult the Court's extensive case-law on this issue, and in particular, to distinguish the applicant's situation from the facts of cases where the Court has found no violation.

### c) Solitary Confinement

Prohibiting contact with other prisoners for security, disciplinary, or other protective reasons does not in itself amount to inhuman treatment or punishment.<sup>337</sup> However, the Court has found that complete sensory deprivation coupled with total social isolation can destroy the personality of a detainee and may constitute a form of inhuman treatment contrary to Article 3.<sup>338</sup> One factor that the Court will examine in these cases is whether the special regime imposed on the detainee is reasonably tailored to, and proportionate with, the legitimate interest – security, disciplinary, etc. – which the State is seeking to advance through the particular measure.

In the case of *Mathew v. the Netherlands* the detention in solitary confinement for a period of approximately 19 months of an applicant with health problems was considered excessive and in violation of Article 3.<sup>339</sup> Firstly, the applicant was detained for at least seven of those months in a cell in which there was a large opening in the roof exposing him to rain and extreme heat. Further, the location of his cell on the second floor prevented his access to outdoor exercise: because of his serious spinal condition and the absence of an elevator in the building, the applicant could only gain access to outdoor exercise at the expense of unnecessary and avoidable physical suffering. On the other hand, in *Rohde v. Denmark* the Court found that the applicant's pre-trial solitary confinement for a period in excess of eleven months did not in itself amount to treatment contrary to Article 3 of the

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336 *Valašinas v. Lithuania*, no. 44558/98, 24 July 2001, §§ 103-111.

337 See *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, § 191.

338 See *Van der Ven v. the Netherlands*, cited above, § 51.

339 *Mathew v. the Netherlands*, no. 24919/03, 29 September 2005, § 217.

Convention.<sup>340</sup> In reaching this conclusion the Court examined the conditions of detention including the extent of the social isolation. The Court observed that:

“[t]he applicant was detained in a cell which had an area of about eight square metres and in which there was a television. Also, he had access to newspapers. He was totally excluded from association with other inmates, but during the day he had regular contact with prison staff, e.g. when food was delivered; when he made use of the outdoor exercise option or the fitness room; when he borrowed books in the library or bought goods in the shop. In addition, every week he received lessons in English and French from the prison teacher and he visited the prison chaplain. Also, every week he received a visit from his counsel. Furthermore, during the segregation period in solitary confinement the applicant had contact twelve times with a welfare worker; and he was attended to thirty-two times by a physiotherapist, twenty-seven times by a doctor; and forty-three times by a nurse. Visits from the applicant’s family and friends were allowed under supervision. The applicant’s mother visited the applicant approximately one hour every week. In the beginning friends came along with her, up to five persons at a time, but the police eventually limited the visits to two persons at a time in order to be able to check that the conversations did not concern the charge against the applicant. Also, the applicant’s father along with a cousin visited the applicant every two weeks”.<sup>341</sup>

In the case of *Ramirez Sanchez v. France*, in which the applicant – better known as “Carlos the Jackal” – had been detained in solitary confinement for over eight years in a cell measuring 6.84 square metres, the Court found that

“the general and very special conditions in which the applicant was being held in solitary confinement and the length of that confinement had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention, having regard to his character and the unprecedented danger he poses”.<sup>342</sup>

The three cases referred to above illustrate that the period of solitary confinement is not on its own dispositive for purposes of Article 3. Other factors such as the identity of the victim, his or her health, the threat he or she poses, the conditions of the detention and whether the regime imposed by the Contracting Party is reasonably tailored to legitimate security interests will also be taken into account.

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340 *Rohde v. Denmark*, no. 69332/01, 21 July 2005, § 98. See also the dissenting opinion of Judges Rozakis, Loucaides and Tulkens in which they argued that “a distinction needs to be made between, on the one hand, social isolation or a special regime imposed after a conviction by a court and, on the other, pre-trial detention in solitary confinement, as in the present case”.

341 § 97.

342 *Ramirez Sanchez v. France*, no. 59450/00, 27 January 2005, § 120. It must be noted that on 15 June 2005 the case was referred to the Grand Chamber at the applicant’s request, and the Grand Chamber had not yet decided the case at the time of writing.

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**d) Strip Searches**

Other conditions of detention which the Court has had occasion to examine include strip searches of applicants. The Court considers that while strip searches may be necessary on occasion to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. It found that no such appropriateness was present in a case in which the (male) applicant was obliged to strip naked in the presence of a woman, and his sexual organs and the food he had received from a visitor were examined by guards who were not wearing gloves. This, in the words of the Court, showed “a clear lack of respect for the applicant, and diminished in effect his human dignity”.<sup>343</sup> Furthermore, in the case of *Van der Ven v. the Netherlands*, the Court considered that the practice of weekly strip searches applied to the applicant over a period of approximately three and a half years, in the absence of convincing security needs and on top of a great number of surveillance measures to which he was already subjected, diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him.<sup>344</sup>

In another case, the Court appreciated that the fact that the applicant was permanently observed by a camera for a period of about four and a half months in his prison cell may have caused him feelings of distress on account of being deprived of any form of privacy. However:

“it did not find it sufficiently established on the basis of objective and concrete elements that the application of this measure had in fact subjected the applicant to mental pain and suffering of a level which could be regarded as attaining the minimum level of severity which constitutes inhuman or degrading treatment within the meaning of Article 3 of the Convention”.<sup>345</sup>

**e) Prisoner Transport**

In a number of cases, the Court has considered complaints concerning the manner in which detainees are transported to and from places of detention. As with prison conditions, the Court will look to whether the conditions under which the detainee is being transported are consistent with respect for human dignity, and if additional restraint measures are imposed during the transportation process such as blindfolding, handcuffing, etc., the Court will assess these complaints in relation to whether such measures are reasonably

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343 *Valašinas v. Lithuania*, cited above, § 117.

344 *Van der Ven v. the Netherlands*, cited above, § 62; see also *Lorsé v. the Netherlands*, cited above, § 74. The respondent Government’s observations in the case of *Van der Ven* are found in Appendix No.14.

345 *Van der Graaf v. the Netherlands* (dec.), no. 8704/03, 1 June 2004.

necessary under the circumstances. In situations where the impugned treatment is not made necessary by the applicant's own conduct or "dangerousness" and where it consequently results in the humiliation of the detainee in a manner which exceeds the normal level of humiliation inherent in any lawful detention or arrest, the Court will find that the minimum level of severity will have been reached in violation of Article 3.

In *Khudoyorov v. Russia*, the applicant claimed that the conditions of his transportation between his detention facility and the court where he was being tried were inhuman and degrading. In particular, he complained that to attend court hearings he was transported to the courthouse in a prison van in which he shared a 1 m<sup>2</sup> individual compartment with another prisoner, forcing the two of them to take turns sitting on each other's lap. He received no food during the entire day and was deprived of outdoor exercise and even, on occasion, the chance to take a shower. The Court observed that the applicant had to endure these cramped conditions twice a day, on the way to and from the courthouse, and that he had been transported in that van no fewer than 200 times in four years of detention. Also, the Court noted that he was subjected to this treatment precisely on the occasions when he most needed his powers of concentration and mental alertness, i.e. during his trial and during the hearings on his detention status. Concluding that the treatment to which the applicant was subjected during his transport to and from the trial court exceeded the minimum level of severity, the Court found a violation of Article 3 of the Convention.<sup>346</sup> In reaching its conclusion the Court also examined the CPT's observations on transport facilities in various Council of Europe Member States.<sup>347</sup>

In *Raninen v. Finland*, the applicant complained of being handcuffed when transported between a prison and a hospital and argued that such measures constituted "degrading treatment" in violation of Article 3. The applicant stressed that the handcuffing occurred in the context of unlawful deprivation of liberty and thus possessed an element of arbitrariness causing him particular distress. He further argued that there had been nothing in his conduct when arrested and detained nor in the past suggesting that he might resist the authorities' measures, nor were any reasons given to him at the time of the handcuffing. According to him, the sole purpose of the handcuffing was to degrade, humiliate, and frighten him in order to discourage him from objecting to military service and substitute service. The two hours' duration of the treatment was significant because a few months after the event, he was diagnosed with an undefined psychosocial problem and was declared unfit for

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<sup>346</sup> *Khudoyorov v. Russia*, cited above, §§ 110-120.

<sup>347</sup> *Ibid.*, § 117.

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military service. According to the applicant, this clearly indicated that the unlawful detention and handcuffing had had adverse mental effects on him. In the opinion of the Commission, the Contracting Party's recourse to physical force by handcuffing the applicant for some two hours had not been made strictly necessary by his own conduct or by any other legitimate consideration and had been imposed while the applicant could be seen in public, including by his own supporters. In sum, the measure had diminished his human dignity and amounted to "degrading treatment" in violation of Article 3.<sup>348</sup>

The Court, however, disagreed. Unlike the Commission, it was not convinced that the applicant's handcuffing had adversely affected his mental state. There was nothing in the evidence to suggest a causal link between the impugned treatment and his "undefined psychosocial problem" which in any event had been diagnosed only several months later. Nor had the applicant substantiated his allegation that the handcuffing had been aimed at debasing or humiliating him. Finally, it had not been contended that the handcuffing had affected the applicant physically. In the light of these considerations, the Court concluded that the treatment in issue had not attained the minimum level of severity required by Article 3 of the Convention.<sup>349</sup>

In *Öcalan v. Turkey*, the Grand Chamber of the Court examined the applicant's allegations that his being handcuffed and blindfolded from the moment of his arrest in Kenya until his arrival at the prison on the island of İmralı in Turkey amounted to a violation of Article 3. The Grand Chamber held that artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure and raise an issue under Article 3. However, it endorsed the findings of the Chamber and held that the applicant, who was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish security forces, was considered dangerous. It accepted the Government's submission that the sole purpose of requiring the applicant to wear handcuffs was to prevent him from attempting to abscond or cause injury or damage to himself or others. As regards to the blindfolding of the applicant during his journey from Kenya to Turkey, the Court observed that this was a measure taken by the members of the security forces in order to avoid being recognised by the applicant. They also considered that it was a means of preventing the applicant from attempting to escape or injuring himself or others. The Court accepted the Government's explanation that the

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348 *Raninen v. Finland*, no. 20972/92, Commission Report of 24 October 1996, § 59.

349 *Raninen v. Finland*, cited above, §§ 52-59.

purpose of that precaution was not to humiliate or debase the applicant but to ensure that the transfer proceeded smoothly; in view of the applicant's character and the reactions to his arrest, considerable care and proper precautions were necessary if the operation was to be a success. The Court concluded that it had not been established beyond reasonable doubt that the applicant's arrest and the conditions under which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply.<sup>350</sup>

#### **f) Force-Feeding**

The case of *Nevmerzhitsky v. Ukraine* concerned the force-feeding of an applicant who was on hunger strike. In order to force-feed him, the authorities used handcuffs, a mouth-widener, and a special rubber tube inserted into the mouth. The Court held that:

“the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture within the meaning of Article 3 of the Convention”.<sup>351</sup>

It must be stressed that this conclusion does not necessarily mean that a Contracting Party will breach its obligations under Article 3 of the Convention each time its agents force-feed persons on hunger strike. As the Court noted in the same judgment,

“a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist... Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case-law under Article 3 of the Convention”.<sup>352</sup>

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350 *Öcalan v. Turkey* [GC], cited above, §§ 176-185.

351 *Nevmerzhitsky v. Ukraine*, no. 54825/00, 5 April 2005, § 98.

352 *Ibid.*, § 94.

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**g) Racial Discrimination**

According to the Commission, discrimination based on race can in itself amount to degrading treatment within the meaning of Article 3.<sup>353</sup> The Commission's view was adopted by the Court in *Cyprus v. Turkey*, in which it found:

“it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The Court would further note that it is the policy of the respondent State to pursue discussions within the framework of the inter-communal talks on the basis of bi-zonal and bi-communal principles... The respondent State's attachment to these principles must be considered to be reflected in the situation in which the Karpas Greek Cypriots live and are compelled to live: isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community. The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members... In the Court's opinion, and with reference to the period under consideration, the discriminatory treatment attained a level of severity which amounted to degrading treatment”.<sup>354</sup>

More recently, and with reference to the *East African Asians* case, the Court has held in *Moldovan and Others v. Romania* that discrimination based on race can in itself amount to degrading treatment within the meaning of Article 3 and that racist remarks should therefore be taken into account as an aggravating factor in the examination of applicants' complaints under this Article. On the basis of the circumstances of the case, the Court found that the racial discrimination to which the applicants had been publicly subjected and the way in which their grievances were dealt with by the various authorities constituted interference with their human dignity which, in the special circumstances of this case, amounted to “degrading treatment” within the meaning of Article 3 of the Convention.<sup>355</sup>

In the vast majority of cases, allegations of racial discrimination have been examined from the standpoint of Article 14 of the Convention which prohibits discriminatory treatment. In a landmark judgment the Court considered that

“any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against

353 See *East African Asians v. the United Kingdom*, nos. 4403/70 et seq., Commission Report of 14 December 1973.

354 *Cyprus v. Turkey*, cited above, §§ 309-311.

355 *Moldovan and Others v. Romania*, cited above, § 113.

persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives”.<sup>356</sup>

It follows from this judgment that the Contracting Parties are now under an obligation to carry out investigations into allegations of use of force triggered by racial motives. Although in the facts of the *Nachova* case the issue of racial discrimination was examined from the standpoint of Article 2 as it concerned the killing of a person, it can by no means be ruled out that the Contracting Parties’ positive obligation in this area extends to ensuring that allegations of ill-treatment triggered by racial motives are also properly investigated.

### **h) Expulsion of Persons with Health Problems**

The Court has further dealt with a number of cases in which applicants with health problems complained that their expulsion to a particular country, where there was a lack of health care and/or support, would exacerbate their health problems to such an extent as to amount to ill-treatment within the meaning of Article 3 of the Convention. The fact that an applicant’s circumstances in the receiving country will be less favourable than those enjoyed by him or her in the host country cannot be regarded as decisive from the point of view of Article 3.<sup>357</sup> According to the Court’s established case-law:

“aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State”.<sup>358</sup>

According to the Court’s judgment in the case of *D. v. the United Kingdom*, it is only in exceptional circumstances, and owing to compelling humanitarian considerations, that the implementation of a decision to remove an alien may result in a violation of Article 3. This case concerned the impending removal from the United Kingdom to the Caribbean island of St Kitts of the applicant who was in the advanced stages of a terminal and incurable illness (AIDS). The Court noted that the removal of the applicant and the resulting abrupt loss of access to a number of health and comforting facilities afforded to him in the United Kingdom would hasten his death. The Court held that

“in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant’s fatal illness, the implementation

356 *Nachova v. Bulgaria* [GC], cited above, §§ 162-168.

357 *Bensaid v. the United Kingdom*, cited above, § 38.

358 See, *inter alia*, *Salkic and Others v. Sweden* (dec.), no. 7702/04, 29 June 2004.



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of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3<sup>359</sup>.

The *D. v. the United Kingdom* judgment remains, however, the only case in which the Court has accepted that “exceptional circumstances” existed such that a State should refrain from removing an alien from its territory. The case of *Bensaid v. the United Kingdom*, for instance, concerned the removal of the applicant – a long-term sufferer of schizophrenia – from the United Kingdom to Algeria where he would not be able to continue taking, as an outpatient and free of charge, a particular course of medication. While the Court accepted the seriousness of the applicant’s medical condition, it did not find that there was a sufficiently real risk that the applicant’s removal, under the circumstances of the case, would be contrary to the standards of Article 3, noting the high threshold set by Article 3 and particularly the fact that the case did not concern the direct responsibility of the Contracting Party for the infliction of harm.<sup>360</sup>

The case of *Ndangoya v. Sweden* concerned the removal of the applicant back to his native Tanzania. He was infected with HIV, but while in Sweden had been receiving treatment such that the HIV levels in his blood were no longer detectable. The doctor who had treated the applicant estimated that he would develop AIDS within 1 to 2 years if the treatment were discontinued. The Court observed that adequate treatment was available in Tanzania, albeit at a considerable cost and difficult to come by in the countryside where the applicant apparently would prefer to live upon return. Noting that it had not appeared that the applicant’s illness had attained an advanced or terminal stage, or that he had no prospect of medical care or family support in his country of origin, the Court found that the circumstances of his situation were not of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3 of the Convention.<sup>361</sup>

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359 *D. v. the United Kingdom*, cited above, § 53.

360 *Bensaid v. the United Kingdom*, cited above, § 40. See also the separate opinion of Judge Sir Nicolas Bratza, the national judge in the case, joined by judges Costa and Greve, in which he stated that “...the present case does not disclose exceptional circumstances similar to those of *D. v. the United Kingdom*... Nevertheless, on the evidence before the Court, there exist in my view powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria”.

361 *Ndangoya v. Sweden* (dec.), no. 17868/03, 22 June 2004. See also *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004 in which the considerable stress caused to the applicant by the national authorities’ decision to expel him was not sufficient to attract the protection under Article 3 of the Convention.

## 2.6.4 Concluding Remarks

If the Court concludes that the applicant has failed to support his or her case with adequate evidence and has failed, therefore, to make out a *prima facie* case, the application will be declared inadmissible as being manifestly ill-founded. Similarly, if the Court concludes that the treatment of which the applicant complains has not reached the minimum level of severity to constitute a breach of Article 3, the application will be declared inadmissible as being manifestly ill-founded.

In order to avoid having an application fail for lack of substantiation, the applicant should make out the strongest possible case from the beginning by submitting all relevant evidence which can support the allegations with the completed application form. If the evidence submitted by the applicant is rebutted or challenged by the respondent Government, the applicant will have the opportunity to counter the Government's allegations<sup>362</sup> by adducing further evidence and/or arguments. Such additional evidence may take the form of additional medical reports confirming the applicants' earlier medical submissions or challenging the submissions of the Government.<sup>363</sup>

Similarly, persuading the Court that the treatment in question has reached the required minimum level of severity may also be achieved by resorting to medical reports. In order to tip the scales, applicants should consider obtaining detailed medical reports describing the physical and mental effects of the ill-treatment to which they were subjected. If the applicant is suffering from psychological disturbances as a result of the ill-treatment, it is particularly important that these effects be documented since the finding of such effects requires the Court to make an assessment of a number of subjective elements. A psychological assessment, carried out by a trained specialist, preferably a psychiatrist, "linking" the applicant's psychological problems to his or her allegations will assist the Court in its examination and is strongly recommended.

The Court's assessment of the severity of the treatment will take into account all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim. Consequently, in some cases the Court might consider a particular form of treatment severe enough to cross the severity threshold, where the applicant can show characteristics which make him or her particularly vulnerable to such treatment. Thus in some cases, ill-treatment of a

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362 See Section 11 for a discussion of the evidential issues in the Court's proceedings.

363 See, as an example, the applicant's observations in the case of *Kişmir v. Turkey*, cited above, (in Appendix No. 13) in which the applicant enclosed a report prepared by a consultant pathologist.

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child, pregnant woman, or elderly or infirm person might constitute a breach of Article 3 while the same treatment, when meted out to a healthy adult, might not be sufficient to constitute prohibited ill-treatment.<sup>364</sup> If relevant to the case, applicants are therefore advised to call to the attention of the Court, through argument and evidence, any particular characteristic which exacerbates their suffering.

Applicants whose health condition has deteriorated because of the ill-treatment should prove this by submitting medical evidence showing their state of health before and after the ill-treatment.

Finally, applicants should support their arguments that the treatment in question reaches the required minimum by referring to the Court's case-law in which similar allegations have been examined. This is particularly appropriate for complaints relating to prison conditions and other circumstances where the threshold level of severity might be an issue. For example, an applicant who has been detained in a prison in conditions similar to that of the applicant in the above mentioned case of *Labzov v. Russia*, may parallel the facts of that case or other similar cases.

## 2.7 Abuse of the Right of Application (Article 35 § 3)

According to Article 35 § 3 of the Convention, the Court will declare inadmissible an application if it considers the application to be an abuse of the right of application. What constitutes an abuse within the meaning of this Article has not been defined by the Convention institutions, which preferred, as the Court continues to do, to deal with the issue on a case-by-case basis.

This ground of inadmissibility has been used by the Court as a tool to weed out vexatious applications which hinder it in carrying out its duty under Article 19 of the Convention to ensure observance of the obligations undertaken by the Contracting Parties in the Convention.

It must be stressed at the outset that any attempt to mislead the Court in its examination of the application, for example by forging documents or by deliberately concealing relevant facts, may result in the Court's conclusion that there has been an abuse of the right of application.

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<sup>364</sup> See, for example, *Mathew v. the Netherlands*, cited above, § 203, where the Court observed that the applicant with health problems was not a person fit to be detained in the conditions of which he complained.

The Court – as did the Commission – receives a considerable number of applications that concern frivolous and repeated complaints by vexatious applicants. In the case of *Philis v. Greece* the Commission observed that the applicant had already introduced five applications with the Commission concerning the same complaint, all of which had been declared inadmissible. Apart from finding that the latest application constituted an abuse of the right of application, the Commission added:

“[i]t cannot be the task of the Commission, a body set up under the Convention to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, to deal with a succession of ill-founded and querulous complaints, creating unnecessary work which is incompatible with its real functions, and which hinders it in carrying them out”.<sup>365</sup>

The Court has adopted the same approach. Applicants receive prior warning that if the new application is rejected for amounting to an abuse of the right of application, no further correspondence will be entertained with them regarding future similar complaints.

Furthermore, in a number of cases the Court has examined whether the use of offensive language in proceedings before the Court – language that was directed either against the respondent Government or its agents,<sup>366</sup> the regime in the respondent Contracting Party,<sup>367</sup> or the Court and its Registry,<sup>368</sup> constituted an abuse of the right of application.<sup>369</sup> Finding that the use of offensive language in proceedings is undoubtedly inappropriate, the Court also held that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts.<sup>370</sup>

Finally, in a number of cases the Commission and the Court have rejected claims made by respondent Governments that applications constituted an abuse of the right of application because they had been made for political purposes. For example, in the case of *Aslan v. Turkey* the respondent Government argued that the application, being devoid of any sound legal basis, had been lodged for purposes of political propaganda against the Turkish Government. The Commission concluded that the Government's

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365 *Philis v. Greece*, no. 28970/95, Commission decision of 17 October 1996.

366 See *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002.

367 See *Iordachi and Others v. Moldova* (dec.) no. 25198/02, 5 April 2005.

368 See *Řehák v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004.

369 See also Rule 44D according to which, “[i]f the representative of a party makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may exclude that representative from the proceedings, refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention”.

370 See *Varbanov v. Bulgaria*, no. 31365/96, 5 October 2000, § 36.

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argument could only be accepted if it was clear that the application was based on untrue facts. However, as this was far from clear at that stage of the proceedings, the Commission found it impossible to reject the application on this ground.<sup>371</sup>

## 2.8 Anonymous Applications (Article 35 § 2 (a))

The Court will not accept anonymous applications.<sup>372</sup> Rule 47 § 1 (a) of the Rules of Court requires that the name, date of birth, nationality, sex, occupation, and address of the applicant be set out in the application form.

The public nature of the Convention proceedings entails that the Court's decisions and judgments list the name, the year of birth, and the place of residence of the applicants. However, some applicants do not wish that their identity be disclosed to the public. In such circumstances, they may ask the Court to refer to them in public documents by their initials or by a single letter such as "X", "Y", "Z", etc.<sup>373</sup> Any such requests, however, must be supported by a statement of the reasons justifying such a departure from the rule of public access to information in proceedings before the Court. The President of the Chamber may authorise anonymity in exceptional and duly justified cases.<sup>374</sup>

Applicants should note that even where the Court grants a request for anonymity, their identities will always be disclosed to the concerned Contracting Party because the Contracting Party cannot, for obvious reasons, be expected to respond to anonymous complaints. In other words, an applicant can be anonymous *vis-à-vis* the general public but not *vis-à-vis* the other party to the complaint.

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371 *Aslan v. Turkey*, no. 22497/93, Commission decision of 20 February 1995.

372 Article 35 § 2 (a) of the Convention.

373 See paragraph 17 of the Practice Direction on the "Institution of Proceedings" which can be found in Appendix No. 3.

374 Rule 47 § 3 of the Rules of Court.

## 2.9 Applications Substantially the Same (Article 35 § 2 (b))

A complaint which has already been examined either by the Court itself or which has already been submitted to another procedure of international investigation or settlement, and which contains no new information, will be declared inadmissible.<sup>375</sup> According to the Court:

“this provision is intended to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same. A situation of this type would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases”.<sup>376</sup>

Two of the terms mentioned in this provision, namely “another international investigation or settlement” and “new information”, necessitate further examination. The Commission has held that the word “another” suggests that that provision is concerned with a procedure similar to that provided by the Commission.<sup>377</sup> Both the Commission<sup>378</sup> and the United Nations’ Human Rights Committee<sup>379</sup> have been held by the Court to be capable of providing “international investigations or settlements” within the meaning of this provision. Examination of an allegation of ill-treatment by the CPT, on the other hand, will not prevent the Court from examining the same allegation.<sup>380</sup> Furthermore, in its admissibility decision in the case of *Jeličić v. Bosnia and Herzegovina*, the Court also found that the Human Rights Chamber of Bosnia and Herzegovina was not an international tribunal within the meaning of Article 35 § 2 (b) of the Convention. In reaching its conclusion the Court observed, *inter alia*, that the Human Rights Chamber’s mandate did not concern obligations between States but strictly those undertaken by Bosnia and Herzegovina and its constituent entities.<sup>381</sup>

Secondly, the Court will not declare a complaint inadmissible on this ground if it is based on facts which have been examined by one of the above mentioned international organisations or by the Court itself, if the complaint

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375 Article 35 § 2 (b) of the Convention.

376 See *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002.

377 *Council of Civil Service Unions and Others v. the United Kingdom*, no. 11603/85, Commission decision of 20 January 1987.

378 See, *inter alia*, *Vogl and Vogl v. Austria* (dec.), no. 50171/99, 23 October 2001.

379 *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995.

380 Paragraph 92 of the Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment expressly addresses this issue. According to this paragraph, “it is not envisaged that a person whose case has been examined by the committee would be met with a plea based on Article [35 § 2 (b) of the Convention] if he subsequently lodges a petition with the European [Court] of Human Rights alleging that he has been the victim of a violation of that Convention”.

381 See *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005.

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raised in relation to those facts is a different one. It thus appears that the Court interprets the concept of “substantially the same application” very restrictively.<sup>382</sup>

Unless the new application contains “relevant new information”, it will be declared inadmissible by the Court. “Relevant new information” within the meaning of this provision may include a domestic court decision obtained by an applicant whose previous application was declared inadmissible by the Court for non-exhaustion of that particular remedy. However, this happens rarely in practice because, as pointed out elsewhere in this section, it is very likely that by the time the Court declares an application inadmissible for non-exhaustion of a particular domestic remedy, the applicant will have missed the time limit in national system to make use of that remedy. A domestic court decision in which the applicant’s appeal was rejected for non-respect of the time limit under the national legislation will not constitute a “relevant new fact”.

## 2.10 The New Admissibility Criterion in Protocol No. 14

Following the entry into force of Protocol No. 14, Article 35 § 3 of the Convention will include a new admissibility criterion according to which an application will be declared inadmissible if:

“the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case maybe rejected on this ground which has not been duly considered by a domestic tribunal”.<sup>383</sup>

According to the Explanatory Report to Protocol No. 14:

“the purpose of this amendment is to provide the Court with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes. The introduction of this criterion was considered necessary in view of the ever increasing case load of the Court”.

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382 See *Kovačić and Others v. Slovenia* (dec.), nos. 44574/98, 45133/98, and 48316/99, 9 October 2003.

383 Article 12 of Protocol No. 14.

As acknowledged in the Explanatory Report, it is intended that the new admissibility criterion lead to the rejection of complaints in respect of which, under the current practice, violations of the Convention would be found.<sup>384</sup> It is for the Court to interpret the rather ambiguous term “significant disadvantage”, and in the two years following the entry into force of Protocol No. 14, the new admissibility criterion will only be applied by Chambers and the Grand Chamber and not by Committees, in order that reasoned and publicly accessible case-law is created.

The new criterion allows the Court to exercise its discretion when deciding whether “respect for human rights” requires an examination of the application on the merits.<sup>385</sup> Furthermore, the new criterion aims to ensure that all Convention complaints are examined either at the national level or by the Court.

It must be stressed, however, that even before Protocol No. 14 has been ratified by the Contracting Parties to the Convention, serious doubts are already being expressed as to the capacity of this new criterion to reduce the case load of the Court.<sup>386</sup>

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384 See paragraph 79 of the Explanatory Report in Appendix No.18.

385 This ‘safeguard clause’ was adopted from Article 37 § 1 of the Convention which allows the Court to continue the examination of a case even if the applicant does not intend to pursue his or her application or even if the parties want to settle the case; see Section 8 below for further information.

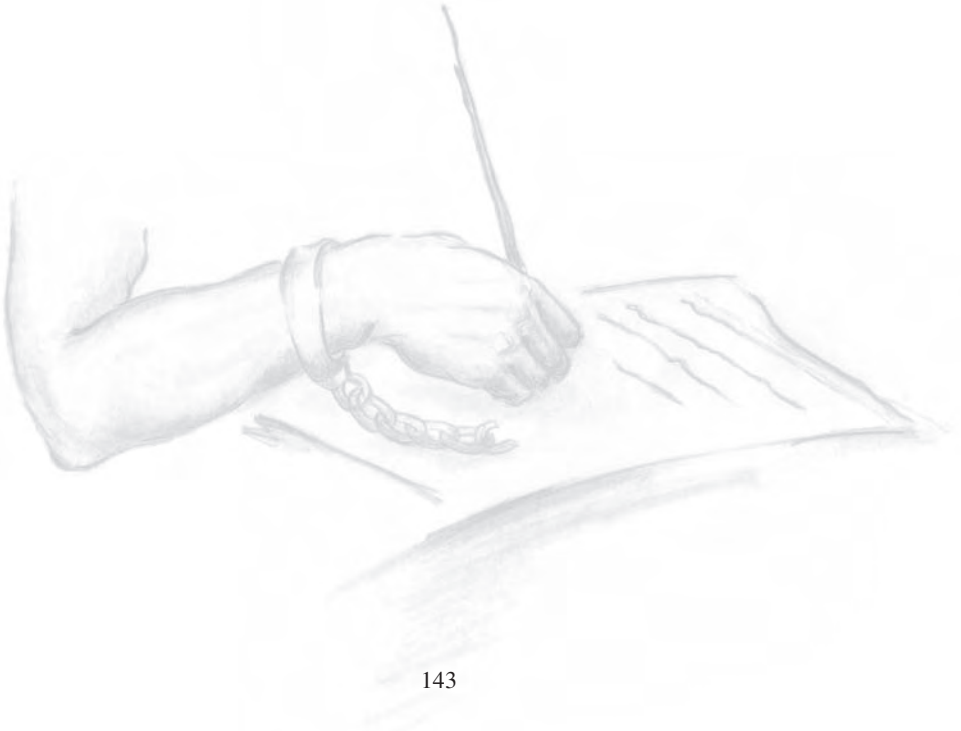
386 See Leach p. 8 *et seq.* and the references cited therein.



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## PART III

### PROCEEDINGS BEFORE THE COURT



## **INTERIM MEASURES AND CASE PRIORITY**

### **3.1 Interim Measures (Rule 39 of the Rules of Court)**

3.1.1 Summary

3.1.2 Discussion

3.1.3 Application Procedure for Interim Measures

### **3.2 Case Priority and Urgent Notification of Applications (Rules 40-41)**

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## 3.1 Interim Measures (Rule 39)

### 3.1.1 Summary

Interim measures are issued by the Court to a respondent Contracting Party indicating that it should refrain from carrying out an act which could be detrimental to the Court's examination of an applicant's case. Interim measures under Rule 39 of the Rules of Court are predominantly granted in expulsion and extradition cases in order to prevent the removal of the applicant to a country where he or she may be subjected to treatment in violation of Articles 2 and/or 3 of the Convention. According to the Court's established case-law, Contracting Parties have a duty to comply with any interim measures indicated to them, failing which, issues will arise under Article 34 as regards the applicant's enjoyment of his or her right to an individual petition.<sup>387</sup>

Interim measures are often sought but rarely granted. For an interim measure to be granted, the applicant must demonstrate an imminent risk of irreparable damage to life or limb.<sup>388</sup>

This section includes practical information for filing interim measure requests. Furthermore, the reader may refer to the sample application for an interim measure and the Practice Direction on Interim Measures in Appendices Nos. 15 and 3, respectively.

### 3.1.2 Discussion

As pointed out above, Rule 39 of the Rules of Court authorizes interim measures and provides as follows:

- “1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated”.

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<sup>387</sup> *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 127.

<sup>388</sup> *Ibid.*, § 104.

One of the most noteworthy cases concerning the indication of interim measures is that of *Soering v. the United Kingdom*,<sup>389</sup> which concerned the extradition by the British authorities of a German national to the United States where the authorities wanted to put him on trial for murder. If convicted, the applicant was liable to be sentenced to death. Mr. Soering argued that his surrender to the authorities of the United States of America might, if implemented, give rise to a breach by the United Kingdom of Article 3 of the Convention because he would be exposed to the so-called “death row phenomenon”, which he alleged constituted treatment contrary to that Article. His application to the Commission for the interim measure under Rule 36 of the Commission’s Rules of Procedure (now Rule 39 of the Rules of Court) was accepted, and the Commission indicated to the United Kingdom Government that it would be advisable not to extradite the applicant to the United States while the proceedings were pending in Strasbourg.<sup>390</sup> The United Kingdom Government complied with the interim measure and the Court subsequently held that the United Kingdom would be in breach of Article 3 if it were to extradite the applicant to the United States because the circumstances of death row would represent treatment prohibited by that Article.<sup>391</sup> Without the interim measure, Mr. Soering might have been extradited before the Convention institutions had had a chance to examine the application, and the risk of ill-treatment as alleged by the applicant might have materialised.

According to the Court, indications of interim measures given by the Court:

“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”.<sup>392</sup>

The Court approaches Rule 39, therefore, from the perspective of the effective exercise of the right of individual application, which is guaranteed under Article 34 of the Convention. In the case of *Mamatkulov and Askarov v. Turkey*, in which the Turkish Government failed to comply with the Court’s indication under Rule 39 and extradited the applicants to Uzbekistan anyway, the Grand Chamber of the Court found that the Turkish Government had not complied with its obligation under Article 34 of the Convention. It held:

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389 *Soering v. the United Kingdom*, cited above.

390 *Ibid.*, § 4.

391 *Ibid.*, § 111. See also Appendix No. 10 below.

392 *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 125.

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“[t]he facts of the case, as set out above, clearly show that the Court was prevented by the applicants’ extradition to Uzbekistan from conducting a proper examination of their complaints in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the Convention as alleged. As a result, the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34 of the Convention, which the applicants’ extradition rendered nugatory”.<sup>393</sup>

The Grand Chamber further held that:

“The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant’s right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention”.<sup>394</sup>

The Grand Chamber of the Court has thus established that indications under Rule 39 impose binding obligations on the Contracting Parties.

Most interim measures indicated by the Commission and the Court have been complied with<sup>395</sup> by the Contracting Parties notwithstanding the fact that until the adoption of the judgment in the case of *Mamatkulov and Askarov*, indications under Rule 39 were not regarded by the Court as binding.

The Grand Chamber further set out in *Mamatkulov and Askarov v. Turkey* that:

“[i]nterim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have

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393 *Ibid.*, § 127.

394 *Ibid.*, § 128. In this case the Court, while acknowledging that Turkey’s failure to comply with the indication given under Rule 39 had prevented it from assessing whether a real risk existed, nevertheless concluded by a majority of 14 to 3 that it was unable to find that substantial grounds existed for believing that the applicants faced a real risk of treatment proscribed by Article 3 (§ 77). See also the partly dissenting opinion of Judges Bratza, Bonello, and Hedigan in which they stated, *inter alia*, the following: “It is unclear to us what further corroborative evidence could reasonably be expected of the applicants, particularly in a case such as the present, where it was Turkey’s failure to comply with the interim measures indicated by the Court which has prevented the Court from carrying out a full and effective examination of the application in accordance with its normal procedures. In such a situation, we consider that the Court should be slow to reject a complaint under Article 3 in the absence of compelling evidence to dispel the fears which formed the basis of the application of Rule 39”.

395 *Ibid.*, § 105: “...Cases of States failing to comply with indicated measures remain very rare.”

been indicated concern deportation and extradition proceedings”.<sup>396</sup>

It follows from this quote that an interim measure under Rule 39 will generally only be granted if the applicant can show that there is an imminent risk of irreparable damage to life or limb.<sup>397</sup> For example, interim measures were applied in the case of *Shamayev and 12 Others v. Georgia and Russia*, which concerned the extradition by Georgia of a number of Chechens to Russia. The Court concluded that in the light of the extremely alarming phenomenon of persecution – in the form of threats, harassment, detention, enforced disappearances, and killings – of persons of Chechen origin who had lodged applications with the Court, the extradition to Russia of the one applicant still remaining in Georgia would constitute a violation of Article 3 of the Convention.<sup>398</sup>

Interim measures were also applied in the case of *D. v. the United Kingdom*, which concerned the removal of a person suffering from AIDS from the United Kingdom. As mentioned earlier, the Court held in that case that the United Kingdom would be in breach of Article 3 of the Convention if it were to proceed with the removal of the applicant.

In an application for an interim measure which concerned somewhat more extraordinary circumstances, the Court rejected Saddam Hussein’s request:

“to permanently prohibit the United Kingdom from facilitating, allowing for, acquiescing in, or in any other form whatsoever effectively participating, through an act or omission, in the transfer of the applicant to the custody of the Iraqi Interim Government unless and until the Iraqi Interim Government has provided adequate assurances that the applicant will not be subject to the death penalty”.<sup>399</sup>

Interim measures, by their nature, will usually be indicated to a Contracting Party, but there have been exceptions. In the case of *Ilaşcu and Others v. Moldova and Russia*, for instance, the President of the Grand Chamber decided on 12 January 2004 to invite the respondent Governments, under Rule 39, to take all necessary steps to ensure that one of the applicants who had been on hunger strike since 28 December 2003 “was detained in conditions which were consistent with respect for his rights under the Convention”.<sup>400</sup> An interim measure to that effect was thus indicated to the Contracting Parties concerned. In addition, however, the President decided on 15 January 2004 to urge the applicant himself, under Rule 39, to call off his hunger strike, a

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396 *Ibid.*, § 104.

397 See also Leach, p. 38 *et seq.*

398 *Shamayev and 12 Others v. Georgia and Russia*, no. 36378/02, 12 April 2005.

399 See the press release of 30 June 2004 at

<http://www.echr.coe.int/Eng/Press/2004/June/RequestforInterimmeasure-SaddamHussein.htm>

400 *Ilaşcu and Others v. Moldova and Russia*, cited above, § 10.

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request which the applicant complied with on the same day.<sup>401</sup>

Perhaps the most far-reaching interim measure indicated by the Court was the one issued in the case of *Öcalan v. Turkey*, which concerned the arrest and subsequent trial, by a State Security Court, of the leader of the PKK (Kurdistan Workers' Party) for offences that were punishable by death under the Turkish legislation in force at the time. The Court requested the Turkish Government to take:

“interim measures within the meaning of Rule 39 of the Rules of Court, notably to ensure that the requirements of Article 6 were complied with in proceedings which had been instituted against the applicant in the State Security Court and that the applicant was able to exercise his right of individual application to the Court effectively through lawyers of his own choosing”.<sup>402</sup>

The Government, which was subsequently invited to clarify specific points concerning the measures that had been taken pursuant to Rule 39 to ensure that the applicant had a fair trial, informed the Court that it was “not prepared to reply to the Court’s questions, as they went far beyond the scope of interim measures within the meaning of Rule 39”.<sup>403</sup> However, the Government did comply with another interim measure indicated by the Court pursuant to which it was asked “to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant’s complaints under the Convention”.<sup>404</sup>

Providing the Court with adequate evidence, showing that there is a real risk of irreparable harm to life or limb, may lead the Court to grant an interim measure but it does not necessarily mean that the same evidence is sufficient for the Court subsequently to find a violation of Articles 2 or 3. For example, although the evidence submitted by the applicant in the case of *Thampibillai v. the Netherlands* was sufficient for the Court to indicate to the respondent Government “that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Sri Lanka pending the Court’s decision”, it was not sufficient for the Court to conclude in its judgment that substantial grounds had been established “for believing that the applicant, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention”.<sup>405</sup>

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401 *Ibid.*, § 11.

402 *Öcalan v. Turkey* [GC], cited above, § 5.

403 *Ibid.*

404 *Ibid.*

405 *Thampibillai v. the Netherlands*, no. 61350/00, 17 February 2004, § 68.

Conversely, a rejection by the Court of a request for an interim measure does not prevent the applicant from pursuing the application, provided obviously that he or she is able to do so. For example, in *Mamatkulov and Askarov v. Turkey* the Court continued its examination of the application despite the fact that the lawyers representing the applicants had been unable to contact them following their extradition to Uzbekistan by the Turkish authorities in violation of the interim measure indicated under Rule 39.<sup>406</sup>

The Court will be much less inclined to issue an interim measure if the country of destination in an expulsion case is another Contracting Party. This is because there is a presumption that the receiving State will comply with its Convention obligations and also because of the fact that the Court will be able to scrutinise any alleged failures by that state to uphold its Convention obligations.<sup>407</sup> Nevertheless, and as was shown in the case of *Shamayev and 12 Others v. Georgia and Russia*,<sup>408</sup> the fact that the receiving country is a Contracting Party will not necessarily prevent the Court from indicating interim measures if it perceives that the risk to an applicant is serious.

In expulsion cases, respondent Governments are increasingly seeking to counter applicants' claims by proffering so called "diplomatic assurances," which the country of destination provides the expelling respondent Government and in which the country of destination promises that the applicant will not be subjected to the treatment he or she complains of. However, in the ill-treatment context, it must be stressed that the Court will approach diplomatic assurances with caution if it perceives that there is a real risk of ill-treatment in the receiving country. For example, in its judgment in the case of *Chahal v. the United Kingdom* the Court observed that the British authorities had sought and received assurances from the Indian authorities to the effect that the applicant, if returned to India, would not be subjected to ill-treatment. The Court, while not doubting the good faith of the Indian Government in providing the assurances, observed that despite the efforts of that Government, the Indian National Human Rights Commission, and the Indian courts to bring about reform, the violation of human rights by members of the security forces in Punjab and elsewhere in India was a recalcitrant and enduring problem. Against this background, the Court was not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.<sup>409</sup> For more on diplomatic assurances, see Section 2.6.2(b).

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406 See, by contrast, *Nehru v. the Netherlands* (dec.), no. 52676/99, 27 August 2002, examined in Section 8.2 below.

407 See *A.G. v. Sweden*, no. 27776/95, Commission decision of 26 October 1995. See also Leach at p. 39.

408 *Shamayev and 12 Others v. Georgia and Russia*, cited above.

409 See *Chahal v. the United Kingdom*, cited above, §§ 92 and 105.



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On the other hand, in the extradition context, if the applicant has complained about conditions on “death row” the Court may reject the request of an interim measure if the Contracting Party has received an assurance from the concerned government that the applicant will not be subject to the death penalty. Thus, in the case of *Einhorn v. France*,<sup>410</sup> where the applicant was wanted for the murder of his former girlfriend, the Court concluded that the assurances obtained by the French Government from the United States authorities were such as to remove the danger of the applicant’s being sentenced to death in Pennsylvania. Consequently, there was no risk of him being put on death row.<sup>411</sup>

### 3.1.3 Application Procedure for Interim Measures

Requests for interim measures should comply with the requirements set out in the Practice Direction issued by the President of the Court on 5 March 2003.<sup>412</sup> It states in relevant part that:

“[s]uch requests should normally be received as soon as possible after the final domestic decision has been taken to enable the Court and its Registry to have sufficient time to examine the matter. However, in extradition or deportation cases, where immediate steps may be taken to enforce removal soon after the final domestic decision has been given, it is advisable to make submissions and submit any relevant material concerning the request before the final decision is given”.<sup>413</sup>

Thus, to enable the Court to examine such requests in good time, they should in so far as possible be submitted during working hours and by a swift means of communication such as facsimile, e-mail, or courier. In cases where time is of the essence, it is important that the communication be clearly marked “Urgent” and that it be written in English or French. Furthermore, it is advisable to contact the Court by telephone and inform its Registry that the request is being made. Indeed, many requests for interim measures are made only hours before the scheduled departure. During holiday periods (i.e. around Christmas and the New Year) the Court’s Registry maintains a skeletal staff to deal with any urgent requests for application of Rule 39.

Where it is expected that the final deportation order or a negative outcome of a final domestic remedy will be very swiftly followed by the removal of the person concerned, without there being time to contact the Court or for a

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410 *Einhorn v. France* (dec.), no. 71555/01, 16 October 2001.

411 See *Soering v. the United Kingdom*, cited above, § 111.

412 See Appendix No. 3.

413 *Ibid.*

request for an interim measure to be examined, a potential applicant or his or her representative may consider lodging a “provisional” request for an interim measure. The Court can then beforehand be provided with the relevant documents – apart from the very last domestic decision – and, should the removal be approved at the domestic level, be informed by telephone or fax that the request for an interim measure has now become “definite”.

A request for an interim measure should normally be accompanied by a completed application form, but in circumstances where time does not permit the preparation of that form, as much information as possible should be provided in the communication in which the request is made. Such information should include the steps taken by the applicant to exhaust domestic remedies and copies of relevant decisions. In any event, a request should, to the greatest extent possible, be supported by adequate and relevant evidence to show the extent of the risk involved in the country of destination.<sup>414</sup>

If the request for an interim measure is accepted, the Court will inform the respondent Government and the Committee of Ministers and will generally grant priority to the application over other pending cases.

### **3.2 Case Priority and Urgent Notification of Applications (Rules 40-41)**

Where possible, the Court deals with applications in the order they are submitted, that is, chronologically. Because of its very heavy workload, proceedings before the Court frequently last for some years. However, in urgent circumstances, the Chamber or its President may decide at any stage of the proceedings to give priority to the examination of a particular application pursuant to Rule 41 of the Rules of Court. Furthermore, pursuant to Rule 40, the Registrar of the Court, with the authorisation of the President of the Chamber, may, in any case of urgency, inform the Contracting Party concerned of the introduction of the application and provide a summary of its contents. If it rejects a request for an interim measure under Rule 39, the Court may still resort to this “urgent notification” procedure under Rule 40 and inform the expelling Contracting Party of the application lodged with the Court. Although it is by no means obliged to do so, the Contracting Party may then decide to postpone the removal of the applicant from its territory until the Court has had an opportunity to examine the application.

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414 See Section 11 below. See also Leach p. 40 *et seq.*

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The Court may thus expedite its examination of a case of its own motion, but it may also be requested to do so by an applicant. Requests for a case to be granted priority must be duly reasoned. In particular, such reasons must be capable of leading the Court to depart from its practice of examining the case in chronological order. The cases referred to below illustrating the wide range of reasons may be taken as a starting point. The Court has discretion to decide whether to accept such requests and it will do so only in exceptional cases. Thus, the Court may grant case priority to a case if delays would render the examination of the merits of that case more difficult. For example, the Court granted priority to the case of *Siddik Aslan and Others v. Turkey*,<sup>415</sup> which concerned the alleged killing of the applicants' relatives by members of the security forces, in view of the risk that important evidence would otherwise be destroyed with the passage of time due to the decomposition of the bodies.

The Court may also grant priority to cases in which the issue at stake needs to be resolved urgently because, for example, the applicant is seriously ill or old. In the case of *Pretty v. the United Kingdom*, for instance, which concerned the claim made by the terminally ill applicant to a right to assisted suicide,<sup>416</sup> priority was granted and a judgment was adopted in the record time of less than four months after the case was lodged. Similarly, in *Mouisel v. France*, which concerned the detention in prison of the applicant – a cancer sufferer – allegedly in violation of Article 3 of the Convention, the Court granted the case priority and it was concluded by a judgment in just over two years.<sup>417</sup> Priority was also granted to the case of *Lebedev v. Russia* in which the seriously ill applicant argued that his detention subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention.<sup>418</sup> In the case of *Poltorachenko v. Ukraine*, concerning the applicant's right to a fair trial and the protection of his property, priority was granted on account of his advanced age.<sup>419</sup>

Priority has on occasion also been granted to cases concerning the right to respect for family life within the meaning of Article 8 of the Convention. For example, in *Tuquabo-Tekle and Others v. the Netherlands*, which concerned the refusal of the Netherlands authorities to grant permission to the applicants' (step-)daughter and (step-)sister – who were living in Eritrea – to join the rest of the family in the Netherlands.<sup>420</sup>

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415 *Siddik Aslan and Others v. Turkey*, no. 75307/01, 18 October 2005.

416 *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002.

417 *Mouisel v. France*, no. 67263/01, 14 November 2002.

418 *Lebedev v. Russia* (dec.), no. 4493/04, 25 November 2004.

419 *Poltorachenko v. Ukraine*, no. 77317/01, 18 January 2005, § 3.

420 *Tuquabo-Tekle and Others v. the Netherlands* (dec.), no. 60665/00, 19 October 2004.

Other than the cases referred to above, applications which have been granted priority under Rule 41 include the following: *Luluyev and Others v. Russia*, concerning the alleged killing by federal forces of the applicant's relative, whose body was found in a mass grave;<sup>421</sup> *Jørgensen v. Denmark*, concerning the Danish authorities' refusal to issue the applicant's wife of Philippine nationality with a residence permit in Denmark;<sup>422</sup> *I.I.N. v. the Netherlands*, concerning the intended expulsion of the applicant to Iran where, he claimed, he risked being subjected to treatment in breach of Article 3 of the Convention on account of his homosexuality;<sup>423</sup> and *Ilaşcu and Others v. Moldova and Russia*, concerning, *inter alia*, the lawfulness and the conditions of the applicants' detention.<sup>424</sup>

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421 *Luluyev and Others v. Russia* (dec.), no. 69480/01, 30 June 2005.

422 *Jørgensen v. Denmark* (dec.), no. 31260/03, 9 June 2005.

423 *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

424 *Ilaşcu and Others v. Moldova and Russia* (dec.), no. 48787/99, 4 July 2001

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## **LODGING THE APPLICATION**

*Textbox vi Contact Details of the Court*

### **4.1 The First Communication to the Court: the Introductory Letter**

*Textbox vii Model Introductory Letter*

*Textbox viii Registry's response to Introductory Letter requesting that applicant submit a completed application form*

### **4.2 The Application Form**

### **4.3 The Court's Processing of the New Application**

*Textbox ix Registration Letter*

### **4.4 Inadmissibility Decided by Committees**

*Textbox x Letter informing the Applicant of the Decision of the Committee*

*Textbox vi*      *Contact Details of the European Court of Human Rights*

**The Registrar  
European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex  
France**

**Telephone:      +33 (0)3 88 41 20 18**

**Fax:              +33 (0)3 88 41 27 30**

**[www.echr.coe.int](http://www.echr.coe.int)**

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## 4.1 The First Communication to the Court: the Introductory Letter

As pointed out above, if there is a risk that the applicant will not be able to complete the full-blown application form before the end of the six-month period, it is important to note that an application may also be introduced by letter or by fax. There are many reasons why the preparation of a complete application form might take a significant amount of time, including the fact that the necessary documentation (domestic judgments, decisions, medical records, witness statements, etc.) might not be immediately available to the applicant.

If the introductory letter is sent by fax, a signed original must be sent to the Court within 5 days by post. If the applicant is represented by a lawyer, a *Form of Authority* signed by the representative and the applicant must accompany the letter.

Many applications are introduced by means of an introductory letter because such letters represent a very important and relatively easy way for applicants to stop the six-month clock. Nevertheless, as explained below, certain critical formalities must be observed when submitting the introductory letter in order for it to have the desired effect of preserving the applicant's complaints.

Rule 47 § 5 of the Rules of Court provides that

“[t]he date of introduction of the application shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application. The Court may for good cause nevertheless decide that a different date shall be considered to be the date of introduction”.

As the rule specifies, such letters will interrupt the running of the six-month period provided that there is no “good cause” to do otherwise. In this connection, several considerations must be observed. The first concerns the substance of introductory letters: the subject matter of the application and a brief summary of the relevant facts and complaints must be set out clearly in the introductory letter. Secondly, the introductory letter should set out the Articles of the Convention which the applicant intends to rely on in the subsequent application. Thirdly, the letter should include information on exhaustion of domestic remedies.

Applicants must exercise care when listing the Convention Articles in the introductory letter. Merely invoking the Convention Articles is not on its own sufficient to make out a complaint. The Court also requires that “some

indication of the nature of the alleged violation under the Convention” is given before a complaint is considered to have been introduced for purposes of interrupting the running of the six-month period.<sup>425</sup> For this reason, the applicant will be expected to “link” his or her allegations with the Articles referred to in the letter. Applicants should further note that if they invoke a Convention Article in the application form that was not previously mentioned in the introductory letter, the Court may declare that particular complaint inadmissible for non-respect of the time limit. Also, when a specific Article is mentioned in the introductory letter but not subsequently in the application form, the complaint in the introductory letter relating to that Article will not be examined since the application form constitutes the basis for the Court’s examination of the case.

The importance of the contents of the introductory letter cannot be overemphasised. For example, in *Schälchli v. the Switzerland* the applicant’s introductory letter mentioned only the Articles of the Convention which had allegedly been violated, and provided only skeletal information to the effect that the applicant was serving a prison sentence as a result of a judgment of the Federal Court but without describing the relevant details of the said judgment. The Court held that this was not sufficient to set out, even summarily, the object of the application and therefore did not stop the clock.<sup>426</sup>

The following example of an Introductory Letter – based on hypothetical facts – may provide guidance as to the form and content of the initial communication to the Court in an Article 3 case.

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425 See *Bozinovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 68368/01, 1 February 2005.

426 *Schälchli v. Switzerland* (dec.), no. 54908/00, 25 November 2003.



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**Textbox vii      Model Introductory Letter**

The Registrar  
 European Court of Human Rights  
 Council of Europe  
 F-67075 Strasbourg Cedex  
 FRANCE

1 May 2006

*Dear Sir/ Madam,*

*On behalf of my client [name] I am writing to introduce an application under Article 34 of the European Convention on Human Rights.*

*On 10 January 2005 my client was arrested in [city] by officers from the Anti-Terrorist Branch on suspicion of involvement in terrorist activities. He was taken to the City Hospital for a medical examination. According to the medical report drawn up at the end of the examination, there were no signs of any injuries on his body. My client was then placed in the detention facility of the police station. During his detention my client was questioned by police officers on three occasions. When he denied the allegations against him, the police officers became agitated and subjected him to serious ill-treatment which included being stripped naked, hosed down with pressurised cold water, suspended from his arms, and being beaten up with a truncheon on his chest. Also, electric shocks were administered to his toes.*

*On 14 January 2005 the police officers took him back to the City Hospital where they remained in the room while my client was being examined by a doctor. When the doctor asked my client to remove his clothes, the police officers told him not to do so. As a result, the doctor stated in a medical report that there were no signs of any ill-treatment on the applicant. My client was then brought before the judge where he informed the judge of his ordeal. The judge ordered his release on account of lack of sufficient evidence to charge him.*

*On his release my client was met outside the court building by his father, who took him to their family doctor. The doctor recorded in his report that there were extensive bruises under his armpits consistent with the client's account that he was suspended by his arms, and the marks on his chest were consistent with having been beaten up with an object. Furthermore, the doctor also observed that the client's toes bore signs of electric burns.*

*On the same day my client went back to the court building where he submitted a petition to the prosecutor containing the details of the ill-treatment to which he had*

*been subjected. With his petition he also enclosed copies of the three medical reports. He asked the prosecutor to investigate his allegations and prosecute the police officers involved.*

*On 1 April 2005 my client received the decision of the prosecutor not to prosecute the police officers. The prosecutor's decision was based on a report prepared by the police chief of the police station where my client had been detained and ill-treated. According to the police chief's report, the police officers involved had been questioned by their commanding officer and had vehemently denied any wrongdoing. The prosecutor's decision also stated that according to the medical report of the City Hospital, there were no signs of any injury on my client's body. As to the medical report obtained from my client's family doctor, the prosecutor decided to exclude it because it was drawn up by a private practitioner, as opposed to a doctor employed by the State. The decision also stated that it would become final if no appeal was lodged against it within the statutory period of two weeks.*

*On 4 April 2005 my client appealed the prosecutor's decision not to prosecute the police officers. The appeal, which is the final remedy under domestic law, was dismissed on 1 November 2005. The decision was served on my client on 2 November 2005.*

*My client submits that the ill-treatment to which he was subjected whilst in the custody of the police officers amounted to torture within the meaning of Article 3 of the Convention. He further submits that the investigating authorities failed to carry out an effective investigation into his allegations of ill-treatment in violation of the positive obligation inherent in Article 3 and that they have thus deprived him of an effective remedy in violation of Article 13 of the Convention.*

*As my client has instructed me only this morning to lodge this application, it has not been possible to prepare a full application form and to compile the relevant supporting documents. I therefore ask the Court to accept this letter, which is being posted within the six-month time limit specified in Article 35 of the Convention, as an introductory letter. A completed application form, together with photocopies of the relevant documents, will be submitted shortly.*

*Yours faithfully,*

Enc: Form of authority signed by my client and myself.

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Following the submission of the introductory letter, it is important to comply strictly with any time limits indicated by the Registry relating to further submissions. When the Registry receives the application, it will be given a number<sup>427</sup> and the applicant will be given six weeks to submit the full application form with the supporting documents. If the applicant fails to comply with the six-week time limit, the Court may decide to regard the date of introduction as the date of the submission of the full application form, rather than the date of the introductory letter. This in turn, may result in the application being declared inadmissible for non compliance with the six-month rule. Therefore, applicants are advised to observe the six-week time limit notwithstanding Article 11 of the Practice Direction on the Institution of Proceedings, which provides that “where within a year, an applicant has not returned an application form or has not answered any letter sent to him by the Registry, the file will be destroyed”. Applicants finding the six-week period insufficient to compile the necessary documents and to prepare the application form should inform the Court of the difficulties and request an extension of the time limit. The Court will normally grant the first such request provided that it is duly reasoned.

The Court is eager to eliminate unnecessary delays in the processing of complaints. Consequently, it has stated that “delays in the pursuit of an application are acceptable only in so far as they are explained by duly justified reasons connected to the subject matter of the application or the applicant personally”.<sup>428</sup> In the case of *Nee v. Ireland*,<sup>429</sup> the final domestic court decision had been adopted in January 1998, and the applicant’s lawyer informed the Commission in an introductory letter on 17 July 1998 that her client wished to introduce an application. The lawyer was urged by the Commission to send the full application form as soon as possible.<sup>430</sup> The lawyer, who acknowledged receipt of the Commission’s letter in September 1998 and indicated to the Commission that the application form would be submitted within six weeks, did not submit it until 22 September 1999. In its decision – adopted more than three years after receipt of the application form – the Court considered 22 September 1999 to be the date of introduction of the application and declared it inadmissible for failure to comply with the six-month rule. Given the lack of any contact with the Commission or the Court for a period of more than one year, the Court was not convinced by the lawyer’s explanations for the delay, which included her lack of familiarity with the Convention system, the complexity of the domestic proceedings and the difficulties she experienced in contacting her client who lived in England.

427 The application number must be mentioned in all subsequent correspondence.

428 *Quaresma Afonso Palma v. Portugal* (dec.), no. 72496/01, 13 February 2003.

429 *Nee v. Ireland* (dec.), no. 52787/99, 30 January 2003.

430 The practice of the Commission to ask applicants to submit their applications forms “as soon as possible” led to a number of difficulties and is now replaced by the Court’s practice of requiring the full application form “within six weeks”.

**Textbox viii**      **Registry's response to Introductory Letter requesting that applicant submit completed application form**<sup>431</sup>

ECHR-PE0

DATE

**Our Ref.**

v.

**Your Ref.**

*The Registry of the European Court of Human Rights has received your communication of [DATE], from which it appears that you intend to lodge an application with the Court on behalf of your client. **It has been given the above file-number, to which you must refer in any further correspondence relating to this case.***

*You will find enclosed a copy of the Convention and its Protocols, the text of Rules 45 and 47 of the Rules of Court, a notice for prospective applicants and the official application form, with an explanatory note.*

*If, after a careful study of the foregoing documents you are satisfied that your case meets all the appropriate criteria, you should fill in the application form carefully, legibly and completely as it will provide the basis for the Court's examination. It should be accompanied by **copies of all relevant documents**, in particular any decisions of national courts or authorities which you wish to challenge before the Court. **Please do not send originals as they will not be returned to you by the Court.***

*You must return the application form and any necessary supplementary documents to the Court **without undue delay, and at the latest within six weeks after receipt of the present letter.** Otherwise you run the risk that the Court will not accept the date of your first letter as the date on which the application was lodged and may consequently conclude that the six-month time limit for the submission of applications under Article 35 § 1 of the Convention has not been complied with.*

**IMPORTANT**

If the Registry receives no response from you, your complaints will be taken to have been withdrawn and the file opened in respect of the application will be destroyed – **without further warning** – one year after dispatch of this letter.

Encs: Convention and Protocols  
Notice to applicants  
Application form and explanatory note  
Authority form (for legal representation)

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431 Source: Council of Europe

OMCT

## 4.2 The Application Form

Rule 47 of the Rules of Court requires that all applications be made using the standard application form provided by the Registry unless the President of the Section concerned decides otherwise.<sup>432</sup> When completing the application form, applicants should also have regard to the “Notes for the guidance of persons wishing to apply to the ECHR” and the “Explanatory note for persons completing the Application Form” which are prepared by the Registry and figure in Appendices Nos. 17 and 4, respectively. Further reference must be made to the “Practice Direction on the Institution of Proceedings” in Appendix No. 3. Using the standard application form and completing it in compliance with the instructions in these documents will help the Court to examine the application and will ensure that all relevant information and documents required by Rule 47 of the Rules of Court are included in the application. The applicant may also find it useful to look at the Model Article 3 Application in Appendix No. 6, prepared on the basis of hypothetical facts.

The application form may be completed in one of the official languages of the Contracting Parties.<sup>433</sup> The form must be completed legibly, preferably typed. Applicants may also consider appending a short cover letter to their application form along the following lines:

*Please find enclosed my [client's] application form and supporting documents. The application concerns the ill-treatment to which I [my client] was subjected while in the custody of the police, as well as the authorities' failure to investigate the circumstances of the ill-treatment and to punish those responsible....*

Such a cover letter is helpful to the Registry in the attribution of cases to lawyers and may speed up the processing of the application.

It is imperative that the facts, complaints, and steps taken when exhausting domestic remedies are set out clearly and concisely and, as far as possible, in chronological order. If the space reserved in the application form is not sufficient, applicants may continue on separate sheets. Where the length of the application (excluding annexes) exceeds 10 pages, a short summary should also be enclosed with the application form, for example in the cover letter.

When completing Part III of the application form, which is entitled “Statement of Alleged Violation(s) of the Convention and/or Protocols and of Relevant Arguments”, the Convention and the relevant Protocols should be

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<sup>432</sup> Application forms exist in the official languages of all of the Contracting Parties and can be accessed at <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Application+form/>.

<sup>433</sup> See Rule 34; see also Section 1.10 above

consulted and their terminology must be observed. If the applicant wishes to invoke a provision of a Protocol to the Convention, the document setting out the “Dates of ratification of the European Convention on Human Rights and Additional Protocols”<sup>434</sup> should be consulted to ensure that the respondent Contracting Party has ratified the relevant Protocol and that it was in force at the relevant point in time. See *Textbox i, Dates of Entry into Force of Convention and Protocols*.

In Part V of the application form, applicants are required to set out briefly what they want to achieve through their application. It is common practice for applicants to set out their claims under Article 41 of the Convention for just satisfaction and costs and expenses in this part of the application form. However, this is not strictly necessary since – as described in Section 7 on “Just Satisfaction” – the Court does not require claims for just satisfaction at this early stage.

As noted above in Section 1.15 on the effects of the Court’s judgments, the Court has recently begun to provide certain guidelines to respondent States on how the consequences of a particular violation of the Convention may be remedied. For example, an applicant who has been convicted on the basis of a confession extracted under ill-treatment may argue in this part of the application form that the most appropriate form of relief would be to grant him or her a retrial. An applicant whose allegations of ill-treatment have not been adequately examined at the national level may claim that the most appropriate form of redress would be the re-opening of the investigation into his or her allegations. Similarly, an applicant who is complaining about the lawfulness of his or her detention may argue that the most appropriate form of relief would be to release him or her from detention. An applicant in an expulsion case may claim, for example, that the most appropriate form of relief would be not to expel him or her.

In Part VII of the application form, applicants are required to list supporting documents, e.g. the applicants’ complaints to domestic authorities, decisions of the domestic courts, and other documentary evidence such as medical records, witness statements, etc. Only copies – not originals – of these documents should be submitted to the Court. For practical reasons, it is advisable to number each document so that easy reference can be made to them in the application form and in subsequent submissions.

Finally, applicants must ensure that they date and sign the application form.

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434 For an updated list of ratifications, the following website should be consulted:  
<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>

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If an applicant is represented by a lawyer or other representative, the signature of the representative is required and not that of the applicant.<sup>435</sup> In such cases the applicant must complete and sign the form of authority authorising the representative to represent him or her in the proceedings before the Court.<sup>436</sup> The form of authority should also be signed by the representative to indicate his or her acceptance.

### 4.3 The Court's Processing of the New Application

Upon receipt by the Court, the completed application form and the supporting documents will be forwarded to the relevant legal division of the Registry. The application will be given a number and assigned to one of the Registry's lawyers who will work as the case lawyer for that application. The Applicant will receive a letter from the Registry, confirming that the application has been registered and indicating a case number to which the applicant must refer in all future correspondence with the Court. The standard Registration Letter is reproduced in *Textbox ix* below.

The case lawyer will carry out an examination of the file and at this stage he or she may ask the applicant to submit further documents, information, or clarifications. Any time limits indicated by the Registry for submission of additional information must be complied with and if there are difficulties in obtaining the requested information, the Registry should be informed and an extension of the time limit should be sought.

When the file is complete, the application will be assigned to a decision body in one of the five Sections. In cases where the material submitted by the applicant on its own is sufficient to disclose that the application is inadmissible or should be struck out of the list,<sup>438</sup> and also where such action can be taken "without further examination",<sup>439</sup> it will be assigned to a Committee. Otherwise the application will be assigned to a Chamber and a judge rapporteur will be appointed. The classification of the application as a Committee or as a Chamber case is confidential and is not disclosed to applicants at this stage of the proceedings. The Registry will inform the applicant that it is his

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435 See also Section 1.8 above.

436 Form of authority is included in *Textbox iii*. It may be downloaded at:  
<http://www.echr.coe.int/NR/rdonlyres/001F1ADA-0F5A-4975-8B10-25D0C239865B/0/English.pdf>

438 Rule 49 § 1 of the Rules of Court.

439 Article 28 of the Convention.

**Textbox ix      Registration Letter<sup>437</sup>**

**FIRST/SECOND/THIRD/FOURTH/FIFTH SECTION**

ECHR-LE1.1R      DATE

**Application no.**

**v.**

*Dear Sir,*

*I acknowledge receipt of your letter of [DATE], with enclosures, including a completed application form.*

*The Court will deal with the case as soon as practicable. It will do so on the basis of the information and documents submitted by you. The proceedings are primarily in writing and you will only be required to appear in person if the Court invites you to do so. You will be informed of any decision taken by the Court.*

*You should inform me of any change in your address or that of your client. Furthermore, you should, of your own motion, inform the Court about any major developments regarding the above case, and submit any further relevant decisions of the domestic authorities.*

*Please note that no acknowledgment will be made as to the receipt of subsequent correspondence. No telephone enquiries either please. If you wish to be assured that your letter is actually received by the Court then you should send it by recorded delivery with a prepaid acknowledgment of receipt form.*

*Yours faithfully,*

For the Registrar

xxx

Legal Secretary

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437 Source: Council of Europe



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or her duty to inform the Court of any subsequent developments relating to the case.<sup>440</sup>

#### 4.4 Inadmissibility Decided by Committees

An application assigned to a Committee will generally be concluded within 12 months of its introduction but it may take shorter or longer depending on the case load of the legal division involved. Decisions of inadmissibility are final.<sup>441</sup> The majority of applications routed to Committees are declared inadmissible. However, Committee decisions need to be unanimous. If there is no unanimity amongst the 3 judges of the Committee, then the application will be referred to a Chamber of 7 judges.

If the application is declared inadmissible by a Committee, the applicant will be informed of the decision by means of a form letter which contains only the briefest of indications of the reasons for the decision.<sup>442</sup> As mentioned above, these decisions are nevertheless final, and there will be no further opportunity for the applicant to enquire into the specific reasons for the decision. By contrast, Chamber decisions on admissibility contain an individualised analysis of the case and reasons for the decision as described in Section 5 below.

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440 See *Textbox ix*.

441 A total of 26,360 applications had been declared inadmissible by Committees of three judges in 2005; this figure represents almost 94% of the cases which were disposed of judicially – as opposed to administratively – by the Court in 2005.

442 See *Textbox x* for a sample letter.

**Textbox x**      **Letter Informing the Applicant of the Decision of the Committee**<sup>443</sup>

**FIRST/SECOND/THIRD/FOURTH/FIFTH SECTION**

ECHR-LE11.0R(CD1)

**Application no.**

v.

Dear Sir,

*I write to inform you that on [DATE] the European Court of Human Rights, sitting as a Committee of three judges (xxx, President, xxx and xxx) pursuant to Article 27 of the Convention, decided under Article 28 of the Convention to declare the above application inadmissible because it did not comply with the requirements set out in Articles 34 and 35 of the Convention.*

*In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.*

*This decision is final and not subject to any appeal to either the Court, including its Grand Chamber, or any other body. You will therefore appreciate that the Registry will be unable to provide any further details about the Committee's deliberations or to conduct further correspondence relating to its decision in this case. You will receive no further documents from the Court concerning this case and, in accordance with the Court's instructions, the file will be destroyed one year after the date of the decision.*

*The present communication is made pursuant to Rule 53 § 2 of the Rules of Court.*

*Yours faithfully,*

For the Committee  
xxx  
Section Registrar

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443 Source: Council of Europe

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## **COMMUNICATION OF THE APPLICATION**

### **5.1 General**

### **5.2 Observations on Admissibility and Merits of the Application**

## 5.1 General

If the application is assigned to a Chamber or referred to the Chamber from a Committee, it will either be declared inadmissible or notification of it will be given to the respondent Government. The notification of respondent Governments is referred to as “communication” of the application. Pursuant to Article 30 of the Convention, the Chamber may also refer the case to the Grand Chamber. However, such a course of action is extremely rare at this stage of the proceedings.

Both the Chamber and its President may decide to communicate an application. This decision is made on the basis of a report provided by the judge rapporteur.<sup>444</sup> If the Chamber or its President agrees with the judge rapporteur’s proposal, the case will be communicated to the government of the respondent Contracting Party<sup>445</sup> which will be invited to respond to the applicant’s allegations and submit its observations on the admissibility and merits of the case pursuant to Rule 54 § 2 (c). It is also possible that at this stage one or more of the complaints will be declared inadmissible and the remainder of the application is communicated. Such a decision can only be taken by the Chamber, the President not being authorised to reject complaints.

In certain circumstances, prior to or instead of the case being communicated, the Chamber, its President, or the judge rapporteur may ask both or one of the parties to submit any factual information, documents and other material which they consider to be relevant.<sup>446</sup> Such a course of action will usually occur in cases in which the Court needs to refer to documents, information or clarifications which the applicant him or herself is unable to obtain and submit to the Court without the respondent Government’s assistance. Upon receipt of the documentation and/or information, the case will either be communicated or declared inadmissible.

When a case is communicated, the respondent Government will be asked to respond to a number of issues in its observations, which it is required to submit within twelve weeks of the notification (in urgent cases, a shorter time limit may be fixed). It is not uncommon for Governments – nor, indeed, for applicants – to request an extension of the deadline. The first such request will generally be granted.

The nature of the questions with which the respondent Government will be asked to deal in its observations will depend on the applicant’s allegations

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444 Rule 49 § 3 (c).

445 Rule 54 § 2 (b).

446 Rule 54 § 2 (a).

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and the circumstances of the case, but in an application concerning ill-treatment in police custody, questions along the following lines may be expected:

“Did the applicant comply with the admissibility requirements set out in Article 35 of the Convention?”

“Was the applicant subjected to treatment in police custody in breach of Article 3 of the Convention?”

“Did the authorities carry out an effective official investigation into the applicant’s complaints of ill-treatment in compliance with the requirements of Articles 3 and 13 of the Convention?”

When the case is communicated, applicants who were until then unrepresented will be required, pursuant to Rule 36 § 2, to be represented by an advocate authorised to practice in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber.<sup>447</sup>

If, at the time of communication, the Chamber or its President decides to apply the joint procedure, the parties will be informed accordingly. As set out above, this procedure has become the rule rather than the exception.<sup>448</sup> This means at this stage of the proceedings that, in addition to observations on admissibility and merits, the respondent Government is also invited to inform the Court of its position regarding a friendly settlement of the case and of any proposals it might wish to make in that connection.<sup>449</sup>

## 5.2 Observations on Admissibility and Merits of the Application

The respondent Government will in most cases submit its observations in one of the official languages of the Court, i.e. English or French. However, the President of the Chamber may invite the respondent Contracting Party to provide a translation into an official language of that Party in order to facilitate the applicant’s understanding of those submissions.<sup>450</sup> An applicant may make a request to that effect. Furthermore, the President of the Chamber may also ask the respondent Contracting Party to provide a translation into, or a summary in, English or French of all or certain annexes to its written submis-

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447 Rule 36 § 4; see also Section 1.8 above.

448 Article 9 of Protocol No. 14 provides that “... a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.”

449 See Section 8 below for friendly settlement related issues.

450 Rule 34 § 5.

sions or of any other relevant documents.<sup>451</sup> In the alternative, the applicant can arrange for the translation of the respondent Contracting Party's observations and of any documents and subsequently claim the costs under Article 41 of the Convention.<sup>452</sup>

The observations and any documents submitted to the Court by the respondent Contracting Party will be forwarded to the applicant, who must respond to them within a certain time limit (usually six weeks). It is possible to request an extension of the time limit, but any such request must be reasoned and made within the time limit. Failure to submit the observations – or to request an extension – within the given time limit, may result in the exclusion of those observations from the case file unless the President of the Chamber decides otherwise.<sup>453</sup> For purposes of observing the time limit, the material date is the certified date of dispatch of the document or, if there is none, the actual date of receipt by the Registry. Applicants must send three copies of the observations by surface post and, if possible, a copy by facsimile.

In principle, the applicant's observations should be drafted in one of the official languages of the Court. However, the applicant may seek leave from the President of the relevant Chamber for the continued use of the official language of a Contracting Party.<sup>454</sup>

In preparing observations, applicants should refer to the "Practice Direction on Written Pleadings".<sup>455</sup> The form which should be followed in preparing the observations and the contents required are set out in Part II of the Practice Direction. It is imperative that the observations be legible; it is recommended that they be typed.

The fact that the applicant has the opportunity to respond to the observations of the Contracting Party is a consequence of the adversarial nature of the Court's proceedings. In certain circumstances, the applicant may also be requested by the Court to address in his or her observations specific issues identified by the Court or answer specific questions posed by the Court.

In their observations, applicants should respond to any objections raised by the respondent Government to the admissibility of the application. For example, if the Government contends that the applicant has failed to comply with the requirement of exhaustion of domestic remedies, it is the applicant who,

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451 Rule 34 § 4 (c).

452 See Section 7.

453 Rule 38 § 1.

454 Rule 34 § 3 (a).

455 Issued by the President of the Court on 1 November 2003. See Appendix No. 3.

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at this stage of the proceedings, bears the burden of establishing that:

“the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement...”<sup>456</sup>

A failure by the applicant to counter the Government’s objections to the admissibility of the application may result in the application being declared inadmissible for non-exhaustion of domestic remedies. In their observations applicants should also describe any developments which might have taken place since the introduction of the application.<sup>457</sup>

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456 See *Akdivar and Others v. Turkey*, cited above, § 68.

457 Relevant parts of observations submitted by the Netherlands Government in the case of *Van der Ven v. the Netherlands*, cited above, and observations submitted by the applicants’ representatives in the cases of *Akkum and Others v. Turkey* and *Kişmir v. Turkey*, both cited above, are included in Appendices Nos. 14, 12 and 13, respectively, and may be consulted as to the form and content of observations in cases concerning allegations of ill-treatment.

## **ADMISSIBILITY DECISIONS**

### **6.1 The Decision on Admissibility**

### **6.2 Admissibility with the Government's Objections Joined to the Merits of the Case**

### **6.3 Inadmissibility and its Consequences**

### **6.4 Admissibility and its Consequences**



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**6.1 The Decision on Admissibility**

As discussed in Section 1.7.3 and in Part II of this *Handbook*, the Court, prior to communicating an application to the respondent Government, examines whether it is not clearly inadmissible. An application (or parts thereof) deemed admissible at this early stage may then be communicated to the respondent Government. The Government may then submit its arguments against the application's admissibility. This section addresses the admissibility evaluation that takes place following the application's communication to the respondent Government.

Following the receipt of the respondent Government's observations on the admissibility and merits of the case and the applicant's observations in reply, and if no friendly settlement has been reached, the Court will again address the application's admissibility. In some cases the Chamber may decide to hold a hearing on admissibility of the application.<sup>458</sup> When the Court determines admissibility in a separate decision (i.e. when the joint procedure has not been applied or has been discontinued) such a decision will typically contain the following components:

- Name of the case and of the Section, application number and names of the judges of the Chamber,
- Date of introduction of the application and date of adoption of the decision,
- **THE FACTS**, consisting of **THE CIRCUMSTANCES OF THE CASE**: the details of the applicant, together with the facts as submitted by the parties, and, if deemed necessary, **RELEVANT DOMESTIC LAW AND PRACTICE**,
- **COMPLAINTS**,
- **THE LAW**,
- Conclusion(s) reached by the Chamber.

The facts as submitted by the parties will be summarised in the "Facts" part of the decision. If the facts of the case are in dispute, they will be set out separately. Furthermore, documents submitted to the Court by the parties together with their observations, in so far as they are relevant, may also be summarised in this part of the decision. Relevant domestic law and practice may be summarised before describing the applicant's complaints under the Convention.

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<sup>458</sup> See Section 1.14 above.

In the “Law” part of the decision, the respondent Contracting Party’s objections to the admissibility of the complaints(s) and the applicant’s responses thereto will be examined. If the Chamber concludes that the applicant has complied with the formal requirements of admissibility within the meaning of Convention Articles 34 and 35, most notably that he or she has exhausted the relevant domestic remedies and has lodged the application within the required six-month time limit, the Chamber will proceed to examine the merits of the case to establish whether (any of) the complaints are manifestly ill-founded. If the case is deemed not to be manifestly ill-founded, it will be declared admissible. As was the case at the communication stage, it is possible that some of the complaints are declared inadmissible and the remainder of the application admissible.

It must be pointed out here that a failure by the Government to object to the admissibility of an application may result in the Court declaring the application admissible. The reason for this is that communication of an application means, in effect, that the application was deemed not to be *prima facie* inadmissible. For example, in the case of *İpek v. Turkey* the Court observed that the respondent Government, beyond arguing in its observations that the “application should be declared inadmissible as being premature, imaginary and ill-founded” had not raised any other objections to its admissibility<sup>459</sup>. The Court, in concluding that the application was not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, stated that “[n]o other grounds for declaring it inadmissible have been raised by the Government and the Court sees no reason to do so of its own motion”.<sup>460</sup>

## 6.2 Admissibility with the Government’s Objections Joined to the Merits of the Case

As described elsewhere in this *Handbook*, Contracting Parties are under an obligation – referred to as a positive obligation – to carry out effective investigations into allegations of ill-treatment and killings.<sup>461</sup> They are also under an obligation under Article 13 to provide effective remedies to those whose Convention rights and freedoms have been violated. Criminal investigations which continue for long periods of time without any tangible results may be deemed by the Court to be ineffective investigations in

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459 *İpek v. Turkey*, (dec.) no. 25760/94, 14 May 2002.

460 *Ibid.*

461 See in particular Section 10 below.

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violation of the Contracting Party's positive obligations under Articles 2 and 3 of the Convention and/or of their obligations under Article 13 of the Convention to provide effective remedies. It follows, therefore, that the issue of exhaustion of remedies may be closely linked both to the issue of positive obligations and the issue of effective remedies within the meaning of Article 13 of the Convention.

The examination of the question of whether an applicant has exhausted domestic remedies (i.e. an admissibility issue) requires the Court in some cases – most notably cases in which complaints are made under Articles 2, 3, and/or 13 – to determine the effectiveness of investigations which have been continuing for long periods of time without yielding any results and the outcome of which the applicant has not awaited before lodging an application to the Court. In such circumstances, the Chamber will abstain from examining the issue in its admissibility decision, since it will want to avoid making a ruling at the admissibility stage about the ineffectiveness of an investigation which would in effect amount to a declaration of a violation of the positive obligation under Articles 2 or 3 and/or of the obligation under Article 13 to provide an effective remedy. Therefore, where the examination of the Government's objection based on non-exhaustion of a particular remedy is inextricably linked to the substance of the applicant's complaint, the Court will join that issue to the merits of the case and will deal with it in its judgment.<sup>462</sup>

A survey of the Court's case law illustrates that, in the great majority of applications in which the Court joined to the merits the Government's objection based on exhaustion of domestic remedies, the Contracting Parties involved were subsequently found to have breached their positive obligation to carry out an effective investigation. In its admissibility decision in the case of *Kişmir v. Turkey*, for example, the Court, noting that "the Government's preliminary objection as to the criminal procedure raised issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention", decided to join that preliminary objection to the merits.<sup>463</sup> When the Court subsequently concluded in its judgment that the authorities had failed to carry out an effective investigation into the applicant's complaints as required by Article 2, it logically rejected the Government's preliminary objection regarding exhaustion of domestic remedies, based on the finding that there were no effective domestic remedies for the applicant to exhaust.<sup>464</sup>

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462 See, for example, *Khashiyev and Akayeva v. Russia*, cited above, § 115.

463 *Kişmir v. Turkey* (dec.), no. 27306/95, 14 December 1999.

464 *Kişmir v. Turkey*, cited above.

## 6.3 Inadmissibility and its Consequences

Inadmissibility decisions – whether adopted by a Chamber or a Committee – are final. The parties cannot request that the case be referred to the Grand Chamber pursuant to Article 43 of the Convention. Furthermore, a new application lodged by the applicant based on the same facts will be declared inadmissible pursuant to Article 35 § 2 (b) as being “substantially the same as a matter that has already been examined by the Court”.<sup>465</sup> There are, however, two circumstances in which the Court may re-examine an application based on the same facts.

Firstly, and as mentioned earlier, if the application is declared inadmissible for non-exhaustion of a domestic remedy, after exhausting that particular domestic remedy, the applicant may submit a new application based on the same complaints. Exhaustion of the domestic remedy will result in a new domestic decision, which is regarded as “relevant new information” within the meaning of Article 35 § 2 (b). In any event, this will not amount to a re-examination of the complaints by the Court; in its inadmissibility decision it will have limited its finding to the exhaustion of domestic remedies, without addressing the merits of the case. However, this happens rarely in practice because by the time the Court examines the application and declares it inadmissible, the applicant will most likely have missed the time limit prescribed in national legislation within which to make use of the relevant remedy. As explained above, applicants are expected to comply with domestic rules of procedure when exhausting domestic remedies. Where an action instituted by an applicant, be it an appeal or otherwise, is dismissed because of his or her non-compliance with a procedural requirement, for instance the time limit within which to file the appeal, this will be regarded by the Court as a failure to exhaust the domestic remedy. The rationale for this is that, as a result of the applicant’s non-compliance, he or she has not afforded the national authorities an opportunity to deal with the substance of the complaints.

The second possibility for the Court to re-examine an application occurs pursuant to the operation of Article 37 § 2 of the Convention. According to that provision,

“[t]he Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course”.

However, this possibility should by no means be perceived as an opportunity to appeal against a decision of inadmissibility. The Court will only restore an

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465 See also Section 2.9 above.

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inadmissible case to its list of cases if its decision on the admissibility was based on a factual error which is relevant to the conclusion or where new circumstances have arisen justifying the Court's resumption of the examination of the case. Such factual errors may include overlooking a letter introducing the application which affected the calculation of the six-month time limit or where the Court relied on a fact that was not correct<sup>466</sup>.

## 6.4 Admissibility and its Consequences

If the case is declared (partially) admissible in a separate decision, the Court may ask the parties to respond to specific questions, to submit observations on a particular issue, or to submit additional evidence.<sup>467</sup> Additionally, the Court might instead inform the parties that it requires no further information or observations but that the parties may nevertheless submit any additional evidence or observations that they wish. Any material thus submitted by a party will be transmitted to the other party for information or for comment, but only if the Court deems it necessary. At this stage of the proceedings it is thus not automatic that an applicant will be allowed to respond to observations submitted by the respondent Government.

The information and explanations concerning observations, set out above in the section on communication of the application (Section 5), are also applicable to observations which the applicant may submit at this stage of the proceedings. However, applicants should take particular note of paragraph 13 of the "Practice Direction on Written Pleadings"<sup>468</sup> which stipulates that the parties' pleadings following the admission (admissibility) of the application should include:

- i. a short statement confirming a party's position on the facts of the case as established in the decision on admissibility;
- ii. legal arguments relating to the merits of the case;
- iii. a reply to any specific questions on a factual or legal points put by the Court.

At this stage of the proceedings the scope of the case will have been determined by the Court's admissibility decision; that is to say, if only some of the

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<sup>466</sup> See Reid, p. 36.

<sup>467</sup> *Khashiyev and Akayeva v. Russia*, cited above, § 11.

<sup>468</sup> See Appendix No. 3.

complaints have been declared admissible, the applicant should not address the complaints declared inadmissible in his or her observations on the merits. Further observations on the merits give the applicant a final opportunity to support his or her case with adequate evidence and argumentation, and for this reason applicants are advised to avail themselves of this opportunity even if the Court does not specifically require further observations at this stage.<sup>469</sup>

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469 See also Leach p. 81 *et seq.*

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## **JUST SATISFACTION (Article 41)**

### **7.1 Summary**

### **7.2 Discussion**

#### 7.2.1 Criteria for Adjudicating Just Satisfaction

- a) Pecuniary Damage
- b) Non-pecuniary Damage
- c) Costs and Expenses

### **7.3 Concluding Remarks**

## 7.1 Summary

If it finds a violation of the Convention, the Court may in its judgment order the respondent Contracting Party to pay the applicant a sum of money – just satisfaction – under Article 41 of the Convention. As pointed out elsewhere in this *Handbook*, the Court may also conclude that the most appropriate form of redress is for the respondent Contracting Party to take a specific action, such as to grant the applicant a re-trial,<sup>470</sup> to release him or her from prison,<sup>471</sup> or to stop his or her removal from the territory of the Contracting Party.<sup>472</sup> For purposes of the Convention proceedings, the term “just satisfaction” includes monetary awards to compensate an applicant’s 1) pecuniary damage, i.e. financial losses which have actually been sustained by the applicant as a direct consequence of the violation; 2) non-pecuniary damage, i.e. those based on the applicant’s mental suffering and distress stemming from the actions that violated the Convention; and finally, 3) the costs and expenses associated with bringing the Convention complaints to the attention of the national authorities and the Court in Strasbourg.

Just satisfaction is a major subject in its own right and, as such, the scope of the present *Handbook* does not allow for a comprehensive analysis of the issue. However, the general requirements and strategic considerations it entails will be examined below in so far as they are relevant for Article 3 claimants.<sup>473</sup>

## 7.2 Discussion

According to Article 41 of the Convention,

“[i]f 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”.

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470 See *Üküncü and Güneş v. Turkey*, cited above, § 32.

471 See, for example, *Assanidze v. Georgia* [GC], cited above, § 203.

472 See, *mutatis mutandis*, *N. v. Finland*, cited above, § 177.

473 For just satisfaction related issues, see Leach p. 397 *et seq.* and Reid p. 542 *et seq.* As an example of just satisfaction claims, see Appendix No. 12 for the applicants’ observations in the case of *Akkum and Others v. Turkey*.



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It must be stressed at the outset that awards for just satisfaction are an equitable remedy and that they are made in discretion of the Court.<sup>474</sup> That is to say that, although the Court will undoubtedly have regard to the claims made by the applicant, it will make an award that it considers equitable or reasonable under the circumstances.

The issue of just satisfaction is also dealt with in Rule 60 of the Rules of Court, which provides as follows:

- “1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise.
3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
4. The applicant’s claims shall be transmitted to the respondent Government for comment”.<sup>475</sup>

If the Court has decided to examine the admissibility and merits of the case simultaneously in accordance with Article 29 § 3 of the Convention and Rule 54A of the Rules of Court (the joint procedure), the applicant will be required to submit his or her claims under Article 41 of the Convention at the same time as submitting observations in reply to those of the Government. Presumably, the Court will adopt a similar course of action following the entry into force of Protocol No. 14, pursuant to which separate admissibility decisions will become the exception. As long as Protocol No. 14 has not yet entered into force, and if the Court has not applied the joint procedure in a particular case, the applicant will be required to submit his or her just satisfaction claims following the admissibility determination. In any event, the Court will always let the applicant know when he or she is supposed to submit just satisfaction claims, and will provide him or her with more information on the matter along the following lines:

“... according to the Court’s established case-law, failure to submit quantified claims within the time allowed for the purpose under Rule 60 § 1, together with the required supporting documents, entails the consequence that the Chamber will either make no award of just satisfaction or else reject the claim in part. This applies even if the applicant has indicated his wishes concerning just satisfaction at an earlier stage of the proceedings. No extension of the time allowed will be granted.

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<sup>474</sup> See Leach, p. 397.

<sup>475</sup> It is expected that the President of the Court will issue a practice direction on filing just satisfaction claims; see paragraph 13 (b) of the “Practice Direction on Written Pleadings” at Appendix No. 3.

The criteria established by the Court's case-law when it rules on the question of just satisfaction (Article 41 of the Convention) are: (1) pecuniary damage, that is to say losses actually sustained as a direct consequence of the alleged violation; (2) non-pecuniary damage, meaning compensation for suffering and distress occasioned by the violation; and (3) the costs and expenses incurred in order to prevent or obtain redress for the alleged violation of the Convention, both within the domestic legal system and through the Strasbourg proceedings. These costs must be itemised, and it must be established that they are reasonable and have been actually and necessarily incurred.

You must attach to your claims the necessary vouchers, such as bills of costs. The Government will then be invited to submit their comments on the matter”.

The Court thus requires applicants to submit their claims for just satisfaction regardless of whether they have already claimed them in the application form.<sup>476</sup> Furthermore, applicants should also include the details of their bank account in their claims for just satisfaction.

## 7.2.1 Criteria for Adjudicating Just Satisfaction

### a) Pecuniary Damage

In claims for pecuniary damage – referred to in some jurisdictions as “material” or “financial” damage – applicants may claim compensation for financial losses they have actually sustained as a direct consequence of the violation. In the context of Article 3, such claims may include loss of income for the period during which the applicant was prevented from working as a result of the ill-treatment and the costs of medical care. For example, in the case of *Dizman v. Turkey* the applicant claimed:

“after being assaulted by the police officers, he had been given medical treatment in a hospital for a period of 90 days. During that time, and a further period of three months, he had been unable to work. His six months’ loss of income amounted to 1,571 pounds sterling (GBP). He had a wife and three children, aged between 6 and 9 years old, for whom he was financially responsible. He also claimed that his hospital expenses amounted to GBP 3,492.84”.

In finding an Article 3 violation, the Court observed a “direct causal link” between on the one hand, the injuries inflicted on the applicant and, on the other hand, the applicant’s medical expenses and loss of earnings. It held the following:

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<sup>476</sup> See Section 4.2 above.

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“... the applicant needed an operation and was unable, according to the Forensic Medicine Directorate’s report of 7 October 1994, to work for a period of 25 days... The Court, deciding on an equitable basis in the absence of any hospital bills, awards the applicant the sum of 5,000 euros (EUR) in respect of his pecuniary damage”.<sup>477</sup>

Thus, in upholding the applicant’s claim for pecuniary damage, the Court referred to the “direct causal link” between the injuries which it found to have been inflicted on the applicant in violation of Article 3 of the Convention on the one hand, and the medical expenses and a certain loss of earnings on the other.<sup>478</sup> Had the applicant submitted his hospital bills, the Court might have awarded him the full amount claimed.

By contrast, in the case of *Mathew v. the Netherlands*<sup>479</sup> the Court held that no “causal link” had been established between the pecuniary damage claimed by the applicant in respect of his medical treatment and the violations the Court found on account of an extended period of solitary confinement:

“[The Court’s] findings of violation of Article 3 of the Convention relate only to certain aspects of the conditions in which the applicant was detained. They do not impute responsibility for the applicant’s medical condition to the respondent Party, from which it follows that the costs thereby caused cannot be recovered from the respondent Party under Article 41 of the Convention”.

It is noteworthy that in this case the respondent Government had not objected to an award being made for medical expenses.

Claims for pecuniary damage must be supported by adequate evidence, e.g. by submitting hospital bills, documents showing the costs of medicines, etc. In a claim for loss of earnings, documents showing the income of the applicant must be submitted to support the claim, together with medical documents showing the period during which the applicant was unable to work. A failure to substantiate claims for pecuniary damage is very likely to lead the Court to reject the claim or to accept only part of it. The Court may, however, consider any inability on the part of the applicant to provide evidence due to circumstances beyond his or her control, and compensate the applicant when awarding non-pecuniary damage.<sup>480</sup>

Pursuant to Rule 60 § 4 of the Rules of Court, the applicant’s claims will be transmitted to the respondent Government for comment. Where – even

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477 *Dizman v. Turkey*, no. 27309/95, 20 September 2005, §§ 105-107.

478 See also *Messegué and Jabardo v. Spain* (Article 50), nos. 10588/83, 10589/83, 10590/83, 13 June 1994, §§ 16-20.

479 *Mathew v. the Netherlands*, cited above, §§ 220-224.

480 See *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, 26 October 2000, § 118.

though extremely unlikely – the respondent Government does not comment on the applicant’s claims or does not dispute the amount claimed or the factual basis for the claim, the Court may award the applicant the full amount claimed. For example, in the case of *Aktaş v. Turkey*, the respondent Government did not comment on the applicant’s detailed claims for pecuniary damage in respect of the loss of earnings of his brother who had been killed in custody, apart from its argument that the sums claimed by him were excessive. The Court, having found the respondent State responsible for the death of the applicant’s brother, concluded that the loss of his future earnings was also imputable to the respondent State and awarded the applicant the full amount claimed, i.e. 226,065 EUR.<sup>481</sup>

The Court’s review of its case-law in paragraphs 352-353 of the *Aktaş* judgment illustrates its approach when calculating damages and explains to a certain extent the reasons behind the greatly varying amounts awarded by the Court, even in cases involving similar facts:

“352. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings...

353. In addition, it is recalled that a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (*Young, James and Webster v. the United Kingdom*, judgment of 18 October 1982 (former Article 50), Series A no. 55, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (*Sunday Times v. the United Kingdom*, judgment of 6 November 1989 (former Article 50), Series A no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, §§ 22-23; ...”

## **b) Non-pecuniary Damage**

Non-pecuniary damage – also referred to as “moral” damage – may be loosely defined as an award to help alleviate an applicant’s mental suffering and distress stemming from the actions which led to a violation of the

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481 *Aktaş v. Turkey*, no. 24351/94, 24 April 2003, §§ 349-355.

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Convention. The following judgments give an idea of the amounts awarded by the Court for non-pecuniary damage in cases in which there have been violations of Article 3.

- *Mathew v. the Netherlands*: violation of Article 3 on account of the length and circumstances of solitary confinement: 10,000 EUR<sup>482</sup>
- *Dizman v. Turkey*: violation of Article 3 on account of the applicant's chin having been broken by police officers: 15,000 EUR<sup>483</sup>
- *Ostrovar v. Moldova*: violation of Article 3 on account of the "frustration, uncertainty and anxiety" suffered by the applicant due to the conditions of his detention in prison: 3,000 EUR<sup>484</sup>
- *Labzov v. Russia*: violation of Article 3 for the distress and hardship suffered by the applicant on account of prison conditions: 2,000 EUR<sup>485</sup>
- *Balogh v. Hungary*: violation of Article 3 on account of the "distress and suffering resulting from [the applicant's] ill-treatment by the police": 10,000 EUR<sup>486</sup>
- *M.C. v. Bulgaria*: violation of Article 3 on account of the "distress and psychological trauma resulting at least partly from the shortcomings in the authorities' approach" in investigating the applicant's allegations of rape: 8,000 EUR<sup>487</sup>
- *McGlinchey and Others v. the United Kingdom*: violation of Article 3 on account of the prison authorities' treatment of Ms McGlinchey – the applicants' daughter and mother. Because Ms McGlinchey died in prison, her two daughters and mother were awarded a total sum of 22,900 EUR<sup>488</sup>
- *Nazarenko v. Ukraine*: violation of Article 3 on account of conditions of detention: 2,000 EUR<sup>489</sup>
- *Mouisel v. France*: violation of Article 3 on account of the continued detention of the applicant – a cancer sufferer – which "undermined his dignity and entailed particularly acute hardship that caused suffering

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482 *Mathew v. the Netherlands*, cited above, § 229.

483 *Dizman v. Turkey*, cited above, § 110.

484 *Ostrovar v. Moldova*, no. 35207/03, 13 September 2005, § 118.

485 *Labzov v. Russia*, cited above, § 59.

486 *Balogh v. Hungary*, no. 47940/99, 20 July 2004, § 85.

487 *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003, § 194.

488 *McGlinchey and Others v. the United Kingdom*, no. 50390/99, 29 April 2003, § 71.

489 *Nazarenko v. Ukraine*, no. 39483/98, 29 April 2003, § 172.

beyond that inevitably associated with a prison sentence and treatment for cancer”: 15,000 EUR<sup>490</sup>

- *Peers v. Greece*: violation of Article 3 on account of the prison conditions which “diminished the applicant’s human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance”: 5,000,000 drachmas<sup>491</sup>
- *Egmez v. Cyprus*: violation of Article 3 on account of the intentional ill-treatment to which the applicant was subjected by police officers at the time of his arrest and in the immediate aftermath but “over a short period of heightened tension and emotions”: 10,000 GBP<sup>492</sup>

The Court has awarded higher sums in cases where the violation was particularly serious. For example, in *Selmouni v. France*, the Court found that the applicant had been tortured while in police custody and it found that he had suffered non-pecuniary damage for which the findings of violations alone did not afford sufficient satisfaction. It therefore awarded him 500,000 French francs.<sup>493</sup> Similarly, in the case of *Tomasi v. France*, in which the applicant’s body:

“had borne marks which had only one origin, the ill-treatment inflicted on him for a period of forty odd hours by some of the police-officers responsible for his interrogation: he had been slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on.”<sup>494</sup>

the Court awarded the applicant 700,000 French francs.

In its judgment in the case of *Aydin v. Turkey*, the Court,

“having regard to the seriousness of the violation of the Convention suffered by the applicant while in custody and the enduring psychological harm which she may be considered to have suffered on account of being raped,”

decided to award a sum of GBP 25,000 by way of compensation for non-pecuniary damage.<sup>495</sup> Reference may also be made to the more recent case of

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490 *Mouiel v. France*, cited above, § 48.

491 *Peers v. Greece*, no. 28524/95, 19 April 2001, §§ 75 and 88.

492 *Egmez v. Cyprus*, no. 30873/96, 21 December 2001, §§ 78 and 106.

493 *Selmouni v. France*, cited above, § 123.

494 *Tomasi v. France*, no. 12850/87, 27 August 1992, § 108.

495 *Aydin v. Turkey*, no. 23178/94, 25 September 1997, § 131.

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*Ilaşcu and Others v. Moldova and Russia*, which was brought by four applicants. The Court found it established that two of the applicants had been subjected to treatment amounting to torture and the remaining two applicants to inhuman and degrading treatment. The ill-treatment in question consisted of the time spent on death row (seven and a half years in the case of one of the applicants), having been “savagely” beaten by prison wardens, withholding of food, protracted periods of time spent in solitary confinement, and unacceptable conditions of detention. On account of these allegations the Court found violations of Articles 3, 5, and 34 of the Convention. The Court awarded 190,000 EUR to each of the applicants on account of the “extreme seriousness of the violations of the Convention of which the applicants were victims”.<sup>496</sup>

In cases which concern expulsion or extradition of applicants to a country where they would run a real risk of being subjected to treatment in violation of Article 3 of the Convention, the Court will not usually make any awards for pecuniary or non-pecuniary damage but only for costs and expenses incurred by the applicant in having the application examined by the Court, e.g. lawyer’s fees and costs, etc. The Court’s logic is that if the applicant has not yet been physically removed from the territory of the respondent Contracting Party, no violation will have occurred. For example, in its judgment in the case of *N. v. Finland* the Court held the following:

“Having regard to all the elements before it, the Court considers that the finding that the applicant’s expulsion to the Democratic Republic of Congo at this moment in time would amount to a violation of Article 3, constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant”<sup>497</sup>

Because of the wide spectrum of circumstances in which mental suffering may occur, the variation in the amounts awarded by the Court for non-pecuniary damage is even greater than that among awards made for pecuniary damage. Nevertheless, awards made by the Court for non-pecuniary damage are the only source of information on which an applicant may rely when claiming non-pecuniary damage. It must be stressed that the Court will not look favourably upon six-digit claims. For this reason, parity of the sum claimed by an applicant with the sums awarded by the Court in its judgments in previous cases against the same Contracting Party, concerning similar facts and complaints, may increase the chances of success of obtaining the claimed sum.

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<sup>496</sup> *Ilaşcu and Others v. Moldova and Russia*, cited above, § 489.

<sup>497</sup> *N. v. Finland*, cited above, § 177.

### c) Costs and Expenses

The Court will award a successful applicant all or part of the costs and expenses incurred by him or her in order to prevent or obtain redress for the alleged violation of the Convention, both within the domestic legal system and in the Strasbourg proceedings.

The claims for costs and expenses must be itemised, and it must be established that they are reasonable and have been actually and necessarily incurred. For this reason, at the time of introducing the application, practitioners must start recording their costs and expenses and the time spent by them on the case in the course of the proceedings, such as the preparation of the application form and the drafting of the observations and other submissions. Costs of any translation, postage, telephone and fax, stationeries, etc., must be itemised with as much detail as possible. In calculating their fees practitioners may have regard to the domestic fee scales issued, for example, by their own bar association. It must be stressed, however, that such fee scales, although relevant, are not binding. A survey of the Court's judgments reveals that when making awards for legal fees, the Court takes into account the earnings of legal practitioners in the respondent Contracting Party. For this reason practitioners should consult the Court's jurisprudence concerning the relevant Contracting Party when making claims for fees, just as they would when calculating damages. Furthermore, when awarding legal fees, the Court will take into account the complexity of the case and the extent to which the applicant has succeeded in his or her application. Needless to say, if the Court finds no violation of any of the Articles invoked by the applicant, it will not make an award for costs and expenses. Any money already received from the Council of Europe in legal aid will be deducted from the sum awarded for costs and expenses, but if the Court does not find a violation, the applicant will not be asked to repay the sum received in legal aid.

Applicants may also make a claim in respect of costs incurred in efforts made at the national level to prevent the violation from occurring or, when it has already occurred, in obtaining redress from the national authorities for that violation. As the Court held in its judgment in the case of *Société Colas Est and Others v. France*:

“...if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation... In the instant case the Court notes that the point at which the applicant companies first relied on their right to respect for their home – the right which it has found to have been violated – was when the case was remitted by the Court of Cassation to the Paris Court of Appeal”.<sup>498</sup>

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498 *Société Colas Est and Others v. France*, 37971/97, 16 April 2002, § 56.



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### 7.3 Concluding Remarks

Awards for just satisfaction will be in euros, but the judgment will stipulate that the sums awarded are to be converted into the official currency of the respondent Contracting Party at the rate applicable at the date of payment and that they are to be paid into the applicant's bank account. If the applicant is not living in the territory of the respondent Contracting Party, the Court may, on the applicant's request, stipulate that the sum is to be paid into the national currency of the country in which the applicant is living and into the applicant's bank account in that country.<sup>499</sup>

Any sums awarded by the Court are to be paid within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention.<sup>500</sup> The judgment will also stipulate that:

“from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points”.

Finally, when making an award for costs and expenses, the Court will often stipulate that the sum awarded is to be paid together with any value added tax (VAT) that may be chargeable.

Should any problems arise as to the payment of the awards by the respondent Government – such as non-payment, late payments, and part payments – applicants are advised to contact the Committee of Ministers as it is not the Court's duty to supervise the execution of judgments.<sup>501</sup>

If a legal representative encounters problems in recovering his or her legal fees from the applicant, as per the award in the judgment, this is a matter for domestic courts and not for the Committee of Ministers or the Court. When making the claim for just satisfaction, legal representatives may request the Court to stipulate in its judgment that sums awarded in respect of legal fees are to be paid into the representative's bank account and not that of the applicant's.

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499 See *Süheyyla Aydın v. Turkey*, cited above, § 228 where the applicant was living in Switzerland and where the Court stated that the sums awarded were to be converted into Swiss francs.

500 See Section 9.2 below.

501 See Section 9.3 below.

## **FRIENDLY SETTLEMENT AND STRIKE OUT (Articles 37-38)**

### **8.1 Friendly Settlement**

#### 8.1.1 Introduction

#### 8.1.2 Friendly Settlement Declaration

*Textbox xi Example of Friendly Settlement Declaration*

#### 8.1.3 Enforcement of Undertakings Expressed in a Friendly Settlement Declaration

### **8.2 Strike Out**

#### 8.2.1 Absence of Intention to Pursue the Application (Article 37 § 1 (a))

#### 8.2.2 Resolution of the Matter (Article 37 § 1 (b))

#### 8.2.3 Strike Out “for any other reason” (Article 37 § 1 (c))

### **8.3 Concluding Remarks**

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## 8.1 Friendly Settlement

### 8.1.1 Introduction

The friendly settlement procedure under the Convention – very much like an out of court settlement in national legislation – affords the parties an opportunity to resolve an issue, usually on payment to the applicant by the respondent Contracting Party of a specified sum of money or on the basis of an undertaking by the respondent Contracting Party to provide appropriate resolution of the issue, or both. The basis for friendly settlements is found in Article 38 of the Convention,<sup>502</sup> the relevant parts of which provide as follows:

“1. If the Court declares the application admissible, it shall

...

(b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2. Proceedings conducted under paragraph 1 b. shall be confidential.”

Furthermore, Article 39 provides that if a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

It must be stressed at this juncture that, although Article 38 speaks of the Court placing itself at the disposal of the parties to secure a friendly settlement only after the application is declared admissible, it does not prevent the parties from making proposals at earlier stages of the Court’s proceedings.<sup>503</sup> Indeed, according to Article 37 § 1, the Court may at any stage of the proceedings strike an application out of its list of cases on the basis of a friendly settlement. Moreover, and as described above, when the joint procedure is applied, parties are asked to state their positions on the subject of friendly settlement at the communication stage of the proceedings. The parties will be informed that, regarding the requirement of strict confidentiality under Rule 62 § 2, any submissions made in this respect should be set out in a separate document, the contents of which must not be referred to in any submissions made in the context of the contentious proceedings. If the parties let it be known that they are interested in reaching a settlement, the Registry will be prepared to make a suggestion for an appropriate arrangement.

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<sup>502</sup> See also Rule 62 of the Rules of Court.

<sup>503</sup> Obviously not before the application has been communicated to the respondent Contracting Party.

If a settlement is reached before the application has been declared admissible, the Court will strike the case out in a decision. Otherwise, it will do so in a judgment.

If the Court decides to examine the admissibility and merits of a case at the same time, in accordance with Article 29 § 3 of the Convention and Rule 54A, the Registrar of the relevant Chamber, at the time of communication the case<sup>504</sup> will ask the respondent Government to inform the Court in its observations on admissibility and merits of its position regarding friendly settlement of the case and any proposals it may wish to make. If the respondent Government has made no proposal for friendly settlement by the time it submits its observations, when forwarding the Government's observations to the applicant, the Registrar will ask the applicant to indicate his or her position regarding a friendly settlement of the case.

### 8.1.2 Friendly Settlement Declaration

The terms of a friendly settlement will be set out in a declaration which will be signed by the parties and submitted to the Court. The parties' declarations in the case of *Sakı v. Turkey* are reproduced in the *Textbox* below and may serve as an illustration of the form and contents of friendly settlement declarations in a case which concerns complaints under Article 3 of the Convention.

On receipt of the declarations, the Court will examine the terms with a view to establishing whether respect for human rights as defined in the Convention and the protocols is upheld in the declaration; pursuant to Article 37 § 1 (c), the Court may continue the examination of the application if, as mentioned above, respect for human rights so requires and in spite of the parties' intention to settle the case.

A friendly settlement declaration signed by a Government may include the Government's expression of regret for the actions which have led to the bringing of the application. For example, in the case of *Sakı v. Turkey*, the respondent Turkish Government submitted in its declaration that it

“...regret[ted] the occurrence, as in the present case, of individual cases of ill-treatment by the authorities of persons detained in custody notwithstanding existing Turkish legislation and the resolve of the Government to prevent such occurrences.”

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504 If no decision has been taken by the Court to examine the case in a joint procedure, at the time of forwarding the admissibility decision.

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Furthermore, the Turkish Government also accepted in the same declaration that:

“recourse to ill-treatment of detainees constitutes a violation of Article 3 of the Convention”

and undertook:

“to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such forms of ill-treatment – including the obligation to carry out effective investigations – is respected in the future.”<sup>505</sup>

Governments may be willing to settle cases for a number of reasons. For example, they may wish to settle a case in which complaints are based on national legislation which the Court has previously identified as incompatible with the Convention or which the respondent Contracting Party has itself acknowledged is incompatible with the Convention. For example, in the case of *Zarakolu v. Turkey*, the applicant, owner of a publishing company, was convicted under the Prevention of Terrorism Act for having disseminated propaganda in support of a terrorist organisation in a book published by her company. The application lodged by the applicant was struck out of the Court’s list of cases as the parties subsequently reached a settlement on the basis of a declaration made by the Turkish Government which included, *inter alia*, the following acknowledgement:

“The Government note that the Court’s rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression show that Turkish law and practice urgently need to be brought into line with the Convention’s requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. The Government undertake to this end to implement all necessary reform of domestic law and practice in this area, as already outlined in the National Programme of 24 March 2001”.<sup>506</sup>

As pointed out above, friendly settlement declarations may include terms pursuant to which a respondent Government may undertake to take specific action to resolve the issue. For example, the case of *K.K.C. v. the Netherlands*, which concerned the intended expulsion of the applicant – a Russian national of Chechen origin – to Russia, where the applicant argued there was a real risk he would be subjected to treatment contrary to Article 3 of the Convention, was struck out on the basis of the settlement reached between the parties. Pursuant to the terms of the declaration, the respondent

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<sup>505</sup> *Saki v. Turkey*, cited above, § 12.1

<sup>506</sup> *Zarakolu v. Turkey*, no. 32455/96, 27 May 2003, § 19.

Government undertook to issue the applicant a residence permit without restrictions.<sup>507</sup>

Parties are expected to stipulate in their respective declarations that the settlement will constitute the final resolution of the case and that they will not request the referral of the case to the Grand Chamber under Article 43 § 1 of the Convention.<sup>508</sup>

*Textbox xi*                      *Example of Friendly Settlement Declaration*

**THE PARTIES' DECLARATIONS IN THE CASE OF SAKI v. TURKEY  
(No. 29359/95)**

**THE GOVERNMENT'S DECLARATION**

I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to Ms Özgül Saki the amount of 55,000 French francs with a view to securing a friendly settlement of the application registered under no. 29359/95. This sum, which also covers legal expenses connected with the case, shall be paid, free of any taxes that may be applicable, to a bank account named by the applicant. The sum shall be payable within three months from the date of delivery of the judgment by the Court pursuant to Article 39 of the European Convention on Human Rights. This payment will constitute the final resolution of the case.

The Government regret the occurrence, as in the present case, of individual cases of ill-treatment by the authorities of persons detained in custody notwithstanding existing Turkish legislation and the resolve of the Government to prevent such occurrences.

It is accepted that the recourse to ill-treatment of detainees constitutes a violation of Article 3 of the Convention and the Government undertake to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such forms of ill-treatment – including the obligation to carry out effective investigations – is respected in the future. The Government refer in this connection to the commitments which they undertook in the Declaration agreed on in Application no. 34382/97 and reiterate their resolve to give effect to those commitments. They note that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of ill-treatment in circumstances similar to those of the instant application as well as more effective investigations.

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507 *K.K.C. v. the Netherlands*, no. 58964/00, 21 December 2001, § 26.

508 See Section 9.2 below.

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The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will continue to be made in this context. To this end, necessary co-operation in this process will continue to take place.

Finally, the Government undertake not to request the reference of the case to the Grand Chamber under Article 43 § 1 of the Convention after the delivery of the Court's judgment.

### **THE APPLICANT'S DECLARATION**

I note that the Government of Turkey are prepared to pay *ex gratia* the sum of 55,000 French francs covering both pecuniary and non-pecuniary damage and costs to the applicant, Ms Özgül Saki, with a view to securing a friendly settlement of application no. 29359/95 pending before the Court. I have also taken note of the declaration made by the Government.

I accept the proposal and waive any further claims in respect of Turkey relating to the facts of this application. I declare that the case is definitely settled.

This declaration is made in the context of a friendly settlement which the Government and the applicant have reached.

I further undertake not to request the reference of the case to the Grand Chamber under Article 43 § 1 of the Convention after the delivery of the Court's judgment.

### 8.1.3 Enforcement of Undertakings Expressed in a Friendly Settlement Declaration

According to Article 46 § 1 of the Convention, Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Furthermore, paragraph 2 of the same provision stipulates that final judgments of the Court shall be transmitted to the Committee of Ministers which will supervise their execution.<sup>509</sup> It follows, therefore, that the Committee of Ministers is responsible for the supervision of a judgment in which the case was struck out on the basis of a friendly settlement. In case of a failure by the respondent Government to uphold the terms of its friendly settlement declaration, applicants may seek assistance from the Committee of Ministers.

When a friendly settlement is concluded before the case is declared admissible, the case will be struck out in a decision rather than a judgment. In such cases problems may arise since Article 46 of the Convention speaks only of the Contracting Parties' obligation to abide by judgments, and does not mention decisions. However, this "loophole" will be eliminated following the entry into force of Protocol No. 14, which amends Article 39 such that the Court will be able to place itself at the disposal of the parties with a view to securing a friendly settlement at any stage of the proceedings. Furthermore, if a friendly settlement is concluded, the Court will strike the case out by means of a decision and not a judgment, regardless of whether that settlement was reached before or after the case was declared admissible. Such decisions will be transmitted to the Committee of Ministers, which will supervise the execution of the terms of the friendly settlement as set out in the decision.

## 8.2 Strike Out

Article 37 of the Convention provides as follows:

- “1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
- a. the applicant does not intend to pursue his application; or
  - b. the matter has been resolved; or
  - c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

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<sup>509</sup> See Section 9.3 below.



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However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course”.

An application may be struck out of the Court’s list of cases by a Committee<sup>510</sup> or by a Chamber.

### 8.2.1 Absence of Intention to Pursue the Application (Article 37 § 1 (a))

Article 37 § 1 of the Convention provides for an applicant’s withdrawal of his or her case. However, in dealing with a request for withdrawal, the Court must first examine whether respect for human rights as defined in the Convention and the Protocols nevertheless requires that the Court continue the examination of the application. For example, the case of *Tyrer v. the United Kingdom* concerned the applicant’s complaint regarding corporal punishment under Article 3 of the Convention. The applicant informed the Commission that he wished to withdraw his application. However, the Commission decided it could not accede to this request, “since the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved”.<sup>511</sup> The applicant took no further part in the proceedings but the Court examined the complaints *ex officio* and concluded that the applicant had been subjected to degrading treatment in violation of Article 3.<sup>512</sup>

The Court will also strike an application out if the applicant fails to respond to letters and/or fails to submit his or her observations and any other documents requested by the Court. The applicant’s inactivity is interpreted as a lack of intention on his or her part to pursue the case. Before striking the case out in such a situation, the Court will give the applicant adequate opportunities to reply and will warn him or her in a letter – sent by registered post – of the possibility that the case might be struck out of the Court’s list.<sup>513</sup>

The case of *Nehru v. the Netherlands* illustrates the fact that in situations where an applicant is unable to contact the Court over an extended period of time – in this case almost 3 years – the Court is likely to consider the application to have been abandoned. In *Nehru*, the applicant, a Sri Lankan national

510 Article 28 of the Convention.

511 *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978, § 21.

512 *Ibid.*, § 35.

513 See, *inter alia*, *Starodub v. Ukraine* (dec.), no. 5483/02, 7 June 2005, in which the applicant failed to respond to the Court’s letter for more than a year and a half.

whose request for an interim measure under Rule 39 of the Rules of Court to suspend his expulsion had been rejected by the Court on 10 November 1999, was deported to Canada by the Netherlands authorities on 18 November 1999. A day later, on 19 November 1999, the applicant was deported from Canada to Sri Lanka. Nothing further was heard from him either by his lawyer or by the Court. In its decision of 27 August 2002, the Court noted that it could neither find it established that the applicant no longer wished to pursue his application nor that the matter had been resolved. It went on to state the following:

“Although the Court would not exclude that an expulsion carried out speedily might frustrate an applicant’s attempts to obtain the protection to which he or she is entitled under the Convention, the Court notes that there is no indication that the applicant, during the period that has elapsed since his expulsion from the Netherlands, has sought in one way or another to contact his lawyer in the Netherlands in relation to his application. In these circumstances, the Court cannot but conclude that there is no indication whatsoever that the applicant intends to pursue his application. In reaching this conclusion, the Court has taken into account its competence under Article 37 § 2 of the Convention to restore the case to its list of cases if it considers that the circumstances justify such a course”.<sup>514</sup>

## 8.2.2 Resolution of the Matter (Article 37 § 1 (b))

In its judgment in the case of *Ohlen v. Denmark*, the Court stated that:

“[i]n order to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) or that for any other reason established by the Court, it is no longer justified to continue the examination of the application within the meaning of Article 37 § 1 (c), and that there is therefore no longer any objective justification for the applicant to pursue his application, the Court considers that it must examine whether the circumstances complained of directly by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed”.<sup>515</sup>

Thus, in a case where the applicant complains of his or her impending expulsion to a country where he or she runs a real risk of being subjected to ill-treatment in violation of Article 3, the Court will conclude that the matter at issue has been resolved if the respondent Contracting Party subsequently issues the applicant a residence permit thereby eliminating the possibility of deportation. After all, in such a situation, where the applicant no longer faces expulsion, the risk of ill-treatment also no longer exists.<sup>516</sup>

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514 *Nehru v. the Netherlands* (dec.), cited above.

515 See *Ohlen v. Denmark*, no. 63214/00, 24 February 2005, § 26.

516 See, for example, *Sokratian v. the Netherlands* (dec.), no. 41/03, 8 September 2005.

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### 8.2.3 Strike Out “for any other reason” (Article 37 § 1 (c))

This provision gives the Court a large measure of discretion and may, for example, be used in a situation where the applicant wishes to pursue his or her application even though in the view of the Court this is no longer necessary. Thus, the Court struck out three cases introduced by Iranian nationals and their families in which they complained that their expulsion to Iran by the Turkish Government would expose them to treatment contrary to Articles 2, 3, and 8 of the Convention. However, after submitting their applications they moved to and settled in Finland, Norway, and Canada respectively. They nevertheless informed the Court that they wished to pursue their applications and maintained that, notwithstanding their resettlement in third countries, the Court should still examine their complaints on the merits. However, given that they no longer faced forced return to Iran, the Court found that the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention and decided that it was no longer justified to continue the examination of the applications.<sup>517</sup>

The Court has also used its powers to strike an application out on the basis of so-called ‘unilateral declarations’ submitted by respondent Governments, usually following the applicants’ rejection of a respondent Government’s offer of friendly settlement. For example, in the case of *Akman v. Turkey*, which concerned the killing of the applicant’s son allegedly by members of the security forces, the parties had been unable to reach a friendly settlement. Five days before the Court was to hold a fact-finding hearing in Turkey to establish the disputed facts of the case,<sup>518</sup> the respondent Government submitted to the Court a declaration on the basis of which it invited the Court to strike the application out of its list of cases. In the declaration, the Turkish Government expressed its regret for the deaths which resulted from excessive use of force, as was the case with the death of the applicant’s son, and offered to pay the applicant 85,000 GBP. The applicant, for his part, asked the Court to reject the Government’s initiative and stressed, *inter alia*, that the proposed declaration omitted any reference to the unlawful nature of the killing of his son. In upholding the respondent Government’s request, the Court stated in its judgment that it had:

“carefully examined the terms of the Government’s declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers

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517 See, respectively, *M.T. v. Turkey* (dec.), no. 46765/99, 30 May 2002; *A.E. v. Turkey* (dec.), no. 45279/99, 30 May 2002; *A.Sh. v. Turkey* (dec.), no. 41396/98, 28 May 2002.

518 See Section 11.3 below for information on fact-finding missions.

that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)) ... The Court notes in this regard that it has [previously] specified the nature and extent of the obligations which arise for the respondent State in cases of alleged unlawful killings by members of the security forces under Articles 2 and 13 of the Convention...".<sup>519</sup>

This same reasoning was subsequently applied by the Court in striking out the cases of, *inter alia*, *Haran v. Turkey*, *Toğcu v. Turkey*, and *T.A. v. Turkey*. These three cases concerned allegations that close relatives of the applicants' had been disappeared by security forces, and in each case the applicants asked the Court to reject the Government's unilateral declaration.<sup>520</sup> However, in *T.A. v. Turkey* the Grand Chamber subsequently decided that the application should not have been struck out because, in view of the gravity of the violation at issue, the Government's declaration offered an insufficient basis for holding that it was no longer justified to continue the examination of the application. In reaching that conclusion the Court considered the following:

"The Court accepts that a full admission of liability in respect of an applicant's allegations under the Convention cannot be regarded as a condition *sine qua non* for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. However in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is *prima facie* evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers in the context of the latter's duties under Article 46 § 2 of the Convention, an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases... As the unilateral declaration made by the Government in the present case contains neither any such admission nor any such undertaking, respect for human rights requires that the examination of the case be pursued pursuant to the final sentence of Article 37 § 1 of the Convention...".<sup>521</sup>

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519 *Akman v. Turkey*, no. 37453/97, 26 June 2001.

520 *Haran v. Turkey*, no. 25754/94, 26 March 2002; *Toğcu v. Turkey* (strike out), no. 27601/95, 9 April 2002; *T.A. v. Turkey*, no. 26308/95, 9 April 2002. The judgments in these cases have led to intense criticism of the Court; see Leach p. 79 *et seq.*

521 See *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26308/95, 6 May 2003, §§ 84-85. The Grand Chamber subsequently examined the merits of the case and adopted its judgment on the merits on 8 April 2004. Also, on 1 March 2005 the Court decided, pursuant to Article 37 § 2 of the Convention, to restore the above mentioned *Toğcu v. Turkey* case to its list of cases and adopted its judgment on the merits of the case on 31 May 2005; see §§ 8-14 of the Court's judgment of 31 May 2005. A request made by the Turkish Government in another case which also concerned the disappearance of the applicant's son, to strike the case out on the basis of a unilateral declaration, was rejected by the Court in the light of the principles laid down in the Grand Chamber's judgment in the case of *Tahsin Acar v. Turkey*; see *Akdeniz v. Turkey*, no. 25165/94, 31 May 2005, § 8.

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Cases raising less serious issues may nevertheless still be struck out on the basis of a unilateral declaration submitted by a respondent Government despite the applicant's opposition.<sup>522</sup>

### 8.3 Concluding Remarks

Given the very heavy workload of the Court, the friendly settlement procedure affords the Court an opportunity to clear up its docket in order to focus on cases which justify merits decisions. Nevertheless, as pointed out above, the Court has powers to review the undertakings in friendly settlement declarations and may refuse to strike a case out if it considers that respect for human rights as defined in the Convention and the Protocols requires an examination on the merits.

The importance and the time-saving potential of friendly settlements has been identified in a report drawn up by Lord Woolf, former Lord Chief Justice of England and Wales and member of the Group of Wise Persons established by the Council of Europe's Third Summit in Warsaw in May 2005. The purpose of the report was to draft a comprehensive strategy to secure the long-term effectiveness of the European Convention on Human Rights and its control mechanism. Lord Woolf's report recommends that the Court establish a specialist "Friendly Settlement Unit" in the Registry, to initiate and pursue proactively a greater number of friendly settlements.<sup>523</sup> The report invites the Court to consider whether it would be desirable or appropriate to strike out an application under Article 37 § 1 (c) on the grounds that the applicant has unreasonably refused to agree to what the Court considers to be a satisfactory friendly settlement offer. According to Lord Woolf, given the safeguards provided by Article 37, this would be an appropriate use of the Court's powers to strike out applications and would give greater weight to friendly settlement negotiations, and would ensure that friendly settlement offers were only rejected for good reason.

In cases concerning allegations of ill-treatment within the meaning of Article 3 of the Convention, applicants may negotiate with respondent Governments to obtain specific undertakings, such as an undertaking to carry out an effective investigation into his or her allegations of ill-treatment. If the respondent Government refuses to carry out such an investigation as part of the friendly

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<sup>522</sup> See *Van Houten v. the Netherlands*, no. 25149/03, 29 September 2005.

<sup>523</sup> The report may be accessed at [www.echr.coe.int](http://www.echr.coe.int)

settlement agreement, the applicant may argue that striking the case out solely on the basis of monetary payment represents insufficient redress and request that the Court continue to examine the merits of the case.<sup>524</sup> In this context it must be reiterated that civil or administrative proceedings which are aimed solely at awarding damages rather than identifying and punishing those responsible are not regarded as effective remedies in the context of Article 3 complaints.<sup>525</sup>

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524 The same argument would also be relevant if the Court decides to strike the case out on the basis of a unilateral declaration submitted by the respondent Government and despite the applicant's rejection of the settlement offer.

525 See *Tepe v. Turkey* (dec.), cited above in Section 2.4.2 (d) (i).

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## **THE JUDGMENT AND THE SUBSEQUENT PROCEDURE**

### **9.1 Finding of a Violation**

### **9.2 Referral to the Grand Chamber**

### **9.3 Execution of Judgments**

## 9.1 Finding of a Violation

As explained earlier,<sup>526</sup> if the Chamber deems the application admissible, under the joint procedure it will immediately move on to the judgment stage. It will receive a draft judgment prepared under the instructions of the judge rapporteur, declaring the application admissible and concluding whether there has been a violation of any of the Articles of the Convention invoked by the applicant. A typical judgment concerning an Article 3 complaint will consist of the following components:

Name of the case and of the Section, application number, names of judges of the Chamber and name of the Section Registrar, date(s) of deliberations;

**PROCEDURE:** A summary of the proceedings, containing the name of the applicant and that of the respondent Contracting Party;

**THE FACTS,** consisting of

I. **THE CIRCUMSTANCES OF THE CASE:** other details of the applicant, together with the facts as submitted by the parties. If the facts are disputed between the parties they will be set out separately. Documents submitted by the parties, in so far as they are relevant, may also be summarised under this heading; and

II. **RELEVANT DOMESTIC LAW AND PRACTICE;**

**THE LAW,** consisting of

I. The applicant's complaints; the parties' arguments; any objections by the Government to the admissibility of the case; the Court's conclusion on the admissibility; establishment of facts and the Court's conclusion on the merits; and

II. **APPLICATION OF ARTICLE 41 OF THE CONVENTION:** The applicant's claims for pecuniary and non-pecuniary damage and for costs and expenses; the Government's response to the applicant's claims and the Court's conclusion on just satisfaction;

**OPERATIVE PART:** A recapitulation of the conclusions reached and any violations found; and, finally,

**SEPARATE OPINIONS**<sup>527</sup>

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<sup>526</sup> See Section 1.7.3 above.

<sup>527</sup> See also Rules 74-75 of the Rules of Court.



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With the exception of “establishment of facts”, these components have already been dealt with in the preceding sections of this *handbook*.<sup>528</sup> The Court’s judgments will be given in one of the official languages of the Court, i.e. English and French. In some cases, the judgment may be translated into the other official language.<sup>529</sup> In exceptional cases, the judgment may be pronounced, i.e. read aloud, at a public hearing. The judgment will be transmitted to the Committee of Ministers for its execution. Certified copies of the judgment will be transmitted to the parties, the Secretary General of the Council of Europe, to any third party, and to any other person directly concerned.<sup>530</sup>

Rule 79 of the Rules of Court provides that parties may request the interpretation of a judgment within one year of the delivery of that judgment. Furthermore, Rule 80 of the Rules of Court provides for situations in which a new fact is discovered; if the fact by its nature might have a decisive influence on the Court’s deliberations, if it was unknown to the Court at the time of delivery of its judgment, and if it could not reasonably have been known to the party, that party may ask the Court to revise the judgment. Requests of this nature must be made within a period of six months after that party learned of the fact. They are, however, quite rare.

Finally, the Court may, of its own motion or at the request of a party made within one month of the delivery of a decision or a judgment, rectify clerical errors, errors in calculation, or obvious mistakes.<sup>531</sup>

## 9.2 Referral to the Grand Chamber

Pursuant to Article 43 of the Convention, any party to the case may, in exceptional cases and within a period of three months from the date of the judgment of the Chamber, request that the case be referred to the Grand Chamber. It must be pointed out that the judgments adopted by the Grand Chamber are final and cannot be referred back to the Grand Chamber.

A request for referral to the Grand Chamber will be examined by a panel of five judges of the Grand Chamber, who will only accept the request in the following circumstances:

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528 The issue of establishment of facts will be dealt with in Section 11 below.

529 Rule 76 of the Rules of Court.

530 Rule 77 § 3 of the Rules of Court.

531 Rule 81 of the Rules of Court.

“if the case raises a serious issue affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance”.<sup>532</sup>

The panel of the Grand Chamber will be composed of the President of the Court, two Presidents of Sections designated by rotation (to be replaced by the Vice-Presidents of their Section if they are prevented from sitting), two judges, and two substitute judges. The substitute judges are designated by rotation from among the judges elected by the remaining Sections to sit on the panel for a period of six months (Rule 24 § 5 (a) of the Rules of Court). The panel shall include neither any judge who took part in the consideration of the admissibility or merits of the case in question nor the judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request (Rule 24 § 5 (b-c)). Any member of the panel unable to sit for these reasons shall be replaced by one of the substitute judges (Rule 24 § 5 (d)).

Decisions of the Panel are final. Since the Panel does not provide reasons for referral decisions, it is difficult to determine exactly what considerations are decisive in any particular case. In any event, it appears from Article 43 that the referral procedure should not be regarded as an appeal on points of fact. It is not surprising, therefore, that the nature and the number of the cases referred to the Grand Chamber illustrate that the Panel will only accept requests for referral in exceptional cases. Indeed, in 2005 the Panel examined a total of 183 requests for referrals and accepted only 20.<sup>533</sup>

If the request is accepted by the Panel, the case referred to the Grand Chamber will embrace in principle all aspects of the application previously examined by the Chamber in its judgment. The scope of its jurisdiction is limited only by the Chamber’s decision on admissibility. This means that the Grand Chamber is precluded from examining complaints which have been declared inadmissible by the Chamber. However, as regards the complaints declared admissible by the Chamber, the Grand Chamber may also examine, where appropriate, issues relating to their admissibility in the same manner as this is possible in normal Chamber proceedings: for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to “reject any application which it considers inadmissible ... at any stage of the proceedings”), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage.<sup>534</sup> The Grand Chamber will generally hold a hearing in Strasbourg before adopting its judgment.

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532 Article 43 § 2 of the Convention.

533 Fifty-six of the 121 requests were made by Governments and five by both parties. See for further information the Annual Activity Report 2005 of the Grand Chamber at <http://www.echr.coe.int/NR/rdonlyres/AF356FA8-1861-4A6B-95E9-28ED53787710/0/2005GrandChamberactivityreport.pdf>.

534 *K. and T. v. Finland* [GC], no. 25702/94, 12 July 2001, §§ 140-141.

### 9.3 Execution of Judgments

It was mentioned earlier that the Committee of Ministers, which consists of the Ministers of Foreign Affairs of the Member States of the Council of Europe, is the decision-making body of the Council of Europe. Amongst its functions is the supervision of the execution of judgments of the European Court of Human Rights. Under Article 44, a judgment becomes final at the time of its delivery by the Grand Chamber. A judgment delivered by a Chamber, on the other hand, becomes final if no request for referral to the Grand Chamber is made within three months of delivery or, when such a request has been made, when it is rejected by the Panel of the Grand Chamber.

Under Article 46 § 1, Contracting Parties undertake to abide by the final judgment of the Court in any case in which they are parties. The final judgment will be transmitted to the Committee of Ministers for supervision of its execution. The respondent Government will be expected to pay the applicant any sums awarded for just satisfaction in the judgment within three months of the date the judgment becomes final according to Article 44 § 2 of the Convention.

Judgments referred to the Committee of Ministers are placed on the agenda of Committee meetings without requiring any action on the part of the applicant. However, it is up to the applicant to ensure that the respondent Government is in possession of the necessary bank account details to allow for the payment of just satisfaction awarded by the Court.<sup>535</sup> An applicant will facilitate the Committee's work by informing it of any specific difficulties encountered, e.g. just satisfaction paid after the due date, interest for overdue payments not paid, refusal to reopen proceedings, etc.

“The Committee of Ministers is a political organ and as such it can bring its weight to bear on the State concerned in order to persuade it to execute the Court's judgment, including through the use of serious political sanctions provided for in the Statute of the Council of Europe”.<sup>536</sup> It will ensure that respondent Contracting Parties pay applicants any awards made by the Court and take any individual measures indicated in the Court's judgment. It will

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535 As pointed out in Section 7 above, applicants should include their bank account details in their claims for just satisfaction when sending those claims to the Court.

536 The ultimate sanction is the expulsion of a Member State from the Council of Europe if that Member State is deemed to have seriously violated Article 3 of the Statute of the Council of Europe, which provides as follows: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I”. See also Article 8 of the same Statute.

also oversee the implementation of more general measures by Contracting Parties so that similar violations are prevented in the future.<sup>537</sup> For example, this may occur where the violation is due to a clear incompatibility between domestic legislation and the Convention, or if it is the result of a structural problem of judicial practice at national level. After establishing that the Contracting Party concerned has taken all the necessary measures to abide by the judgment, the Committee of Ministers adopts a resolution concluding that its functions under Article 46 § 2 of the Convention have been completed.<sup>538</sup> Resolutions adopted by the Committee of Ministers may be searched through the above mentioned HUDOC search engine of the Court.<sup>539</sup>

Protocol No. 14 will enhance the powers of the Committee of Ministers in the area of execution of judgments by adding the following three new sub-paragraphs to Article 46 of the Convention, the second of which is probably the most far-reaching:<sup>540</sup>

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

If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case”.

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537 In this connection, it must be noted that according to Article 9 § 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements which were adopted on 10 May 2006, “The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention”.

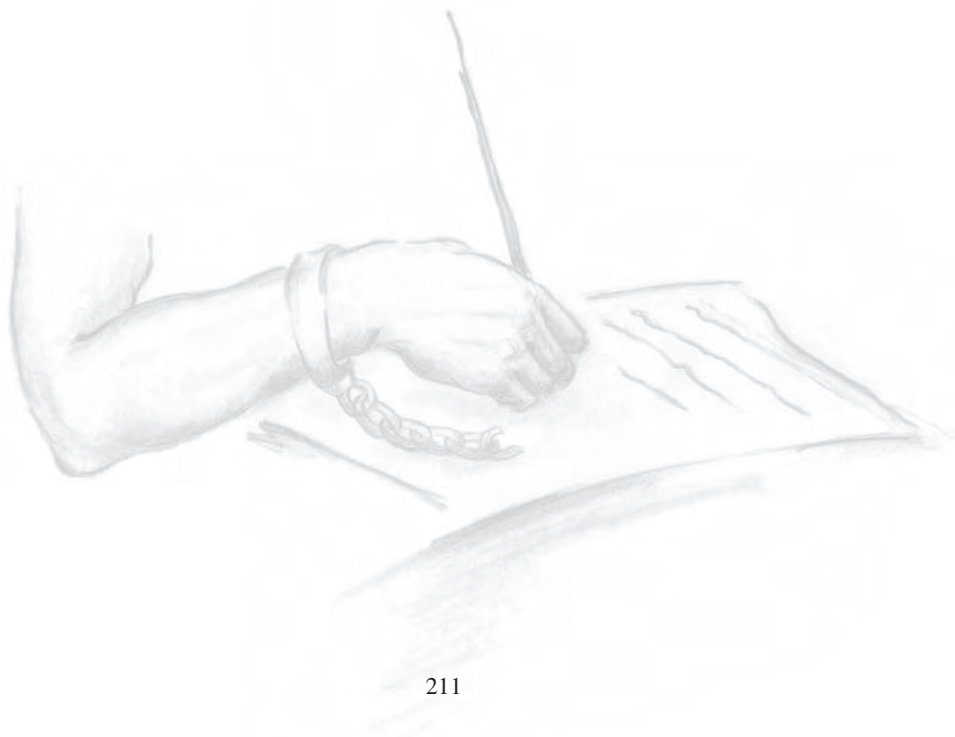
538 See the Committee of Ministers’ webpage devoted to “Execution of Judgments of the European Court of Human Rights” for further information: [http://www.coe.int/T/E/Human\\_Rights/execution/](http://www.coe.int/T/E/Human_Rights/execution/).

539 Which may be accessed at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

540 See Article 16 of Protocol No. 14. See also the paragraphs 16 and 95-100 of the Explanatory Report to that Protocol in Appendix No.18.

## PART IV

### THE ABSOLUTE NATURE OF THE PROHIBITION AND THE INHERENT OBLIGATIONS OF ARTICLE 3



## **THE ABSOLUTE NATURE OF THE PROHIBITION AND THE INHERENT OBLIGATIONS OF ARTICLE 3**

### **10.1 Summary**

### **10.2 Discussion**

#### 10.2.1 The Negative Obligation

#### 10.2.2 The Positive Obligation

- a) The Obligation to Investigate Allegations of Ill-treatment
  - i. Concluding Remarks
- b) The Obligation to Protect Against Ill-treatment by Private Individuals
  - i. Concluding Remarks

## 10.1 Summary

Article 3 of the Convention simply states that

“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

At first sight, Article 3 appears to impose only a negative obligation on Contracting Parties, i.e. an obligation only to refrain from inflicting ill-treatment on individuals within their jurisdiction. However, such a restrictive approach to Article 3 would not provide individuals with adequate protection against ill-treatment for two primary reasons. Firstly, if the right guaranteed by Article 3 did not also impose an obligation on the Contracting Party to conduct effective investigations into allegations of ill-treatment which are capable of leading to the prosecution and punishment of the perpetrators, the obligations of Article 3 would in practice not deter agents of the State from abusing the rights of those within their control. Secondly, if the obligation of Article 3 were only negative, it would in theory allow a Contracting Party to sit by as a passive spectator to ill-treatment by *private actors* without engaging its responsibilities under the Convention.

According to the Court’s case-law, it is now well established that in addition to the negative obligation, Article 3 also imposes two separate positive obligations (sometimes referred to as procedural obligations). Thus, under Article 3, Contracting Parties have a positive obligation to conduct effective investigations into allegations of ill-treatment (regardless of whether the perpetrator is alleged to be an official of the State or a private party) capable of leading to the identification and punishment of those responsible for the ill-treatment.<sup>541</sup> There arises a separate positive obligation to take effective measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment by officials or by private parties.<sup>542</sup> This second positive obligation requires that effective criminal law provisions be in force in order to afford maximum protection from ill-treatment. It also requires that the relevant officials of the Contracting Parties take pre-emptive steps to protect vulnerable individuals from ill-treatment.<sup>543</sup> Indeed, similar positive obligations are inherent in various Articles of the Convention to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective.<sup>544</sup>

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541 See *Assenov v. Bulgaria*, cited above, § 102.

542 See *A. v. the United Kingdom*, no. 25599/94, 23 September 1998, § 22.

543 See *Z. v. the United Kingdom*, no. 29392/95, 10 May 2001, §§ 73-74.

544 See *İlhan v. Turkey*, cited above, § 91.

## 10.2 Discussion

Article 3, together with Article 2 (right to life), is regarded by the Court as:

“one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe. In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention”.<sup>545</sup>

Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment in absolute terms and irrespective of the circumstances or the victim's conduct.<sup>546</sup> The Court has recognised this to be the case even when Contracting Parties are confronted with difficult challenges such as the fight against terrorism and organised crime.<sup>547</sup> Indeed, the Court has recognised that the prohibition of torture constitutes a *jus cogens* norm, that is, a peremptory norm of international law. In *Al-Adsani v. UK*, the Court stated the following:

“Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens* [reference is made to Furundzija and Pinochet (No. 3)] ...

... the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law ...”<sup>548</sup>

Because of the absolute nature of the prohibition, the Court's vigilance is heightened when dealing with Article 3 complaints. Unlike some of the qualified Articles of the Convention, such as Articles 8-11, Article 3 makes no provision for exceptions. It follows, therefore, that although the Court may allow a Contracting Party's national authorities a certain margin of

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545 See, *inter alia*, *Pretty v. the United Kingdom*, cited above, § 49.

546 See, *inter alia*, *Lorsé v. the Netherlands*, cited above, § 58.

547 See, *inter alia*, *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, 13 November 2003, § 632; *Chahal v. the United Kingdom*, cited above, § 79.

548 *Al-Adsani v. the United Kingdom*, no. 35763/97, 21 November 2001.



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appreciation when dealing with issues concerning the rights guaranteed in Articles 8-11 (in particular when striking a fair balance between the competing interests of the individual and of the community as a whole), it will not accord Contracting Parties the same latitude in their examination of allegations of ill-treatment. For example, any attempt by the national authorities to balance the dangers of terrorism or organised crime against an individual's rights under Article 3 will fall foul of the standard of the protection guaranteed in that Article.<sup>549</sup>

The absolute nature of the prohibition of torture and other forms of ill-treatment is examined in detail in the *amicus* briefs submitted by third party interveners in the case of *Ramzy v. The Netherlands*, at Appendix No. 9, and in the *Written Submission to the UK House of Lords by Third Party Interveners in the case of A and Others v. Secretary of State for the Home Department and A and Others (FC) and another v. Secretary of State for the Home Department*, at Appendix No. 16.

### 10.2.1 The Negative Obligation

Despite the absolute nature of the prohibition of ill-treatment, there are situations which permit Contracting Parties to use force against individuals in the exercise of legitimate State functions, as in the context of making arrests. In these situations however, the Court has clarified that:

“in respect of a person deprived of liberty, any recourse to physical force which has not been made strictly necessary by his own conduct, diminishes human dignity and is in principle an infringement of the right set forth in Article 3”<sup>550</sup>

The phrase “strictly necessary by the victim's own conduct” must be construed in a restrictive manner. For example, law enforcement officers sometimes must use force when effecting an arrest if the arrestee resists the arrest by violent or forceful means. In such a situation, an injury caused to the arrested person may fall outside the protection afforded by Article 3 provided that the use of force by the authorities was strictly necessary under the circumstances. In *Klaas v. Germany*, for instance, force used by police officers in the course of the arrest of the applicant who tried to run away resulted in a

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549 The absolute nature of the prohibition has also been emphasised by the European Committee for the Prevention of Torture (CPT): “Like the prohibition of slavery, the prohibition of torture and inhuman or degrading treatment is one of those few human rights which admit of no derogations. Talk of ‘striking the right balance’ is misguided when such human rights are at stake. Of course, resolute action is required to counter terrorism; but that action cannot be allowed to degenerate into exposing people to torture or inhuman or degrading treatment. Democratic societies must remain true to the values that distinguish them from others”.

550 *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, § 38.

number of injuries. The Court found, as the domestic German courts had, that the injuries were caused during the applicant's struggle and that the force used by the police officers was not excessive.<sup>551</sup>

Perhaps one of the most extreme examples of the legitimate use of force is found in the case of *Douglas-Williams v. the United Kingdom*. In this case, the applicant's brother threatened the arresting police officers with a knife. The officers then hit him with their truncheons and pinned him face down on the ground, restrained his hands behind his back, handcuffed him, and transferred him in this position to the police station in a police car. He died of positional asphyxia within one hour and ten minutes of his arrest. The Court did not find a violation in this case because it concluded that the use of restraint techniques was justified by the applicant's own violence.<sup>552</sup> By contrast, in the case of *Rehbock v. Slovenia*, where the use of force against an unarmed person who did not resist caused a double fracture of the jaw, the Court found that such use of force was excessive and therefore amounted to inhuman treatment within the meaning of Article 3.<sup>553</sup>

As the Court held in its judgment in *Pretty v. the United Kingdom*, mentioned above,

“[a]n examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities... It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction”.<sup>554</sup>

If the Court finds that a Contracting Party has failed in its negative obligation, it will find a violation of Article 3 in its substantive aspect.<sup>555</sup>

Cases in which the Court has found a substantive violation of Article 3 may be categorized under three headings: 1) ill-treatment intentionally inflicted by law enforcement officers, such as police and other security forces; 2) ill-treatment resulting from a lawful or unlawful act carried out by State agents; and finally, 3) ill-treatment emanating from State agents' omissions.<sup>556</sup>

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551 *Klaas v. Germany*, no. 15473/89, 22 September 1993, §§ 30-31.

552 *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002.

553 *Rehbock v. Slovenia*, no. 29462/95, 20 May 1998, §§ 68-78.

554 *Pretty v. the United Kingdom*, cited above, § 50.

555 See, for example, *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, 13 November 2003, § 2 of the operative part of the judgment.

556 556 See also Appendix No. 10 for the section in which the Court's judgments in Article 3 cases are examined in different contexts.

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Notable examples of the first category include, *inter alia*, ill-treatment by police officers at the time of arrest and immediately afterwards;<sup>557</sup> ill-treatment during interrogation in police custody;<sup>558</sup> physical and mental violence in police custody;<sup>559</sup> rape in a gendarmerie station;<sup>560</sup> the force-feeding of an applicant on hunger strike;<sup>561</sup> and interrogation techniques employed by law enforcement officers.<sup>562</sup>

The second group of cases concerns actions of State agents which constitute ill-treatment indirectly. It must be noted that such actions need not be carried out with an intention to subject a person to ill-treatment; in fact, in most cases they are not. This group of cases can be divided into two sub-groups: ill-treatment stemming from lawful actions of State agents and ill-treatment stemming from unlawful actions of State agents. Cases in which lawful actions of State agents have led to violations of Article 3 include expulsions or extraditions of applicants to countries where they would be subjected to ill-treatment;<sup>563</sup> prison conditions<sup>564</sup> and corporal punishment.<sup>565</sup> Unlawful actions that subject applicants to indirect ill-treatment have included the intentional destruction of applicants' homes and possessions by soldiers in the course of military operations in southeast Turkey,<sup>566</sup> and the disappearances of the applicants' close relatives after having been taken into unacknowledged detention.<sup>567</sup>

The third group of cases concerns situations where national authorities have failed to assist persons in need of medical assistance. It appears from the Court's case-law that Contracting Parties owe a duty to provide medical care

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557 *Egmez v. Cyprus*, cited above, §§ 74-79.

558 *Salman v. Turkey* cited above, §§ 103 and 115.

559 *Selmouni v. France*, cited above, § 105.

560 *Aydm v. Turkey*, cited above, §§ 86-87

561 *Nevmerzhitsky v. Ukraine*, cited above, §§ 98-99.

562 *Ireland v. the United Kingdom*, cited above, § 96. The five interrogation techniques which the Court found to be degrading and inhuman included wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.

563 See *Soering v. the United Kingdom*, cited above, which concerned the applicant's intended extradition to the United States where there was the possibility that he would be placed on death row; see also *Said v. the Netherlands*, cited above, § 55, in which the Netherlands authorities intended to expel the applicant to Eritrea.

564 See Section 2.6.3 (b) above.

565 *Tyrer v. the United Kingdom*, cited above, § 35.

566 See, *inter alia*, *Ayder and Others v. Turkey*, cited above, § 110, in which the Court found that "the destruction of the applicants' homes and possessions, as well as the anguish and distress suffered by members of their family, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3".

567 See, *Kurt v. Turkey*, no. 24276/94, 25 May 1998, § 134; see also, more recently, *Akdeniz v. Turkey*, cited above, § 124, in which the Court found that "the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and of her inability to find out what has happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3".

to detainees and also to persons whose health problems are caused by Government actions. In its judgment in *McGlinchey and Others v. the United Kingdom*, the Court found a violation of Article 3 on account of the prison authorities' failure to provide adequate medical assistance to a detainee suffering from heroin withdrawal as well as asthma.<sup>568</sup> Similarly, in the case of *Keenan v. the United Kingdom* concerning the suicide in prison of the applicant's son who was an identifiable suicide risk, the Court, in finding a violation, stated:

“[t]he lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk”<sup>569</sup>

In its judgment in the case of *İlhan v. Turkey*, the Court's finding of a violation of Article 3 was influenced by the authorities' failure to provide the applicant's brother, who had been badly beaten up by soldiers and who suffered brain damage and long-term impairment of function as a result of the beating, with medical care until 36 hours after the incident.<sup>570</sup>

Finally, it must be noted that the scope of the duty of care owed by Contracting Parties under the substantive aspect of Article 3 was extended in the case of *Moldovan and Others v. Romania*. In this case, the Court found that police officers had been involved in the destruction of houses and belongings of the applicants, who were Romanian citizens of Roma origin. The destruction took place before Romania ratified the Convention, and for that reason the Court could not examine it. However, the Court pointed out that:

“following this incident, having been hounded from their village and homes, the applicants had to live, and some of them still live, in crowded and improper conditions – cellars, hen-houses, stables, etc. – and frequently changed address, moving in with friends or family in extremely overcrowded conditions”.<sup>571</sup>

Noting “the direct repercussions of the acts of State agents on the applicants' rights”, the Court found that the Government had a responsibility as regards the applicants' subsequent living conditions. The Court concluded that the destitute conditions in which the applicants had to live following the destruction of their houses and belongings, coupled with “the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities” constituted interference with

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568 *McGlinchey and Others v. the United Kingdom*, cited above.

569 *Keenan v. the United Kingdom*, no. 27229/95, 3 April 2001, § 116.

570 *İlhan v. Turkey* [GC], cited above, §§ 86-88.

571 *Moldovan and Others v. Romania*, cited above, § 103.

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their human dignity which, in the special circumstances of the case, amounted to “degrading treatment” within the meaning of Article 3.<sup>572</sup>

### 10.2.2 The Positive Obligation

According to the Court’s established case-law, Contracting Parties have, in addition to the negative obligation examined above, a positive obligation under Article 3 to carry out effective investigations into allegations of ill-treatment and to take measures designed to ensure that individuals within their jurisdictions are not subjected to ill-treatment, including ill-treatment administered by private individuals. As explained below, the Court examines the obligation to carry out an effective investigation either from the standpoint of the positive obligation inherent in Article 3 or from the standpoint of the right to an effective remedy under Article 13. In some cases it has even examined the obligation under both Articles 3 and 13.<sup>573</sup> Before the Court resolves this somewhat inconsistent practice, applicants are strongly advised to invoke both Articles in their applications to the Court.

The issue of positive obligation is examined below under two sub-headings: a) The Obligation to Investigate and b) The Obligation to Protect Against Ill-Treatment by Private Individuals.

#### a) The Obligation to Investigate Allegations of Ill-treatment

In its judgment in the case of *McCann and Others v. the United Kingdom* concerning the killing of the applicants’ relatives by members of the British special forces in Gibraltar, the Court held:

“[A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under [Article 2 of the Convention], read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State”.<sup>574</sup>

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<sup>572</sup> *Ibid.*, § 113.

<sup>573</sup> See, *inter alia*, *Menesheva v. Russia*, no. 59261/00, 9 March 2006, §§ 61-74.

<sup>574</sup> *McCann and Others v. the United Kingdom*, no. 18984/91, 27 September 1995, § 161.

This approach was adopted by the Court in its judgment in the case of *Assenov v. Bulgaria* and was applied, *mutatis mutandis*, to investigations into allegations of ill-treatment. In *Assenov*, the Court stated the following:

“...where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance... would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity”.<sup>575</sup>

The obligation to carry out an effective investigation into allegations of ill-treatment was later “described as a ‘procedural obligation’ which devolves on Contracting Parties under Article 3”.<sup>576</sup> Violations of Article 3 of the Convention based on failures to comply with the positive obligation are referred to as “procedural violations” of Article 3.<sup>577</sup>

It must be noted that the Contracting Parties’ obligation to carry out effective investigations into allegations of ill-treatment existed prior to the adoption of the judgment in the case of *Assenov* and was examined from the standpoint of the obligation to provide adequate remedies under Article 13 of the Convention. The Court stated in its judgment in the case of *Aksoy v. Turkey* that:

“[t]he nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”.<sup>578</sup>

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<sup>575</sup> *Assenov v. Bulgaria*, cited above, § 102.

<sup>576</sup> *Sevtap Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000, § 35. See also Jacobs & White, pp. 66-68 for a review of the evaluation of the positive obligation.

<sup>577</sup> See, *inter alia*, *Elçi and Others v. Turkey*, cited above, § 2 of the operative part of the judgment.

<sup>578</sup> *Aksoy v. Turkey*, cited above, § 98.

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In its judgment in the case of *İlhan v. Turkey* the Court preferred to examine the applicant's allegations concerning the effectiveness of the investigation into his allegations of ill-treatment under Article 13 because it found, *inter alia*, that:

“[p]rocedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective. The obligation to provide an effective investigation into the death caused by, *inter alios*, the security forces of the State was for this reason implied under Article 2 which guarantees the right to life (see the *McCann and Others* judgment cited above, pp. 47-49, §§ 157-64). This provision does, however, include the requirement that the right to life be “protected by law”. It may also concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials... Article 3, however, is phrased in substantive terms. Furthermore, although the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials...”<sup>579</sup>

However, since the adoption of the judgment in *İlhan*, the Court has continued to examine the obligation to carry out investigations both from the standpoint of Article 13 and from the standpoint of Article 3.<sup>580</sup> Recent judgments adopted by the Court highlight the Court's somewhat inconsistent practice in this area. For example, in *Bekos and Koutropoulos v. Greece* the Court, having found a procedural violation of Article 3 on account of the lack of an effective investigation, did not deem it necessary to examine separately the same allegation under Article 13.<sup>581</sup> On the other hand, in *Murat Demir v. Turkey*, the Court considered it more appropriate to examine the allegation of the lack of an effective investigation solely from the standpoint of Article 13.<sup>582</sup> Finally, in a number of cases, including the recent case of *Corsacov v. Moldova*, the Court examined the allegations of a lack of an effective investigation under both Articles 3 and 13 and found a violation of both Articles.<sup>583</sup>

579 *İlhan v. Turkey* [GC], cited above, §§ 91-92.

580 See, *inter alia*, *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, §§ 127-128 and *Elçi and Others v. Turkey*, cited above, § 649; see also the separate opinions of judge Sir Nicolas Bratza in both judgments.

581 *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, §§ 53-57.

582 *Murat Demir v. Turkey*, no. 879/02, 2 March 2006, §§ 43-45.

583 See *Corsacov v. Moldova*, no. 18944/02, 4 April 2006, §§ 68-82.

Applicants should note that it is not necessary for the Court to find a substantive violation of Article 3 before it can examine whether the respondent Contracting Party has complied with its procedural obligations under the article. In fact, sometimes the Court is unable to find a substantive violation *precisely because* the respondent Government has violated its procedural obligations by not conducting an effective investigation. In particular, where the authorities fail to take basic investigative steps (for example by performing medical examinations, autopsies, taking statements from key witnesses, etc.) the substantive violation might be very difficult or impossible for the applicant to prove. This was the case in *Khashiev and Akayeva v. Russia*, which concerned the ill-treatment and killing of Chechen civilians by Russian forces in the vicinity of Grozny in January 2000. The Court found a procedural and substantive violation of Article 2 (right to life). However, because the Russian authorities had failed to conduct autopsies or prepare other forensic reports, it was not possible for the Court to conclude that the victims were tortured before they were killed, and it therefore could not find a substantive violation of Article 3. However, in finding a procedural violation of Article 3, it stated the following:

“[t]he procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, *deriving at least in part, from the failure of the authorities to react effectively to such complaints* at the relevant time ...”.<sup>584</sup>

The kind of investigation that will satisfy a Contracting Party’s obligation under the procedural limb of Article 3 may vary according to the circumstances of the case and nature of the allegations. However, minimum standards identified by the Court in its case-law must be observed. The following paragraphs from the judgment in the case of *Bati and Others v. Turkey*, in which the Court reviewed its case-law on the subject, illustrate the required standards.<sup>585</sup> An investigation into allegations of ill-treatment lacking the following steps will fall foul of the requirement and result in a procedural violation of Article 3 or a violation of Article 13:

“133. ... whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used (see, among other authorities, *Özbey v. Turkey* (dec.), no. 31883/96, 8

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584 *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 178 (emphasis supplied).

585 It must be noted that in *Bati and Others v. Turkey* the Court examined the allegation of a lack of an effective investigation from the standpoint of Article 13 of the Convention only.



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March 2001; see also the Istanbul Protocol, paragraph 100 above<sup>586</sup>). The authorities must take into account the particularly vulnerable situation of victims of torture and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint (see *Aksoy*, cited above, pp. 2286-87, §§ 97-98).

134. The investigation must be ‘effective’ in practice as well as in law, and not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy*, cited above, p. 2286, § 95, and *Aydm*, cited above, pp. 1895-96, § 103). It should be capable of leading to the identification and punishment of those responsible (see *Aksoy*, cited above, p. 2287, § 98). Otherwise, the general legal prohibition of torture and inhuman or degrading treatment or punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

Admittedly, this is a qualified, not an absolute, obligation. The Court takes note of the fact that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence (see *Aksoy*, cited above, p. 2286, § 97). The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard.

135. For an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events (see, *mutatis mutandis*, *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in

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586 The Istanbul Protocol referred to by the Court in this judgment is the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was submitted to the United Nations High Commissioner for Human Rights on 9 August 1999. The “Istanbul Principles” subsequently received the support of the United Nations through resolutions of the United Nations Commission on Human Rights and the General Assembly. It is the first set of guidelines to have been produced for the investigation of torture. The Protocol contains full practical instructions for assessing persons who claim to have been the victims of torture or ill-treatment, for investigating suspected cases of torture and for reporting the investigation’s findings to the relevant authorities. The principles applicable to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment are to be found in Annex 1 of the Manual, reprinted in Appendix No. 7 of the present *Handbook*. See also Conor Foley, *Combating Torture Handbook: A Manual for Judges and Prosecutors*, published by the Human Rights Centre of the University of Essex, United Kingdom, 2003. An online version of the *Handbook* may be consulted at [http://www2.essex.ac.uk/human\\_rights\\_centre/publications/index.shtm](http://www2.essex.ac.uk/human_rights_centre/publications/index.shtm).

practice (see, *mutatis mutandis*, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84, and *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, 4 May 2001).

136. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, among other authorities, *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001, and *Özgür Kılıç v. Turkey* (dec.), no. 42591/98, 24 September 2002). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, it may generally be regarded as essential for the authorities to launch an investigation promptly in order to maintain public confidence in their adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 72, ECHR 2002-II).

137. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure (see *Aksoy*, cited above, p. 2287, § 98, and *Büyükdağ*, cited above, § 67).<sup>587</sup>

In its judgment in the case of *Abdulsamet Yaman v. Turkey* the Court added the following:

“...where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted (see Conclusions and Recommendations of the United Nations Committee against Torture: Turkey, 27 May 2003, CAT/C/CR/30/5).”<sup>588</sup>

Finally, it should be noted that the obligation to investigate “is not an obligation of result, but of means”.<sup>589</sup> Naturally, the Court does not require that every criminal investigation result in a conviction. In *Mikheyev v. Russia* the Court stated the following:

“Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the

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587 *Bati and Others v. Turkey*, cited above. See also Leach pp. 191-198 for a review of the Court’s case-law on the requirement of effective investigations into killings under Article 2 of the Convention, which are also applicable, *mutatis mutandis*, in the context of Article 3 of the Convention.

588 *Abdulsamet Yaman v. Turkey*, cited above, § 55.

589 *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71.

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facts of the case and, if the facts prove to be true, to the identification and punishment of those responsible (see, *mutatis mutandis*, *Mahmut Kaya v. Turkey*, no. 22535/93, § 124, DCHR 2000-III).<sup>590</sup>

*i. Concluding Remarks*

It must be stressed once more that the positive obligation examined above is not limited solely to cases of ill-treatment by State agents;<sup>591</sup> investigating authorities of the Contracting Parties are under an obligation to investigate allegations of ill-treatment regardless of the identity of the alleged perpetrator.

The types and methods of domestic criminal investigations and criminal trials in the Contracting Parties vary considerably, and neither the Convention nor the Court's case-law require uniformity in these respects. However, the Court's paramount consideration is that whatever methods are employed, criminal investigations should be capable of establishing the accuracy of allegations of ill-treatment and lead to the identification and punishment of those responsible. The requirements of an effective investigation set out in the above mentioned judgments have been identified by the Court on a case-by-case basis, and the list is by no means exhaustive. When distilling these requirements the Court has sometimes identified defects in the national legislation of the Contracting Parties while observing in some other instances that the shortcomings were due to negligence – or reluctance – of the authorities to investigate the allegations. Defects identified in a national criminal justice system obviously need to be remedied by the national law-making bodies to ensure compliance with the Convention system. Furthermore, the Contracting Parties need to ensure that their investigating authorities conduct their business properly and in accordance with applicable law and procedure. Mention must once more be made of the close relationship between effective remedies and the requirement of exhaustion of domestic remedies. As pointed out earlier, there is no obligation to exhaust a remedy that is ineffective.<sup>592</sup> Furthermore, if an applicant succeeds in demonstrating that a particular remedy is ineffective, this will not only absolve the applicant from the requirement of exhausting that remedy but may also lead the Court to find a procedural violation of Article 3 or a violation of Article 13.

When arguing that the national authorities have failed to investigate their allegations of ill-treatment, applicants should refer to the criteria described in

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590 *Mikheyev v. Russia*, no. 77617/01, 26 January 2006, § 107.

591 See, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17 January 2002.

592 See Section 2.4.2 above.

the Court's case-law, using these criteria as a "check list" and should refer to the relevant judgments in which they figure.

Finally, because of the Court's present practice of examining allegations of ineffective investigations both under Articles 3 and 13, and until the Court resolves the issue, applicants should consider invoking both Article 3 and Article 13 in relation to complaints concerning the effectiveness of investigations.

#### **b) The Obligation to Protect Against Ill-treatment by Private Individuals**

According to the Court's case-law, Article 3 protects individuals not only from ill-treatment emanating directly from State agents but also, in certain circumstances, from ill-treatment at the hands of private individuals. This is a positive obligation, sometimes referred to as the third-party effect, or *drittwirkung*, of the Convention under Article 3 which is conferred upon the Contracting Parties by the Court's case-law. Under this obligation, States are not only required to enact legislation criminalising ill-treatment but also to enforce their legislation in a way that affords real and effective protection for individuals.

This obligation was described in the judgment in the case of *A. v. the United Kingdom* where the Court held that the obligation on the Contracting Parties:

"under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".<sup>593</sup>

Such protection requires the existence of effective domestic law provisions criminalising ill-treatment by private individuals and adequate application of those provisions by the judiciary.

The *A. v. the United Kingdom* case concerned an applicant who at the age of nine was regularly beaten by his stepfather. The Court found that this treatment rose to the level of severity prohibited by Article 3. The stepfather did not deny having beaten A. and was charged with and tried for assault occasioning actual bodily harm. However, he was found not guilty of assault occasioning actual bodily harm as he successfully invoked the defence of "reasonable chastisement" provided for parents and other persons *in loco parentis* in domestic law. The Court in Strasbourg, in agreement with the

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593 *A. v. the United Kingdom*, cited above, § 22.

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respondent Government, found that the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.<sup>594</sup>

When the victim is a vulnerable individual, the scope of the obligation to protect individuals from harm at the hands of private individuals is broader. In such circumstances the Contracting Parties will be under an obligation to take reasonable steps to prevent harm if their authorities knew or had reason to know of that maltreatment.<sup>595</sup>

For example in *Z. v. the United Kingdom* the Court stated that the measures referred to in its judgment in the case of *A. v. the United Kingdom* “should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge”.

In the *Z. v. the United Kingdom* case, the failure of social services to protect the applicants – four siblings – from serious abuse at the hands of their parents for a period of four and a half years, notwithstanding their awareness of the abuse, left “no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse” in violation of Article 3 of the Convention.<sup>596</sup>

The scope of the positive obligation to provide effective protection was further extended by the Court in its decision in the case of *M.C. v. Bulgaria*, where the Court considered that States also “have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution”.<sup>597</sup> In this case, the investigating authorities discontinued the investigation into the applicant’s allegations that she had been raped by two men on a date. The absence of direct proof of rape, such as traces of violence and resistance or calls for help, formed the basis for the authorities’ decision to discontinue the investigation. The Court held:

“the investigation of the applicant’s case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”<sup>598</sup>

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594 *Ibid.*, §§ 18 and 24.

595 See also Alastair R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, 2004, pp. 43-65.

596 *Z. v. the United Kingdom*, cited above, §§ 73-74.

597 *M.C. v. Bulgaria*, cited above, § 153.

598 *Ibid.*, § 185.

The Court went on to find a violation of Article 3.

*i. Concluding Remarks*

It follows from the jurisprudence discussed above that the positive obligation to take steps to protect individuals from harm at the hands of other private individuals exists primarily when the victim is a “vulnerable” individual, such as a child. On the other hand, the positive obligation to enact domestic law provisions criminalising ill-treatment by private individuals and adequate application of those provisions by the judiciary exists regardless of the identity of the victim. In this connection, parallels may be drawn between the positive obligations under Article 3 and those that exist under Article 2. According to the Court’s established case-law concerning the right to life, the first sentence of Article 2 § 1 requires the Contracting Parties not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction.<sup>599</sup> As with the obligation inherent in Article 3, Article 2 also imposes an obligation to put in place effective criminal law provisions to deter the commission of offences against the person. Furthermore, the State’s obligation in this respect includes “in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.<sup>600</sup>

However, not every claimed risk to life entails for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. It must be established to the Court’s satisfaction that the authorities knew or should have known of the existence of a real and immediate risk to the life of the individual(s) from the criminal acts of a third party and that they failed to take measures within the scope of their powers which reasonably might have prevented the harm.<sup>601</sup> It follows, therefore, that the obligation to take pre-emptive steps to protect an individual from being killed depends on the identity or the circumstances of the victim. In an Article 3 case, on the other hand, the applicant will be expected to show that he or she belongs to a category of persons who are vulnerable for reasons of, for example, age, mental or physical health and that the authorities therefore were under an obligation to exercise a heightened standard of vigilance to protect them from harm.

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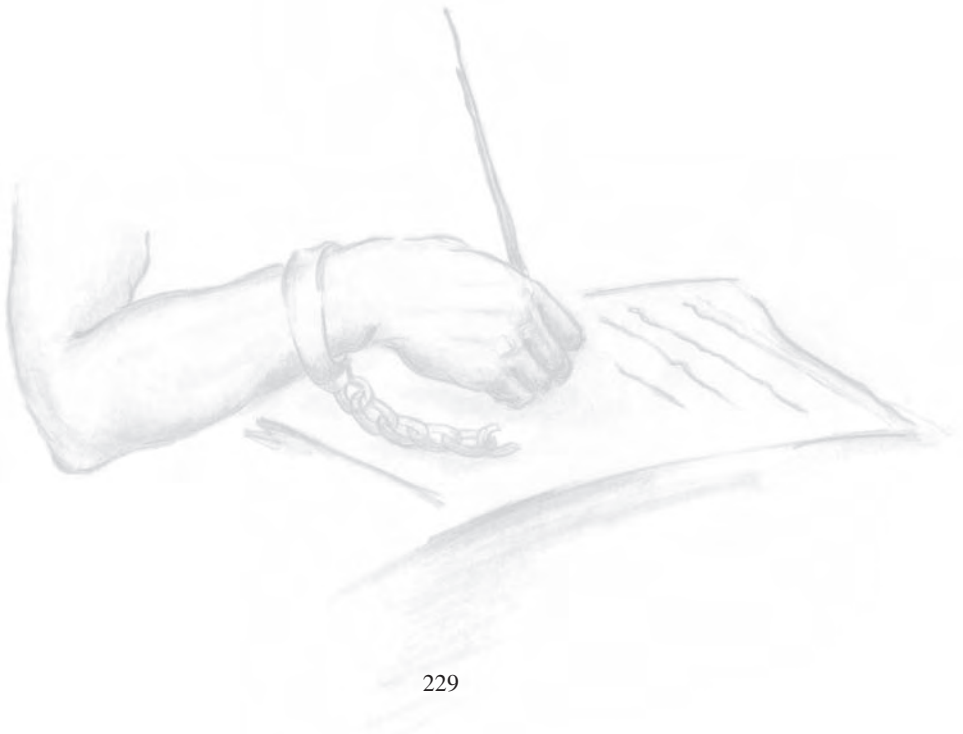
599 See, *inter alia*, *L.C.B. v. the United Kingdom*, no. 23413/94, 9 June 1998, § 36.

600 See *Osman v. the United Kingdom*, no. 23452/94, 28 October 1998, § 115.

601 *Ibid.*, § 116.

## PART V

### ESTABLISHMENT OF FACTS



## **THE ESTABLISHMENT OF FACTS**

### **11.1 Summary**

### **11.2 The Court's Powers in the Establishment of Facts**

### **11.3 Fact-finding Hearings**

### **11.4 Admissibility of Evidence**

#### 11.4.1 Medical Evidence

#### 11.4.2 Witnesses

#### 11.4.3 Other Evidence

#### 11.4.4 Reports Compiled by International Organisations

### **11.5 Burden of Proof**

#### 11.5.1 Obligation to Account for Injuries Caused During Custody

#### 11.5.2 Obligation to Assist the Court in Establishing Facts

#### 11.5.3 Concluding Remarks

### **11.6 Standard of Proof**



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## 11.1 Summary

In the preceding section's discussion of the negative obligation, Article 3 cases were examined as belonging to three groups, namely those in which 1) ill-treatment was intentionally inflicted by law enforcement officers, 2) ill-treatment was caused as a consequence of a lawful or unlawful act carried out by State agents, and finally, 3) ill-treatment emanated from State agents' omissions. It is particularly in the first type of cases that the facts will most often be in dispute and where they will need to be established by the Court. In the second and third categories of cases, facts will not usually be disputed but the applicants will need to satisfy the Court that the ill-treatment they allege reached the minimum threshold and that the use of force by State agents was not warranted in the circumstances of the case. The second and third category cases have already been discussed above (see Section 2.2.4, on the "well-foundedness" of the application) and further regard may be had to Appendix No. 10 where the Court's Article 3 jurisprudence is examined in detail in all three categories of cases. For purposes of examining the way in which the Court establishes the facts in an Article 3 case, the present section will predominantly deal with the first category of cases, i.e. where ill-treatment is intentionally inflicted by State officials. Reference will be made to judgments which concerned not only ill-treatment but also violations of Article 2 (violations of the right to life) since considerations pertaining to the establishment of facts are generally applicable in both types of cases.

Before the Court can reach a finding under Article 3 on an allegation of ill-treatment, it must first establish the facts of the case, i.e. the accuracy of the applicant's allegations and the circumstances surrounding those allegations. In establishing the facts, the Court has adopted a system of free evaluation of evidence whereby no evidence is inadmissible and no witness is incompetent to testify.<sup>602</sup> Furthermore, although the Court will expect the applicant to adduce evidence in support of his or her allegations, in circumstances where the applicant is unable to do so, the Court may obtain such evidence of its own motion, either by asking the respondent Government to provide it or by taking evidence *in situ*.

The types of evidence which may be adduced in order to substantiate allegations of ill-treatment include – but are not limited to – medical and forensic reports, x-rays and other similar medical records, witness statements, photographs, custody records, reports compiled by inter-governmental and non-governmental organisations, and documents showing that the applicant's

602 See *Nachova and Others v. Bulgaria*, cited above, § 147.

allegations of ill-treatment have been brought to the attention of the domestic authorities.

The Court, in assessing the evidence before it, employs a very high standard of proof, i.e. the “beyond reasonable doubt” standard.<sup>603</sup> Nevertheless, it should be noted that this high standard is to a certain extent mitigated by the Court’s reliance on inferences<sup>604</sup> and the fact that the Court will under certain circumstances shift the burden of proof to the respondent Government.<sup>605</sup>

In cases involving allegations of ill-treatment, the burden to disprove the applicant’s allegations will shift to the Government in two circumstances. Firstly, if the applicant has been detained in good health but is found to be injured upon release, the respondent Government must explain those injuries.<sup>606</sup> Secondly, if the Government withholds evidence that the Court believes has a bearing on the applicant’s case, the Government will be required to show that the documents do not corroborate the applicant’s allegations.<sup>607</sup>

## 11.2 The Court’s Powers in the Establishment of Facts

In most instances, the facts of a case will already have been established by national courts. The duty of the Strasbourg Court will then usually be limited to examining whether or not those factual findings “entail a result compatible with the requirements of the Convention”.<sup>608</sup> The Court has often made it clear that it is:

“sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Where domestic proceedings have taken place, it is not the Court’s task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them. Though the Court is not bound by the findings of domestic courts, in nor-

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603 See *Ireland v. the United Kingdom*, cited above, § 161.

604 See Section 11.5.2 below.

605 See Section 11.5 below.

606 See *Selmouni v. France*, cited above, § 87.

607 See *Akkum and Others v. Turkey*, cited above, § 211. As will be seen below, the Court may, instead of shifting the burden to the Government, prefer to draw inferences from the Government’s failure to cooperate with the Court; see *Timurtaş v. Turkey*, cited above, § 66.

608 See P. Mahoney, “Determination and Evaluation of Facts in Proceedings Before the Present and Future European Court of Human Rights” in Salvino Busutil, ed., *Mainly Human Rights: Studies in Honour of J. J. Cremona*, (Fondation Internationale Malte, 1999) pp. 119-134.

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mal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts. The same principles apply *mutatis mutandis* where no domestic court proceedings have taken place because the prosecuting authorities have not found sufficient evidence to initiate such proceedings. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place".<sup>609</sup>

It follows that under certain circumstances, particularly in the context of Article 2 and 3 violations, the Court will not hesitate to take on the role of a first instance tribunal and establish the disputed facts. Such circumstances may include situations where domestic authorities have failed to carry out effective investigations into allegations of ill-treatment or where they have failed to punish those responsible. The *Adalı v. Turkey* judgment cited above illustrates the point that a purported lack of evidence, which might have prevented domestic authorities from bringing criminal proceedings against persons implicated in ill-treatment, will not deter the Court from investigating the allegations of its own motion if such a course of action appears justified under the circumstances. Furthermore, whatever the outcome of the domestic proceedings, the conviction or acquittal of those implicated in ill-treatment does not absolve the respondent State from its responsibility under the Convention to account for any injuries found on a person at the time of his or her release from detention.<sup>610</sup> For example, in the case of *Ribitsch v. Austria*, the Court observed that the police officers allegedly responsible for the ill-treatment had been acquitted because of the high standard of proof required in the domestic legislation. In this connection the Court observed that significant weight had been given by the domestic court to the explanation that the injuries were caused by a fall against a car door. The Court, finding this explanation unconvincing, considered that even if Mr Ribitsch had fallen while he was being moved under escort, this could only have provided a very incomplete, and therefore insufficient, explanation of the injuries he sustained.<sup>611</sup>

The following sub-sections will deal with the evidential issues and the methods employed by the Court in establishing facts.

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609 See, *inter alia*, *Adalı v. Turkey*, no. 38187/97, 31 March 2005, § 213.

610 *Selmouni v. France*, cited above, § 87.

611 *Ribitsch v. Austria*, cited above, § 34.

## 11.3 Fact-finding Hearings

Before the entry into force of Protocol No. 11, it was the Commission that established the facts of a case and reached a conclusion as to whether those facts revealed a breach of the Convention. While the Court was not bound by the Commission's findings and remained free to make its own assessment of the facts in light of all the material before it, it was only in exceptional circumstances that it exercised such powers in this area.<sup>612</sup> Following the entry into force of Protocol No. 11, however, the Court has assumed this role as the Commission no longer exists.

During its time, the Commission carried out a number of fact-finding hearings in the territory of the respondent Contracting Party in cases where the facts were disputed between the parties. The majority of such hearings were held in Turkey. To carry out these fact-finding hearings, the Commission appointed delegations comprised of Commission and Registry members. The Commission delegates questioned the applicants, eye-witnesses, and expert witnesses, such as doctors. Representatives of the parties were also entitled to cross-examine the applicants and witnesses. Despite a number of difficulties associated with such hearings, including language and cultural differences and the fact that witnesses could not be compelled to attend, these fact-finding hearings enabled the Commission to carry out its task of establishment of facts satisfactorily.

Following the entry into force of Protocol No. 11, the Court has continued to hold fact-finding hearings. However, because of its very heavy case load, it has done so in only a small number of cases. These fact-finding missions are carried out pursuant to Article 38 § 1 (a) of the Convention, which provides:

“If the Court declares the application admissible,<sup>613</sup> it shall pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities”.

Furthermore, the Annex to the Rules of Court<sup>614</sup> sets out the procedure to be followed in such hearings and regulates the conduct of those participating in them. According to Rule 1 § 3 of the Annex to the Rules of Court,

“[a]fter a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its

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612 *Akdvar and Others v. Turkey*, cited above, § 78.

613 Following the entry into force of Protocol No. 14, Contracting Parties will have the obligation under this Article to cooperate with the Court not only after admissibility of the application, but at all stages of the proceedings. See Article 14 of Protocol No. 14.

614 The Annex to the Rules of Court entered into force on 7 July 2003.

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members or of the other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. The Chamber may also appoint any person or institution of its choice to assist the delegation in such manner as it sees fit.”

The Court may decide to hold a fact-finding hearing of its own motion, but applicants can also invite the Court to do so. Any such request must be reasoned, and the applicant should explain how a fact-finding hearing would help establish the facts. The applicant should also submit a list of the proposed witnesses together with information about their relevance to the events in question. In the context of Article 3 complaints, such witnesses may include the perpetrators of the ill-treatment, doctors who carried out medical examinations of the applicant, investigating authorities to whose attention the allegations of ill-treatment were brought, and eye-witnesses. As an example of such a request, Appendix No. 13 can be consulted for the applicant’s observations in the case of *Kişmir v. Turkey*, in which the applicant invited the Court to hold a fact-finding hearing to question a number of witnesses identified by her in her observations.

If the Court decides to hold a fact-finding hearing, it is imperative for an applicant to be represented by a lawyer who is capable of asking pertinent questions and adequately cross-examining witnesses. It is not uncommon for previously undisclosed documents to be produced during a fact-finding hearing and the representative must be able to study such documents on very short notice and formulate new questions in light of them.

Simultaneous interpretation will be arranged by the Court’s Registry, and the costs associated with fact-finding hearings will be borne by the Council of Europe. Following the hearing, the parties will receive the verbatim records of the hearing and will usually be able to submit further observations on the basis of the information obtained in the hearing.

## 11.4 Admissibility of Evidence

The Court has a very liberal attitude towards the admissibility of evidence; it has adopted a system of free evaluation of evidence<sup>615</sup> whereby no evidence is inadmissible and no witness is incompetent to testify.

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615 *Nachova and Others v. Bulgaria* [GC], cited above, § 147.

The Court made it clear in its judgment in the case of *Ireland v. the United Kingdom* that it is:

“not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials”.<sup>616</sup>

Furthermore:

“the Court being master of its own procedure and of its own rules ... has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it”.<sup>617</sup>

This liberal approach of the Court to the admissibility of evidence is unavoidable because in many human rights cases there is an understandable lack of direct evidence. Furthermore, for an international court which in most cases is located far from the location where the incident has occurred, there will be inevitable difficulties in accessing first-hand evidence, and therefore decisions will have to be made largely on the basis of the evidence submitted by the parties. What follows is a review of the Convention institutions' case-law with regard to the types of evidence which have been found to be particularly important in cases concerning complaints of ill-treatment.

### 11.4.1 Medical Evidence

Where allegations of ill-treatment are contested, medical findings constitute the most objective and convincing type of evidence.<sup>618</sup> In this regard, the applicant should note that the *most* probative kind of medical evidence is evidence that is obtained *immediately upon*, or *very shortly after*, the applicant's ill-treatment and which is consistent with the applicant's allegations. In practical terms, this usually means that medical evidence should be obtained upon the applicant's release from State custody, since ill-treatment most often occurs in the custodial setting. This is in line with the fact that in order to prevail in an Article 3 case, the applicant must establish a direct causal link between his or her injuries and the fact of having been in the control of the State. Therefore, the longer the applicant waits before seeking medical assistance, the more difficult it is going to be for him or her to prove that the

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616 *Ireland v. the United Kingdom*, cited above, § 209.

617 *Ibid.*, § 210.

618 See D. R. Jones and S. V. Smith, “Medical Evidence in Asylum and Human Rights Appeals,” in *International Journal of Refugee Law*, (2004) Vol. 16 No. 3, pp. 381-410 and the references cited therein.

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injuries were sustained during, or were connected with, his or her custody. If the applicant succeeds in establishing that his or her injuries occurred while in the custody of the State, then the burden of proof shifts to the respondent State to disprove the allegations, or to prove that the use of force which caused the injuries was warranted and proportionate under the circumstances. Moreover, for purposes of showing exhaustion of domestic remedies, it is equally important that the applicant has shared such evidence with the relevant domestic authorities in the context of a complaint as soon as possible after the occurrence of the ill-treatment. These issues are discussed further below in the context of the Court's case-law.

As mentioned above, by far the strongest medical evidence is a medical report drawn up immediately after the period of detention during which the person was ill-treated. However, in some cases the applicant might not have been medically examined at the time of release. Furthermore, there may be problems associated with medical reports drawn up while the person is still in the custody of the State. For example, the applicant's medical examination might have been carried out in the presence of police officers, in which case the applicant may conceivably have been too frightened to inform the doctor of the extent or cause of his or her injuries. The medical examinations and reports drawn up in the course of those examinations themselves may sometimes be very short and therefore not capable of proving or disproving the applicant's allegations of ill-treatment.<sup>619</sup> For example, in the case of *Elçi and Others v. Turkey* the Court observed that “[t]he collective medical examination of the applicants prior to being brought before the Public Prosecutor can only be described as superficial and cursory... The Court does not therefore attach great weight to it”.<sup>620</sup>

In this context, it may be useful to consult the CPT Standards on Police Custody, the relevant parts of which provide as follows:

“As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer”.<sup>621</sup>

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619 See Camille Giffard, *The Torture Reporting Handbook: How to document and respond to allegations of torture within the international system for the protection of human rights*, published by the Human Rights Centre of the University of Essex, United Kingdom, 2000. An online version of the Handbook may be consulted at [http://www2.essex.ac.uk/human\\_rights\\_centre/publications/index.shtml](http://www2.essex.ac.uk/human_rights_centre/publications/index.shtml).

620 *Elçi and Others v. Turkey*, cited above, § 642.

621 CPT Standards may be consulted at <http://www.cpt.coe.int/en/documents/eng-standards.doc>

When examining allegations of ill-treatment, the Court takes these standards into account. For example, in the case of *Akkoç v. Turkey* the applicant alleged that she had been subjected to ill-treatment in police custody which included being doused with hot and cold water and subjected to electric shocks and blows to the face. Upon release she was brought together with sixteen other detainees before a doctor who stated in a “medical report” that they had not suffered any physical blows. A few days after her release, she was medically examined at a university where x-rays of her head were taken showing that her chin had been broken. The Commission, after holding a fact-finding hearing in Turkey and hearing a number of persons who had witnessed the applicant’s state of health following her release from police custody, concluded that she had indeed been subjected to the treatment described in her application form. This conclusion was subsequently upheld by the Court, which found a violation of Article 3. In its judgment the Court stated the following:

“The Court further endorses the comments expressed by the Commission concerning the importance of independent and thorough examinations of persons on release from detention. The European Committee for the Prevention of Torture (CPT) has also emphasised that proper medical examinations are an essential safeguard against ill-treatment of persons in custody. Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations. The practices of cursory and collective examinations illustrated by the present case undermines [*sic*] the effectiveness and reliability of this safeguard”.<sup>622</sup>

The lack of medical evidence in an ill-treatment case will not necessarily mean that the applicant will be unable to prove his or her allegations of ill-treatment. As the Commission stated in *Çakıcı v. Turkey*, in cases of unacknowledged detention and disappearance, independent, objective medical evidence or eyewitness testimony is unlikely to be forthcoming and to require either as a prerequisite of a finding of a violation of Article 3 would undermine the protection afforded by that provision.<sup>623</sup> Similarly, in the case of *Tekin v. Turkey* the Court observed that:

“[i]t is true that, as the Government have pointed out, the applicant was unable to provide any independent evidence, for example medical reports, to substantiate his allegations of ill-treatment. However, in this respect the Court notes that the State authorities took no steps to ensure that Mr Tekin was seen by a doctor during his time in detention or upon his release,

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622 *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, § 118.

623 *Çakıcı v. Turkey*, no. 23657/94, Commission Report of 12 March 1998.



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despite the fact that he had complained of ill-treatment to the public prosecutor ... who was under a duty under Turkish law to investigate this complaint".<sup>624</sup>

In both cases the Court found the applicants' allegations of ill-treatment to be substantiated but it based its decision on evidence obtained by the Commission which had held fact-finding missions in Turkey during which members of the Commission questioned the applicants and a number of eye-witnesses.<sup>625</sup> The lack of medical evidence obtained immediately after the period of detention may therefore be compensated by obtaining evidence *in situ*. However, and as pointed out earlier, the Court holds fact-finding hearings in only a small number of cases and for this reason applicants should consider obtaining independent medical reports as soon as possible after their release from custody.

The probative value of independent medical reports is increased if those reports have been brought to the attention of the national authorities. Bringing the evidence to the attention of the national authorities is also critically important for the requirement of exhaustion of domestic remedies. For example, in the case of *Dizman v. Turkey*, the applicant had been taken away from a café by plain-clothes police officers who ill-treated him in a deserted field. He was then released and taken to a hospital by his relatives the same day. The medical examination and x-rays taken in the course of that examination revealed that his jaw had been broken and required surgery. The following day the applicant submitted the x-rays to the attention of the prosecutor and made an official complaint about the ill-treatment. In response, the prosecutor sent the applicant to the Forensic Medicine Directorate where he obtained another medical report, confirming that his jaw had been broken. The police officers were subsequently tried but acquitted for lack of sufficient evidence, in particular, due to the fact that the medical report in question had been obtained two days after the alleged event. The Strasbourg Court accepted the accuracy of the applicant's allegations of ill-treatment and noted that neither the respondent Government nor any other domestic authority had contacted the hospital where the applicant claimed to have been examined and where x-rays were taken immediately after his release in order to verify the accuracy of the applicant's statement.<sup>626</sup>

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624 *Tekin v. Turkey*, no. 22496/93, 9 June 1998, § 41.

625 For a review of the issue of the role of medical evidence in international human rights tribunals, see Camille Giffard and Nigel Rodley, "The Approach of International Tribunals to Medical Evidence in Cases Involving Allegations of Torture" in Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, Greenwich Medical Media Limited, 2002, pp. 19-43.

626 *Dizman v. Turkey*, cited above, §§ 75-76.

Similarly, in the case of *Balogh v. Hungary*, the applicant alleged that he had been beaten in the course of his interrogation by police. However, the applicant did not obtain a medical examination until two days after his release. He claimed that:

“he had had no experience with the police or with any other authorities before the incident. He was not therefore aware of the importance of contacting officials at once about his injuries. Although his injuries required immediate medical attention, he felt humiliated and ashamed because of the incident. Being unfamiliar with the towns which he subsequently passed through on his way home, he did not seek medical help until he returned to his home town. However, he was in constant pain throughout this period on account of the severity of his injuries”.<sup>627</sup>

The respondent Government submitted, for its part, that “[d]ue to the applicant’s belatedness in seeking medical help ... the medical expert ... could not determine with certainty whether the applicant’s injuries had been inflicted before, during or after his interrogation”.<sup>628</sup> The Court rejected the Government’s submissions and held that:

“... the applicant, having been interrogated in police custody on 9 August 1995, was said by his four companions to have left the police station with a red and swollen face. All these witnesses deposed, in consistent terms, that he must have been beaten ... It is true that the applicant did not seek medical help in the evening of the alleged incident or on the next day, but waited until 11 August 1995 before doing so. However, in view of the fact that the applicant immediately sought medical assistance on his arrival in his home town, the Court is reluctant to attribute any decisive importance to this delay, which, in any event, cannot be considered so significant as to undermine his case under Article 3”.<sup>629</sup>

This case illustrates that independent medical reports that are corroborated by witness statements will have an even higher evidential value than medical reports standing on their own.

Moreover, before relying on a medical report obtained some time after the release, the Court will take into account the degree of consistency of the applicant’s allegations and will expect the applicant to describe with a certain amount of precision the causal link between the medical report and the ill-treatment. This is illustrated in the case of *Gurepka v. Ukraine* in which the applicant submitted to the Court a medical report, drawn up six days after his release from detention, showing that the conditions of detention had had a negative effect on his health. The Court rejected the allegation as being manifestly ill-founded, holding in relevant part:

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627 *Balogh v. Hungary*, cited above, § 37.

628 *Ibid.*, § 40.

629 *Ibid.*, §§ 48-49.

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“[i]n so far as the applicant complains of his detention in a cold cell and his ensuing health problems allegedly caused by it, the Court finds that the applicant has failed to demonstrate that the impugned treatment, formulated by the applicant in very general terms, attained the minimum level of severity proscribed by Article 3 of the Convention, particularly in the absence of any medical or other evidence ... The sick leave certificate presented by the applicant as to his illness from 7 December 1998, that is 6 days after his release, does not constitute sufficient proof of a causal link with the alleged ill-treatment”.<sup>630</sup>

Where possible, medical evidence obtained from institutions specialising in identifying and treating ill-treatment should also be submitted to the Court in support of allegations of ill-treatment.<sup>631</sup>

However, and as pointed out above, the Court requires that such evidence is first brought to the attention of the national authorities to give them the opportunity to investigate allegations of ill-treatment. Failure to do so may result in the complaint being declared inadmissible for non-exhaustion of domestic remedies. This is illustrated in the case of *Saraç v. Turkey* in which the applicant argued that she had been taken into police custody where she was hung from her arms and hit repeatedly on the head with truncheons until she lost consciousness. While unconscious, her feet were burnt by cigarettes. Following this, she was raped with a truncheon on two occasions. She was then taken by car to an isolated place and abandoned. Thirteen days after the event in question the applicant went to the Human Rights Foundation of Turkey and sought medical assistance. Following medical examinations carried out over a period of three days in two different hospitals and the Nuclear Medical Centre in Istanbul, including gynaecological and neurological tests, x-rays, thorax graphics, scintigraphic imaging, and examinations by an ear, nose and throat consultant as well as a psychiatrist, the doctors concluded in a medical report that the applicant’s allegations of ill-treatment, such as post-traumatic stress, depression, marks on her feet caused by cigarette burns, and a pelvic complaint were compatible with the medical findings. The Strasbourg Court, observing that neither this report nor any relevant evidence in support of the allegations of ill-treatment had ever been conveyed to the public prosecutor, concluded that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.<sup>632</sup>

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630 *Gurepka v. Ukraine*, no. 61406/00, 6 September 2005, § 35.

631 For a review of the medical techniques in documenting ill-treatment, see Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, Greenwich Medical Media Limited, 2002. See also Appendix No. 8 for “Diagnostic Tests”, published in the Istanbul Protocol, for a review of advanced medical techniques used in the diagnoses of ill-treatment.

632 *Saraç v. Turkey* (dec.), no. 35841/97, 2 September 2004.

## 11.4.2 Witnesses

According to Rule 1 of the Annex to the Rules of Court:

“...[t]he Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks”.

Other than hearing witnesses directly, the Court also accepts statements taken from any eye-witnesses or other persons whose testimonies may help it establish the facts of cases. Naturally, statements taken from such witnesses by domestic authorities will have a higher evidential value. For example, in the case of *Akdeniz v. Turkey*, the Court accepted the applicant’s allegation that her son had been detained and ill-treated by soldiers solely on the basis of statements taken by the investigating prosecutor from a number of eye-witnesses to the events. In fact, the prosecutor himself had concluded, on the basis of the same eye-witness evidence, that the applicant’s allegations were true but had failed to prosecute those responsible.<sup>633</sup>

The Court also takes into account eye-witness statements taken by an applicant him or herself or by his or her lawyer or an NGO. However, such statements need to be corroborated by other evidence. Furthermore, as both parties to a case will be given the opportunity to comment on any documents submitted in Convention proceedings, the Court may attach greater evidential value to an unauthenticated document if its accuracy and veracity is not contested by the parties. For instance, in the case of *Koku v. Turkey* the applicant submitted to the Court a chronology of events in which attacks against, and killings of, members of a pro-Kurdish political party were detailed. He argued that his brother, who had been a member of that party, was kidnapped and his disappearance was not investigated by the authorities. The body of his brother was found some months after the kidnapping. The Court, noting that the respondent Government had not contested the accuracy of the document submitted by the applicant, and noting further that the alleged kidnapping and disappearance happened at a time when dozens of other politicians of the same political party were being kidnapped, injured, and killed, accepted that the authorities had failed to protect the right to life of the applicant’s brother and found a violation of Article 2 of the Convention.<sup>634</sup>

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633 *Akdeniz v. Turkey*, cited above, §§ 81-82.

634 *Koku v. Turkey*, cited above, § 131.

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### 11.4.3 Other Evidence

In cases concerning allegations of ill-treatment, the Court has examined a wide variety of evidence submitted to it by the parties or obtained by the Court itself. Such evidence has included, *inter alia*, custody records showing that a particular person had or had not been detained at a particular detention facility, photographs of the applicant's body,<sup>635</sup> video footage of the prison cell in which the applicant was allegedly detained,<sup>636</sup> plans of the detention facility where the applicant was detained and raped and which she described in her application form,<sup>637</sup> a piece of cloth used to blindfold the applicant in police custody while he was being ill-treated,<sup>638</sup> autopsy reports showing that the person had been subjected to ill-treatment prior to his killing,<sup>639</sup> and photographs showing that a body had been mutilated.<sup>640</sup> It must be stressed that such objects, individually, do not constitute conclusive evidence and in most cases they will be regarded as circumstantial evidence. However, sufficient circumstantial evidence may persuade the Court, in the absence of any direct evidence – which can be very difficult to obtain in human rights cases – to find an applicant's allegations established.

### 11.4.4 Reports Compiled by International Organisations

Reports compiled by governmental and non-governmental organisations are regularly relied on as evidence by the Court. For example, in examining allegations relating to prison conditions, the Court frequently relies on the reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) based on that organisation's visits to prisons in the territory of the respondent Contracting Party.<sup>641</sup>

Furthermore, reports prepared by such organisations enable the Court to take into account the general human rights situation in a Contracting Party when examining allegations of ill-treatment against that Party. For example, in its judgment in the case of *Elçi and Others v. Turkey* the Court relied on the CPT's reports on Turkey when examining the testimony of the Government's witnesses during the fact-finding hearing. The Court observed that:

“In its second public statement, issued on 6 December 1996, the CPT

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635 *Mathew v. the Netherlands*, cited above, §§ 158-165.

636 *Ostrovar v. Moldova*, cited above, § 72.

637 *Aydın v. Turkey*, cited above, § 39.

638 *Tekin v. Turkey*, no. 22496/93, Commission Report of 17 April 1997, § 190.

639 *Süheyła Aydın v. Turkey*, cited above, § 188.

640 *Akkum and Others v., Turkey*, cited above, §§ 51-52.

641 See, *inter alia*, *Van der Ven v. the Netherlands*, cited above, §§ 32-33. For further details on the mandate and working methods of the CPT, see Appendix No. 11.

noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that torture and other forms of ill-treatment were still important characteristics of police custody. In the course of visits in 1996, CPT delegations once again found clear evidence of the practice of torture and other forms of severe ill-treatment by the police. It referred to its most recent visit in September 1996 to police establishments. It noted the cases of seven persons who had been very recently detained at the headquarters of the anti-terrorism branch of the Istanbul Security Directorate and which ranked among the most flagrant examples of torture encountered by CPT delegations in Turkey. It concluded that resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey”.<sup>642</sup>

In reference to this information, the Court stated that the Government witnesses before the Commission Delegates had “constantly denied the applicants’ allegations, but in such a strident manner as to cast doubt on their testimony in the light of the accepted background knowledge for the period”.<sup>643</sup> Similarly, in its judgment in the case of *Khashiyev and Akayeva v. Russia* the Court, in concluding that the applicants’ version of the events was accurate, consulted reports prepared by human rights groups and documents prepared by international organisations which supported their version of events.<sup>644</sup>

Furthermore, in expulsion and extradition cases the Court may consult the Guidelines, Position Papers, and Country Reports published by the United Nations High Commissioner for Refugees (UNHCR).<sup>645</sup> The Court also has regard to information and reports compiled by non-governmental organisations. For example, in the case of *Kalantari v. Germany* the Court examined evidence submitted to it by the World Organisation Against Torture (OMCT) showing that the applicant would be at risk of persecution if expelled to Iran.<sup>646</sup> In *Said v. the Netherlands*, the Court concluded that the expulsion of the applicant to Eritrea would expose him to a real risk of being subjected to treatment contrary to Article 3 relying in part on material compiled by Amnesty International showing the existence of such a risk.<sup>647</sup>

Applicants are therefore advised to append any such reports or information to their application or to their observations. Applicants should avoid submitting such information separately, and in order to avoid the risk of rejection by the Court, all supporting evidence should be submitted within the applicable time limits for submission of written pleadings (see Rule 38 § 1).

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642 *Elçi and Others v. Turkey*, cited above, § 599.

643 *Ibid.*, § 643.

644 *Khashiyev and Akayeva v. Russia*, cited above, § 144.

645 See, *inter alia*, *N. v. Finland*, cited above, §§ 119-121.

646 *Kalantari v. Germany*, no. 51342/99, 11 October 2001, §§ 35-36.

647 *Said v. the Netherlands*, cited above, §§ 31-35.

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## 11.5 Burden of Proof

As pointed out above, Convention proceedings do not always lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation).<sup>648</sup> In this connection, reference may be made to the Court's judgment in *Ireland v. the United Kingdom*:

“[I]n order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*”.<sup>649</sup>

Nevertheless, according to the Court's established case-law, an applicant bears the initial burden of producing evidence in support of his or her complaints at the time the application is introduced. Once the applicant satisfies this burden and the Court decides that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3,<sup>650</sup> the burden may shift to the Government to disprove the applicant's allegations. The Court's case-law provides for such a shift in two circumstances. They are examined below.

### 11.5.1 Obligation to Account for Injuries Caused During Custody

The difficulties associated with proving ill-treatment have perhaps best been described by Judge Bonello in his dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey*, in which he stated the following:

“[e]xpecting those who claim to be victims of torture to prove their allegations ‘beyond reasonable doubt’ places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim's complaint is almost invariably confronted with the negation ‘corroborated’ by many”.<sup>651</sup>

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648 See Section 2.6.2.above.

649 *Ireland v. the United Kingdom*, cited above, § 160.

650 See Section 2.6 above.

651 *Sevtap Veznedaroğlu v. Turkey*, cited above. As regards the issue of standard of proof beyond reasonable doubt, see Section 11.6 below.

Indeed, in most cases of ill-treatment, the only evidence the victim will be able to produce is his or her own testimony. However, the Court is aware of this difficulty and has created its own unique set of rules to mitigate it. Thus, according to the Court's established case-law, if the victim of ill-treatment is able to show that he or she suffered injuries while in the custody of the State, the Court will shift the burden onto the Government to explain those injuries.

*Ribitsch v. Austria* was the first case in which the burden was expressly shifted onto the respondent Government to explain injuries caused during police custody.<sup>652</sup> In this case, it was not disputed that the applicant had suffered injuries in custody. However, the respondent Government submitted that because of the required high standard of proof in the proceedings before the national courts, it had not been possible to establish that the policemen had been responsible for the applicant's injuries. The Government also argued that in order for a violation of the Convention to be found, it was necessary for the ill-treatment to be proved beyond reasonable doubt. The Commission rejected the Government's argument and found that where a person sustains injuries in police custody, it is for the Government to produce evidence establishing facts which cast doubt on the allegations of the victim, particularly if the victim's account is supported by medical certificates. In this case, the explanations put forward by the Government were not sufficient to cast a reasonable doubt on the applicant's allegations concerning ill-treatment.<sup>653</sup> The Commission's approach was adopted by the Court, which found in its subsequent judgment that Article 3 had been violated.<sup>654</sup>

This approach was followed by the Court in its judgment in the case of *Selmouni v. France*; the Court stated that

“... where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention”.<sup>655</sup>

In its judgment in the case of *Salman v. Turkey*, the Court added that “[t]he obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies”.<sup>656</sup>

Three aspects of the Court's finding in *Selmouni* require further exploration. They are: 1) the question of *when* the obligation to account for a detainee's

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652 For a review of the issue of burden of proof in Convention proceedings, see U. Erdal, “Burden and Standard of Proof in Proceedings under the European Convention” (2001) 26 *EL Rev. Human Rights Survey*, 81 et seq., (hereinafter referred to as “Erdal”).

653 *Ribitsch v. Austria*, cited above, § 31.

654 *Ibid.*, § 40.

655 *Selmouni v. France*, cited above, § 87.

656 *Salman v. Turkey*, cited above, § 99.



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fate starts, 2) the *duration* of the period during which the obligation is in force, and 3) the meaning of the term “plausible explanation”.

As regards the first question, it must be stressed that the term “police custody” in *Selmouni*, or “custody” in *Salman*, does not necessarily imply that the person has been placed in a detention facility.<sup>657</sup> In its judgment in the case of *Yasin Ateş v. Turkey*, which concerned the killing of the applicant’s son during a military operation following his arrest, the Court held that a lack of evidence in support of the applicant’s allegation that his son had been killed by agents of the State did not:

“mean that the respondent Government are absolved from their responsibility to account for Kadri Ateş’s death, which occurred while he was under arrest. In this connection the Court reiterates that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them”.<sup>658</sup>

Referring to its earlier case-law, the Court went on to hold:

“... States are under an obligation to account for the injuries or deaths which occurred, not only in custody, but also in areas within the exclusive control of the authorities of the State because, in both situations, the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005)”.<sup>659</sup>

It follows, therefore, that a Contracting Party’s obligation will begin as soon as its agents detain a person, regardless of whether that person is subsequently placed in a detention facility.

As regards the second aspect – the duration of the obligation to account for a detainee’s fate – the Contracting Parties’ obligation to protect a detained person continues until that person is released. It appears from the Court’s case-law that it is incumbent on the Contracting Party to show that the person is released. This issue is well illustrated by the judgment in the case of *Süheyla Aydın v. Turkey*, in which the applicant’s husband was arrested and detained at a police station. He was then brought before a judge at the court house who ordered his release on 4 April 1994. However, he never emerged from that court house and on 9 April 1994 his body was found in a field some 40 kilometres away. The Government argued that the applicant’s husband had been released on 4 April 1994 and responsibility for his subsequent death could not be attributed to agents of the State. The Commission held a fact-finding

657 See, *mutatis mutandis*, *H.L. v. the United Kingdom*, no. 45508/99, 5 October 2004, § 91.

658 *Yasin Ateş v. Turkey*, no. 30949/96, 31 May 2005, § 93.

659 *Ibid.*, § 94.

hearing in Turkey to hear a number of witnesses, but the respondent Government failed to identify and summon police officers who had accompanied the applicant's husband to the court house on 4 April 1994. Furthermore, the Government failed to produce any documents to prove that the applicant's husband had indeed been released. The Court concluded in its judgment of 24 May 2005 that:

“[i]n the light of the above-mentioned failure of the Government to identify and summon the police officers who accompanied Necati Aydın to the Diyarbakır Court on 4 April 1994, coupled with the absence of a release document, the Court concludes that the Government have failed to discharge their burden of proving that Necati Aydın was indeed released from the Diyarbakır Court building on 4 April 1994. The Court finds it established that Necati Aydın remained in the custody of the State. It follows that the Government's obligation is engaged to explain how Necati Aydın was killed while still in the hands of State agents. Given that no such explanation has been put forward by the Government, the Court concludes that the Government have failed to account for the killing of Necati Aydın”.<sup>660</sup>

In this judgment the Court also referred to Article 11 of the Declaration on the Protection of all Persons from Enforced Disappearance (United Nations General Assembly resolution 47/133 of 18 December 1992). This Article provides that

“[a]ll persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured”.<sup>661</sup>

Finally, as regards the third aspect, i.e. the nature of the “plausible explanation” for the injuries caused during custody, the Commission has held that in cases where injuries occurred in the course of police custody, it is “not sufficient for the Government to point at other possible causes of injuries, but it is incumbent on the Government to produce evidence showing facts which cast doubt on the account given by the victim and supported by medical evidence”.<sup>662</sup> Similarly, in the above mentioned case of *Ribitsch v. Austria* the respondent Government's explanations “were not sufficient to cast a reasonable doubt on the applicant's allegations concerning ill-treatment he had allegedly undergone while in police custody”.<sup>663</sup>

In establishing whether a respondent Government has accounted for injuries caused in custody, the Court refers to investigations – in particular forensic

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660 *Süheyla Aydın v. Turkey*, cited above, § 154.

661 *Ibid.*, § 153.

662 See *Klaas v. Germany*, cited above, § 103.

663 *Ribitsch v. Austria*, cited above, § 31.

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and medical examinations – carried out at the national level. For example, in the case of *Salman v. Turkey*, in which the detained person died in police custody, the Court observed that no plausible explanation had been provided by the respondent Government:

“for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government’s contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage”.<sup>664</sup>

In reaching that conclusion, the Court noted a number of medical reports prepared by international forensic experts on the basis of the post-mortem reports prepared following the death of the detained person. Thus, it concluded that the opinion expressed in the post-mortem report which found that the bruising of the chest pre-dated the arrest and that the detained person died of a heart attack brought on by the stress of his detention alone and after a prolonged period of breathlessness, “was rebutted by the evidence of Professors Pounder and Cordner”.<sup>665</sup>

In the case of *Kişmir v. Turkey*, the respondent Government submitted, as a possible explanation for the death of the applicant’s son in police custody, that the death could have been due to a childhood illness. However, the Court observed that the Government had failed to put forward any evidence in support of that submission. There was no indication in the documents submitted by the Government that the deceased person had any previous health problems.<sup>666</sup> The Court further observed that the Government had not specifically dealt in its observations with the cause of the oedema in the lungs, which was the cause of death according to post mortem examinations. The Court agreed with the shortcomings in the post mortem examination identified by an international forensic expert who had been commissioned by the applicant and who had drawn up his report on the basis of the post mortem reports prepared following the death.<sup>667</sup>

In *Akkum and Others v. Turkey*, the Court, examining whether the Government had explained the killings of the applicant’s two relatives, assessed the oral evidence taken by the Commission’s delegates and also took particular note of the investigation carried out at the domestic level.

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664 *Salman v. Turkey*, cited above, § 102.

665 *Ibid.*

666 *Kişmir v. Turkey*, cited above, §§ 91-98. See also Appendix No. 13 for the applicant’s observations.

667 *Ibid.*, § 85.

Having established that no meaningful investigation had been conducted at the domestic level capable, firstly, of establishing the true facts surrounding the killings and the mutilation of one of the bodies, and secondly, of leading to the identification and punishment of those responsible, the Court concluded that the Government had failed to account for the killings and for the mutilation in violation of Articles 2 and 3 of the Convention.<sup>668</sup>

It also appears from the Court's case-law that when a respondent Government fails to conduct a medical examination before placing a person in detention, it will to some extent have forfeited the argument that the injuries present at the time of release pre-dated the period of detention. Thus, in its judgment in the case of *Abdülşamet Yaman v. Turkey* the Court observed that the applicant had not been medically examined at the beginning of his detention and had not had access to a doctor of his choice while in police custody. Following his transfer from police custody, he had undergone two medical examinations which resulted in a medical report and the inclusion of a medical note in the prison patients' examination book. Both the report and the note referred to scabs, bruises, and lesions on various parts of the applicant's body.<sup>669</sup> Those injuries, in the absence of a plausible explanation from the respondent Government, were sufficient for the Court to conclude that they were the result of ill-treatment for which the Government bore responsibility in violation of Article 3 of the Convention.<sup>670</sup>

In conclusion, based on the case-law examined above, the Court expects a respondent Government to provide a satisfactory and convincing explanation for injuries and deaths caused in custody. It is not sufficient for a respondent Government to point to other potential causes without providing adequate evidence in support of its submissions. Any medical evidence submitted by a respondent Government will be scrutinised by the Court before it can be accepted as proof of the cause of injury or death in custody. It is also open to applicants to submit to the Court medical reports to rebut those put forward by the respondent Government. Furthermore, the Court itself can ask a forensic expert to comment on any medical evidence submitted by the parties. The Commission did just this in the *Salman v. Turkey* case mentioned above when it requested an expert opinion on the medical issues in the case "from Professor Cordner, Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine".<sup>671</sup>

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668 *Akkum and Others v. Turkey*, cited above, §§ 212-232.

669 *Abdülşamet Yaman v. Turkey*, cited above, § 45.

670 *Ibid.*, §§ 46-48.

671 See *Salman v. Turkey*, cited above, § 6.

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### 11.5.2 Obligation to Assist the Court in Establishing Facts

As pointed out above, pursuant to Article 38 § 1 of the Convention, respondent Governments have an obligation to cooperate with the Court in the establishment of facts. Furthermore, according to Rule 44A of the Rules of Court, the parties to a case before the Court<sup>672</sup> have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice.

The Court has encountered difficulties in establishing the facts in a number of cases in which respondent Governments have failed to cooperate either by withholding documents or other evidence requested by the Court, or by failing to submit all the relevant documents in their possession. In this connection, the Court has stated that:

“it is of the utmost importance for the effective operation of the system of individual petition, instituted under Article 34 of the Convention, that States should furnish all necessary facilities to make possible a proper and effective examination of applications”.<sup>673</sup>

The Court acknowledged in its judgment in the case of *Timurtaş v. Turkey* that where an individual applicant accuses State agents of violating his or her rights under the Convention, it is in certain instances solely the respondent Government that has access to information capable of corroborating or refuting these allegations. The failure of a respondent Government to submit such information in its possession – or to submit it timely – without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention.<sup>674</sup> The case of *Timurtaş* concerned the disappearance of the applicant’s son after the latter had allegedly been taken into unacknowledged custody by soldiers. The respondent Government denied that the applicant’s son had been detained. The applicant submitted to the Commission a photocopy of a document which he argued was a post-operation military report. The report detailed the arrest and detention of his son by the soldiers who took part in the operation. When requested by the Commission to submit the original of the document, the respondent Government argued that a document with the same reference number did indeed exist but that they could not submit it to the Commission as it con-

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672 Indeed, the duty to cooperate with the Court is extended in Rule 44A to Contracting Parties which are not even parties to the case at hand.

673 *Tanrıkulu v. Turkey* [GC], no. 23763/94, 8 July 1999, § 70.

674 *Timurtaş v. Turkey*, cited above, § 66.

tained military secrets. In the Government's opinion, the photocopy of the original document had been manipulated by the applicant to insert the name of his son. The Court stated in its judgment that the Government was in a pre-eminent position to assist the Commission by providing access to the document which it claimed was the genuine one; it was insufficient for the Government to rely on the allegedly secret nature of the document. In light of the respondent Government's failure to submit the original document, the Court drew an inference as to the well-foundedness of the applicant's allegations and accepted that the photocopied document was indeed a photocopy of the authentic post-operation report. Consequently, the Court found it established that the applicant's son had indeed been detained by the soldiers and had died in their custody.<sup>675</sup>

The approach adopted by the Court in the case of *Timurtaş* has become established practice, and the Court continues to draw inferences from the failures of respondent Governments to submit documents and other evidence as to the well-foundedness of applicants' allegations. Furthermore, on 13 December 2004 a new Rule was added to the Rules of Court in light of the approach adopted by the Court in *Timurtaş*.<sup>676</sup> According to this Rule:

"[w]here a party fails to adduce evidence or provide information requested by the Court or to divulge relevant important information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate".

It was not until the adoption of the judgment in the case of *Akkum and Others v. Turkey* on 31 May 2005 that a respondent Government's failure to cooperate with the Court by withholding relevant documents led the Court to shift the burden to that Government to disprove an applicant's allegations. This case, in so far as relevant, concerned the killing of two of the applicants' relatives in an area where a military operation had taken place, as well as the mutilation of the ears of one of those relatives. When the documents submitted by the parties proved insufficient to establish the facts of the case, the Commission held a fact-finding mission in Turkey and heard, *inter alia*, a number of military personnel who had taken part in the operation. Their testimonies made it clear that there existed another military report which was potentially capable of shedding light on the events in question but which the Government had not made available to the Commission. The Commission requested that the Government submit the report, but the Government failed to respond. The applicants, for their part, argued that in the circumstances of the case, the Government was required to provide a plausible explanation of

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675 *Ibid.*, § 86.

676 Rule 44C of the Rules of Court.

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how their relatives had been killed. In support of their arguments, they referred to the judgment of the Inter-American Court of Human Rights in the case of *Godinez Cruz v. Honduras*, in which that court held the following:

“in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State’s cooperation” (judgment of 20 January 1989, Inter-Am. Ct. H. R. Ser. C No. 5, § 141).

Moreover, the Human Rights Committee has also adopted a similar approach. The applicants referred to *Barbato v. Uruguay* (Human Rights Committee Communication No. 84, 1981, § 9.6), in which it had been considered that:

“with regard to the burden of proof, the Committee has already established in other cases that the said burden cannot rest alone on the complainant, especially considering that the author and the State Party do not always have equal access to the evidence and that frequently the State Party has access to the relevant information”.

The Court accepted the applicants’ arguments and held that it was inappropriate to conclude that they had failed to submit sufficient evidence in support of their allegations, given that such evidence was in the hands of the respondent Government. The Court considered it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is responsible,<sup>677</sup> and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. According to the Court, that parallel was based on:

“the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. It is appropriate, therefore, that in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise”.<sup>678</sup>

Observing that the Government had failed to make any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicants’ claims, the Court went on to examine the investigation carried out at the national level in order to establish whether the respondent Government had discharged its burden. Having established that the domestic investigation was defective in many ways, the Court found that

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<sup>677</sup> See Section 11.5.1 above.

<sup>678</sup> *Akkum and Others v. Turkey*, cited above, § 211.

the Government had failed to account for the killings and also for the mutilation of one of the bodies, in violation of Articles 2 and 3 of the Convention.

Similarly, in the case of *Çelikbilek v. Turkey*, the Court, referring to the *Akkum and Others* judgment, shifted the burden to the Government to prove that the documents it withheld could not serve to corroborate the applicant's allegations. In this case the applicant alleged that his brother had been taken into police custody and killed there. Despite the Commission's, and subsequently the Court's, numerous requests that the Government submit copies of the custody records to enable them to verify whether the applicant's brother had indeed been taken into custody, the Government failed to submit those records. The Court held:

“in cases such as the present – where it is the non-disclosure by the Government of crucial documents in their possession which puts obstacles in the way of the Court's establishment of facts –, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegation made by the applicant”.<sup>679</sup>

Noting that the Government had not presented any such arguments, the Court found that the applicant's brother had indeed been arrested and detained by agents of the State as alleged by the applicant. Noting further that no explanation had been put forward by the Government to explain the killing, the Court concluded that the Government had failed to account for the killing in violation of Article 2 of the Convention.<sup>680</sup>

The judgments in the cases of *Akkum and Others v. Turkey* and *Çelikbilek v. Turkey*, mentioned above, brought the Court's case-law in the area of burden of proof in line with the case-law of the Inter-American Court of Human Rights as well as that of the Human Rights Committee. In this connection, it must be pointed out that according to the Rules of Procedure of the Inter-American Commission on Human Rights:

“[t]he facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion”.<sup>681</sup>

It remains to be seen whether the Rules of Court in Strasbourg will be modified in the light of the Court's new approach to the burden of proof.

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679 *Çelikbilek v. Turkey*, no. 27693/95, 31 May 2005, § 70.

680 *Ibid.*, §§ 71-72.

681 Article 39 of the Rules of Procedure of the Inter-American Commission on Human Rights.



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### 11.5.3 Concluding Remarks

There is an understandable difficulty in obtaining evidence in ill-treatment cases. Because of the nature of ill-treatment, perpetrators are usually the only persons to witness it and they are therefore in a position to cover up their criminal actions. Such a cover-up will make it very difficult to establish the accuracy of allegations even if the authorities do have the will to investigate them. In certain circumstances, perhaps less frequent, perpetrators will not be deterred from ill-treating people publicly and will not even make attempts to cover up their actions because of the tolerance displayed by the authorities towards such actions. In such cases the authorities will not secure the evidence implicating State agents in the ill-treatment. Whatever the reasons, the fact remains that in most instances the victim will have difficulties supporting his or her case with “hard” evidence. It is in light of this fact that the Court’s unique rules of evidence pertaining to the burden of proof must be examined. Burden-shifting compensates for the superior situation of a respondent Contracting Party *vis-à-vis* an individual and maximises the opportunity for the Court to establish the truth.

Needless to say, a respondent Government will not bear the burden of disproving each allegation of ill-treatment made against it. As pointed out elsewhere, the Court will have weeded out the frivolous allegations in its examination of the admissibility of an application. The rules discussed above relating to the burden of proof are employed by the Court only after it has decided that the allegations are not manifestly ill-founded. Furthermore, the Court will also require the applicant to be consistent in his or her allegations throughout the proceedings. For example, in the *Akkum and Others v. Turkey* and *Çelikkilek v. Turkey*, discussed above, the applicants were consistent in their allegations throughout the proceedings before the Convention institutions and did everything within their power to substantiate those allegations. These two cases can be contrasted with the case of *Togcu v. Turkey*, which concerned the disappearance of the applicant’s son after the latter had allegedly been detained by police officers. In his application form and later observations the applicant presented seriously contradictory versions of events leading up to his son’s alleged detention by the police. The Government, for its part, failed to submit to the Court a number of important documents including custody records. The Court stated that it was faced with a situation in which it was unable to establish what had taken place and that this inability had emanated from, on the one hand, the contradictory information submitted by the applicant, and, on the other hand, the incomplete investigation file submitted by the Government. While noting the difficulties for an applicant to obtain the necessary evidence from the hands of the respondent Government, the Court concluded that to shift the burden of proof onto a

respondent Government under circumstances similar to those in the case of *Akkum and Others* required by implication that the applicant have already made out a *prima facie* case. In light of the contradictory versions of events put forward by the applicant, the Court concluded that he failed to make out his case to the extent necessary for the burden to shift to the Government to explain that the documents withheld by them contained no relevant information concerning his son's disappearance.<sup>682</sup>

## 11.6 Standard of Proof

The Commission held in the *Greek Case* that the standard of proof it adopted when evaluating the material it had obtained was "proof beyond reasonable doubt".<sup>683</sup> This standard was also adopted by the Court in its judgment in the inter-State case of *Ireland v. the United Kingdom*, in which it stated the following:

"...to assess [the] evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account".<sup>684</sup>

"Reasonable doubt" was explained by the Commission in the *Greek Case* in the following terms:

"A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented".<sup>685</sup>

The high standard adopted by the Court has been the focus of intense criticism from a substantial number of the Court's own judges over the years. For example, eight of the seventeen judges of the Grand Chamber in the case of *Labita v. Italy* stated, *inter alia*, the following in their dissenting opinion:

"The majority of the Court considered that the applicant has not proved 'beyond all reasonable doubt' that he was subjected to ill-treatment in Pianosa as he alleged. While we agree with the majority that the material produced by the applicant constitutes only *prima facie* evidence, we are nonetheless mindful of the difficulties which a prisoner who has suffered ill-treatment on the part of those responsible for guarding him may experi-

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682 *Toğcu v. Turkey*, cited above, §§ 96-97.

683 *The Greek Case*, Yearbook of the Convention, 1969, p. 196, § 30.

684 *Ireland v. the United Kingdom*, cited above, § 161.

685 § 30.

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ence, and the risks he may run, if he denounces such treatment... We are accordingly of the view that the standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable since, in the absence of an effective investigation, the applicant was prevented from obtaining evidence and the authorities even failed to identify the warders allegedly responsible for the ill-treatment complained of. If States may henceforth count on the Court's refraining in cases such as the instant one from examining the allegations of ill-treatment for want of sufficient evidence, they will have an interest in not investigating such allegations, thus depriving the applicant of proof 'beyond reasonable doubt'... Lastly, it should be borne in mind that the standard of proof 'beyond all reasonable doubt' is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation; its task is to protect victims and provide redress for damage caused by the acts of the State responsible. The test, method and standard of proof in respect of responsibility under the Convention are different from those applicable in the various national systems as regards responsibility of individuals for criminal offences...".<sup>686</sup>

Similarly, Judge Bonello stated in his dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey* that

"[p]roof 'beyond reasonable doubt' reflects a maximum standard relevant and desirable to establish *criminal* culpability. No person shall be judicially deprived of liberty, or otherwise penally censured, unless his guilt is manifest 'beyond reasonable doubt'. I subscribe to that stringent standard without hesitation. But in other fields of judicial enquiry, the standard of proof should be proportionate to the aim which the search for truth pursues: the highest degree of certainty, in criminal matters; a workable degree of probability in others... Confronted by conflicting versions, the Court is under an obligation to establish (1) on whom the law places the burden of proof, (2) whether any legal presumptions militate in favour of one of the opposing accounts, and (3) 'on a balance of probabilities', which of the conflicting versions appears to be more plausible and credible. Proof 'beyond reasonable doubt' can, in my view, only claim a spurious standing in 'civil' litigation, like the adversarial proceedings before this Court. In fact, to the best of my knowledge, the Court is the only tribunal in Europe that requires proof 'beyond reasonable doubt' in non-criminal matters".<sup>687</sup>

A review of the Court's case-law on the subject provides little guidance as to the nature of the "reasonable doubt" standard. However, the same review of the case-law reveals that in most cases the doubts which have prevented the Court from finding allegations to be substantiated were attributable to a lack of evidence which could only have been obtained with the cooperation of the respondent Contracting Party.<sup>688</sup> It is submitted that the application of this

686 *Labita v. Italy* [GC], cited above.

687 *Sevtap Veznedaroğlu v. Turkey*, cited above.

688 See Erdal, pp. 73-79.

criminal law standard adopted from common law legal systems, in isolation from a number of other principles in those legal systems which are intertwined with this standard, may not always result in the establishment of the true facts of a case. In this connection, three principles associated with the standard of proof in common law legal systems are relevant for the purposes of illustration. Firstly, in the legal systems where the standard of proof “beyond reasonable doubt” is employed, the burden of proving the guilt of the accused rests solely on the prosecution, and the accused person does not have to prove his or her innocence. This is not so in Convention proceedings: the applicant does not have the legal burden in its technical sense, and therefore the burden of proof continually shifts.<sup>689</sup>

The second prominent principle of the common law legal systems connected with the standard of proof “beyond reasonable doubt” is the defendant’s right to silence. By virtue of this right, an accused person enjoys the freedom from compulsion to incriminate him or herself while at the same time enjoying the right not to have adverse inferences drawn from his or her silence. On the other hand, a respondent Government in Convention proceedings does not enjoy such freedoms. As pointed out above, Contracting Parties have obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to assist the Court in establishing the facts of cases. The failure of a respondent Government to cooperate with the Court may give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations and, in certain circumstances, to the shifting of the burden to the Government.

Finally, the standard of proof “beyond reasonable doubt” is applied in conjunction with a rule of evidence whereby only the most relevant evidence is admissible. In Convention proceedings, on the other hand, no evidence is inadmissible, and therefore it is easy for the respondent party to create doubts in the minds of the Court’s judges by adducing evidence which would be inadmissible in a court of law in common law legal systems.

The Court acknowledged the criticisms in its judgment of 6 July 2005 in the case of *Nachova and Others v. Bulgaria* and stated the following:

“In assessing evidence, the Court has adopted the standard of proof ‘beyond reasonable doubt’. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the

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689 Both in the area of exhaustion of domestic remedies and in the area of establishment of facts as explained above in Sections 2.4.2 and 11.5, respectively.

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Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights".<sup>690</sup>

This new approach has already been followed in the judgment of 29 September 2005 in the case of *Mathew v. the Netherlands*, in which the Court added that the term "beyond reasonable doubt" has an autonomous meaning in the context of Convention proceedings.<sup>691</sup> However, the term remains undefined, and the Court has yet to state with precision the nature of the standard in Convention proceedings.

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690 *Nachova and Others v. Bulgaria*, cited above, § 147.

691 *Mathew v. the Netherlands*, cited above, § 156.



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## **APPENDICES**







**Convention for the Protection  
of Human Rights  
and Fundamental Freedoms  
as amended by Protocol No. 11**

**with Protocol Nos. 1, 4, 6, 7, 12 and 13**

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed.

Registry of the European Court of Human Rights  
September 2003

# **Convention for the Protection of Human Rights and Fundamental Freedoms**

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

## **Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

## **SECTION I – RIGHTS AND FREEDOMS**

### **Article 2 – Right to life**

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Article 3 – Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **Article 4 – Prohibition of slavery and forced labour**

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this article the term "forced or compulsory labour" shall not include:
  - a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

- c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- d any work or service which forms part of normal civic obligations.

#### **Article 5 – Right to liberty and security**

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

**Article 6 – Right to a fair trial**

- 1 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 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;

- c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 7 – No punishment without law**

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **Article 8 – Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 9 – Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 6

- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

**Article 10 – Freedom of expression**

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

**Article 11 – Freedom of assembly and association**

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

#### **Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

#### **Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

#### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### **Article 15 – Derogation in time of emergency**

- 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.



**Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

**Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

**Article 18 – Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## **SECTION II – EUROPEAN COURT OF HUMAN RIGHTS**

### **Article 19 – Establishment of the Court**

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.

### **Article 20 – Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

### **Article 21 – Criteria for office**

- 1 The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
- 2 The judges shall sit on the Court in their individual capacity.
- 3 During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

### **Article 22 – Election of judges**

- 1 The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
- 2 The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

**Article 23 – Terms of office**

- 1 The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
- 2 The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
- 3 In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
- 4 In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
- 5 A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
- 6 The terms of office of judges shall expire when they reach the age of 70.
- 7 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

**Article 24 – Dismissal**

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

**Article 25 – Registry and legal secretaries**

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

## **Article 26 – Plenary Court**

The plenary Court shall

- a elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- b set up Chambers, constituted for a fixed period of time;
- c elect the Presidents of the Chambers of the Court; they may be re-elected;
- d adopt the rules of the Court, and
- e elect the Registrar and one or more Deputy Registrars.

## **Article 27 – Committees, Chambers and Grand Chamber**

- 1 To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
- 2 There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
- 3 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

## **Article 28 – Declarations of inadmissibility by committees**

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

**Article 29 – Decisions by Chambers on admissibility and merits**

- 1 If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
- 2 A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
- 3 The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

**Article 30 – Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

**Article 31 – Powers of the Grand Chamber**

The Grand Chamber shall

- a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
- b consider requests for advisory opinions submitted under Article 47.

**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 and 47.
- 2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 33 – Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

### **Article 34 – Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

### **Article 35 – Admissibility criteria**

- 1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
- 2 The Court shall not deal with any application submitted under Article 34 that
  - a is anonymous; or
  - b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
- 3 The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
- 4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

**Article 36 – Third party intervention**

- 1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
- 2 The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

**Article 37 – Striking out applications**

- 1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
  - a the applicant does not intend to pursue his application; or
  - b the matter has been resolved; or
  - c for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

- 2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

**Article 38 – Examination of the case and friendly settlement proceedings**

- 1 If the Court declares the application admissible, it shall
  - a pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

b place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2 Proceedings conducted under paragraph 1.b shall be confidential.

#### **Article 39 – Finding of a friendly settlement**

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

#### **Article 40 – Public hearings and access to documents**

1 Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2 Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

#### **Article 41 – Just satisfaction**

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.

#### **Article 42 – Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

#### **Article 43 – Referral to the Grand Chamber**

1 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2 A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.



- 3 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

**Article 44 – Final judgments**

- 1 The judgment of the Grand Chamber shall be final.
- 2 The judgment of a Chamber shall become final
  - a when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - b three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - c when the panel of the Grand Chamber rejects the request to refer under Article 43.
- 3 The final judgment shall be published.

**Article 45 – Reasons for judgments and decisions**

- 1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
- 2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

**Article 46 – Binding force and execution of judgments**

- 1 The High Contracting Parties undertake 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.

**Article 47 – Advisory opinions**

- 1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

- 2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
- 3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

#### **Article 48 – Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

#### **Article 49 – Reasons for advisory opinions**

- 1 Reasons shall be given for advisory opinions of the Court.
- 2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
- 3 Advisory opinions of the Court shall be communicated to the Committee of Ministers.

#### **Article 50 – Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.

#### **Article 51 – Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

### **SECTION III – MISCELLANEOUS PROVISIONS**

#### **Article 52 – Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

#### **Article 53 – Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

#### **Article 54 – Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

#### **Article 55 – Exclusion of other means of dispute settlement**

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

#### **Article 56 – Territorial application**

- 1 Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
- 2 The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

- 3 The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
- 4 Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

#### **Article 57 – Reservations**

- 1 Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
- 2 Any reservation made under this article shall contain a brief statement of the law concerned.

#### **Article 58 – Denunciation**

- 1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
- 2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
- 3 Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
- 4 The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

**Article 59 – Signature and ratification**

- 1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
- 2 The present Convention shall come into force after the deposit of ten instruments of ratification.
- 3 As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
- 4 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

## **Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms**

Paris, 20.III.1952

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

### **Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

### **Article 2 – Right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

### **Article 3 – Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

#### **Article 4 – Territorial application**

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

#### **Article 5 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

#### **Article 6 – Signature and ratification**

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

**Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto**

Strasbourg, 16.IX.1963

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

**Article 1 – Prohibition of imprisonment for debt**

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

**Article 2 – Freedom of movement**

- 1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- 2 Everyone shall be free to leave any country, including his own.
- 3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



- 4 The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

**Article 3 – Prohibition of expulsion of nationals**

- 1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
- 2 No one shall be deprived of the right to enter the territory of the state of which he is a national.

**Article 4 – Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.

**Article 5 – Territorial application**

- 1 Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
- 2 Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
- 3 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 4 The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

- 5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.”

#### **Article 6 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 7 – Signature and ratification**

- 1 This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
- 2 The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

**Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty**

Strasbourg, 28.IV.1983

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

**Article 2 – Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

**Article 3 – Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

#### **Article 4 – Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

#### **Article 5 – Territorial application**

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

#### **Article 6 – Relationship to the Convention**

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

#### **Article 7 – Signature and ratification**

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

**Article 8 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

**Article 9 – Depositary functions**

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with articles 5 and 8;
- d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 7 to the Convention for  
the Protection of Human Rights and  
Fundamental Freedoms**

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

**Article 1 – Procedural safeguards relating to expulsion of aliens**

- 1 An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
  - a to submit reasons against his expulsion,
  - b to have his case reviewed, and
  - c to be represented for these purposes before the competent authority or a person or persons designated by that authority.
- 2 An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

**Article 2 – Right of appeal in criminal matters**

- 1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
- 2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person

concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

### **Article 3 – Compensation for wrongful conviction**

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

### **Article 4 – Right not to be tried or punished twice**

- 1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
- 2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
- 3 No derogation from this Article shall be made under Article 15 of the Convention.

### **Article 5 – Equality between spouses**

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

### **Article 6 – Territorial application**

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.
- 4 A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 5 The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.
- 6 Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

#### **Article 7 – Relationship to the Convention**

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 8 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of



Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

**Article 9 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

**Article 10 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- d any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 12 to the Convention for  
the Protection of Human Rights and  
Fundamental Freedoms**

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

**Article 1 – General prohibition of discrimination**

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

**Article 2 – Territorial application**

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.
- 4 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

### **Article 3 – Relationship to the Convention**

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **Article 4 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 5 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

#### **Article 6 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 13 to the Convention for  
the Protection of Human Rights and  
Fundamental Freedoms  
Concerning the abolition of the death  
penalty in all circumstances**

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

**Article 2 – Prohibitions of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

### **Article 3 – Prohibitions of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

### **Article 4 – Territorial application**

- 1 Any state may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
- 2 Any state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

### **Article 5 – Relationship to the Convention**

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **Article 6 – Signature and ratification**

This Protocol shall be open for signature by member states of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member state of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

**Article 7 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.
- 2 In respect of any member state which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

**Article 8 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member states of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- d any other act, notification or communication relating to this Protocol;

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, this 3rd day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.



*Council of Europe Treaty Series No. 194*

**PROTOCOL No. 14  
TO THE CONVENTION  
FOR THE PROTECTION  
OF HUMAN RIGHTS  
AND FUNDAMENTAL FREEDOMS,  
AMENDING THE CONTROL SYSTEM  
OF THE CONVENTION**



## **Preamble**

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Having regard to Resolution No. 1 and the Declaration adopted at the European Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000;

Having regard to the Declarations adopted by the Committee of Ministers on 8 November 2001, 7 November 2002 and 15 May 2003, at their 109th, 111th and 112th Sessions, respectively;

Having regard to Opinion No. 251 (2004) adopted by the Parliamentary Assembly of the Council of Europe on 28 April 2004;

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;

Considering, in particular, the need to ensure that the Court can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

## **Article 1**

Paragraph 2 of Article 22 of the Convention shall be deleted.

## **Article 2**

Article 23 of the Convention shall be amended to read as follows:

### **“Article 23 – Terms of office and dismissal**

- 1 The judges shall be elected for a period of nine years. They may not be re-elected.
- 2 The terms of office of judges shall expire when they reach the age of 70.
- 3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
- 4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.”

## **Article 3**

Article 24 of the Convention shall be deleted.

**Article 4**

Article 25 of the Convention shall become Article 24 and its text shall be amended to read as follows:

**“Article 24 – Registry and rapporteurs**

- 1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.
- 2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court’s registry.”

**Article 5**

Article 26 of the Convention shall become Article 25 (“Plenary Court”) and its text shall be amended as follows:

- 1 At the end of paragraph d, the comma shall be replaced by a semi-colon and the word “and” shall be deleted.
- 2 At the end of paragraph e, the full stop shall be replaced by a semi-colon.
- 3 A new paragraph f shall be added which shall read as follows:

“f make any request under Article 26, paragraph 2.”

**Article 6**

Article 27 of the Convention shall become Article 26 and its text shall be amended to read as follows:

**“Article 26 – Single-judge formation, committees, Chambers and Grand Chamber**

- 1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time.
- 2 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
- 3 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
- 4 There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

- 5 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.”

#### **Article 7**

After the new Article 26, a new Article 27 shall be inserted into the Convention, which shall read as follows:

#### **“Article 27 – Competence of single judges**

- 1 A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
- 2 The decision shall be final.
- 3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.”

#### **Article 8**

Article 28 of the Convention shall be amended to read as follows:

#### **“Article 28 – Competence of committees**

- 1 In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
- a declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
  - b declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
- 2 Decisions and judgments under paragraph 1 shall be final.
- 3 If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.”

#### **Article 9**

Article 29 of the Convention shall be amended as follows:

- 1 Paragraph 1 shall be amended to read as follows: “If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.”
- 2 At the end of paragraph 2 a new sentence shall be added which shall read as follows: “The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.”
- 3 Paragraph 3 shall be deleted.

#### **Article 10**

Article 31 of the Convention shall be amended as follows:

- 1 At the end of paragraph a, the word “and” shall be deleted.
- 2 Paragraph b shall become paragraph c and a new paragraph b shall be inserted and shall read as follows:  
  
“b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and”.

#### **Article 11**

Article 32 of the Convention shall be amended as follows:

At the end of paragraph 1, a comma and the number 46 shall be inserted after the number 34.

#### **Article 12**

Paragraph 3 of Article 35 of the Convention shall be amended to read as follows:

- “3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that :
  - a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
  - b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

#### **Article 13**

A new paragraph 3 shall be added at the end of Article 36 of the Convention, which shall read as follows:

- “3 In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.”

#### **Article 14**

Article 38 of the Convention shall be amended to read as follows:

##### **“Article 38 – Examination of the case**

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

#### **Article 15**

Article 39 of the Convention shall be amended to read as follows:

##### **“Article 39 – Friendly settlements**

- 1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
- 2 Proceedings conducted under paragraph 1 shall be confidential.
- 3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
- 4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.”

#### **Article 16**

Article 46 of the Convention shall be amended to read as follows:

##### **“Article 46 – Binding force and execution of judgments**

- 1 The High Contracting Parties undertake 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.
- 3 If 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. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
- 4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

- 5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

#### **Article 17**

Article 59 of the Convention shall be amended as follows:

- 1 A new paragraph 2 shall be inserted which shall read as follows:
- “2 The European Union may accede to this Convention.”
- 2 Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively.

#### **Final and transitional provisions**

#### **Article 18**

- 1 This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by
- a signature without reservation as to ratification, acceptance or approval; or
  - b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
- 2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 19**

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.

#### **Article 20**

- 1 From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.
- 2 The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.

#### **Article 21**

The term of office of judges serving their first term of office on the date of entry into force of this Protocol shall be extended *ipso jure* so as to amount to a total period of nine years. The other judges shall complete their term of office, which shall be extended *ipso jure* by two years.

#### **Article 22**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c the date of entry into force of this Protocol in accordance with Article 19; and
- d any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 13<sup>th</sup> day of May 2004, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

PRACTICE DIRECTION<sup>1</sup>

**INSTITUTION OF PROCEEDINGS<sup>2</sup>**

(individual applications under Article 34 of the Convention)

**I. General**

1. An application under Article 34 of the Convention must be submitted in writing. No application may be made by phone.
2. An application must be sent to the following address:  
  
The Registrar  
European Court of Human Rights  
Council of Europe  
F – 67075 STRASBOURG CEDEX.
3. An application should normally be made on the form<sup>3</sup> referred to in Rule 47 § 1 of the Rules of Court. However, an applicant may introduce his complaints in a letter.
4. If an application has not been submitted on the official form or an introductory letter does not contain all the information referred to in Rule 47, the Registry may ask the applicant to fill in the form. It should as a rule be returned within 6 weeks from the date of the Registry's letter.
5. Applicants may file an application by sending it by facsimile ("fax")<sup>4</sup>. However, they must send the signed original copy by post within 5 days following the dispatch by fax.
6. The date on which an application is received at the Court's Registry will be recorded by a receipt stamp.
7. An applicant should be aware that the date of the first communication setting out the subject-matter of the application is considered relevant for the purposes of compliance with the six-month rule in Article 35 § 1 of the Convention.
8. On receipt of the first communication setting out the subject-matter of the case, the Registry will open a file, whose number must be mentioned in all subsequent correspondence. Applicants will be informed thereof by letter. They may also be asked for further information or documents.

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003.

2. This practice direction supplements Rules 45 and 47 of the Rules of Court.

3. The relevant form can be downloaded from the Court's website ([www.echr.coe.int](http://www.echr.coe.int)).

4. Fax no. +00 33 (0)3 88 41 27 30; other facsimile numbers can be found on the Court's website.



9. (a) An applicant should be diligent in conducting correspondence with the Court's Registry.

(b) A delay in replying or failure to reply may be regarded as a sign that the applicant is no longer interested in pursuing his application.

10. Failure to satisfy the requirements laid down in Rule 47 §§ 1 and 2 and to provide further information at the Registry's request (see paragraph 8) may result in the application not being examined by the Court.

11. Where, within a year, an applicant has not returned an application form or has not answered any letter sent to him by the Registry, the file will be destroyed.

## **II. Form and contents**

12. An application must contain all information required under Rule 47 and be accompanied by the documents referred to in paragraph 1 (h) of that Rule.

13. An application should be written legibly and, preferably, typed.

14. Where, exceptionally, an application exceeds 10 pages (excluding annexes listing documents), an applicant must also file a short summary.

15. Where applicants produce documents in support of the application, they should not submit original copies. The documents should be listed in order by date, numbered consecutively and given a concise description (e.g. letter, order, judgment, appeal, etc.).

16. An applicant who already has an application pending before the Court must inform the Registry accordingly, stating the application number.

17. (a) Where an applicant does not wish to have his or her identity disclosed, he or she should state the reasons for his or her request in writing, pursuant to Rule 47 § 3.

(b) The applicant should also state whether, in the event of anonymity being authorised by the President of the Chamber, he or she wishes to be designated by his or her initials or by a single letter (e.g. "X", "Y", "Z", etc.).

## PRACTICE DIRECTION<sup>1</sup>

### WRITTEN PLEADINGS

#### I. Filing of pleadings

##### General

1. A pleading must be filed with the Registry within the time-limit fixed in accordance with Rule 38 and in the manner described in paragraph 2 of that Rule.
2. The date on which a pleading or other document is received at the Court's Registry will be recorded on that document by a receipt stamp.
3. All pleadings, as well as all documents annexed thereto, should be submitted to the Court's Registry in 3 copies sent by post with 1 copy sent, if possible, by fax.
4. Secret documents should be filed by registered post.
5. Unsolicited pleadings shall not be admitted to the case file unless the President of the Chamber decides otherwise (see Rule 38 § 1).

##### Filing by facsimile

6. A party may file pleadings or other documents with the Court by sending them by facsimile ("fax")<sup>2</sup>.
7. The name of the person signing a pleading must also be printed on it so that he or she can be identified.

#### II. Form and contents

##### Form

8. A pleading should include:
  - (a) the application number and the name of the case;
  - (b) a title indicating the nature of the content (e.g. observations on admissibility [and the merits]; reply to the Government's/the applicant's observations on admissibility [and the merits]; observations on the merits; additional observations on admissibility [and the merits]; memorial etc.).

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003.

2. Fax no. +00 33 (0)3 88 41 27 30; other facsimile numbers can be found on the Court's website ([www.echr.coe.int](http://www.echr.coe.int)).

9. A pleading should normally in addition
  - (a) be on A4 paper having a margin of not less than 3.5 cm wide;
  - (b) be wholly legible and, preferably, typed;
  - (c) have all numbers expressed as figures;
  - (d) have pages numbered consecutively;
  - (e) be divided into numbered paragraphs;
  - (f) be divided into chapters and/or headings corresponding to the form and style of the Court's decisions and judgments ("Facts" / "Domestic law [and practice]" / "Complaints" / "Law"; the latter chapter should be followed by headings entitled "Preliminary objection on ..."; "Alleged violation of Article ...", as the case may be);
  - (g) place any answer to a question by the Court or to the other party's arguments under a separate heading;
  - (h) give a reference to every document or piece of evidence mentioned in the pleading and annexed thereto.
10. If a pleading exceeds 30 pages, a short summary should also be filed with it.
11. Where a party produces documents and/or other exhibits together with a pleading, every piece of evidence should be listed in a separate annex.

#### **Contents**

12. The parties' pleadings following communication of the application should include:
  - (a) any comments they wish to make on the facts of the case; however,
    - (i) if a party does not contest the facts as set out in the statement of facts prepared by the Registry, it should limit its observations to a brief statement to that effect;
    - (ii) if a party contests only part of the facts as set out by the Registry, or wishes to supplement them, it should limit its observations to those specific points;
    - (iii) if a party objects to the facts or part of the facts as presented by the other party, it should state clearly which facts are uncontested and limit its observations to the points in dispute;

(b) legal arguments relating first to admissibility and, secondly, to the merits of the case; however,

(i) if specific questions on a factual or legal point were put to a party, it should, without prejudice to Rule 55, limit its arguments to such questions;

(ii) if a pleading replies to arguments of the other party, submissions should refer to the specific arguments in the order prescribed above.

13. (a) The parties' pleadings following the admission of the application should include:

(i) a short statement confirming a party's position on the facts of the case as established in the decision on admissibility;

(ii) legal arguments relating to the merits of the case;

(iii) a reply to any specific questions on a factual or legal point put by the Court.

(b) An applicant party submitting claims for just satisfaction at the same time should do so in the manner described in the practice direction on filing just satisfaction claims.<sup>1</sup>

14. In view of the confidentiality of friendly-settlement proceedings (see Article 38 § 2 of the Convention and Rule 62 § 2), all submissions and documents filed within the framework of the attempt to secure a friendly settlement should be submitted separately from the written pleadings.

15. No reference to offers, concessions or other statements submitted in connection with the friendly settlement may be made in the pleadings filed in the contentious proceedings.

### **III. Time-limits**

#### **General**

16. It is the responsibility of each party to ensure that pleadings and any accompanying documents or evidence are delivered to the Court's Registry in time.

#### **Extension of time-limits**

17. A time-limit set under Rule 38 may be extended on request from a party.

18. A party seeking an extension of the time allowed for submission of a pleading must make a request as soon as it has become aware of the circumstances justifying such an extension and, in any event, before the expiry of the time-limit. It should state the reason for the delay.

19. If an extension is granted, it shall apply to all parties for which the relevant time-limit is running, including those which have not asked for it.

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1. Not yet issued, for the time being see Rule 60.

#### **IV. Failure to comply with requirements for pleadings**

20. Where a pleading has not been filed in accordance with the requirements set out in paragraphs 8-15 of this practice direction, the President of the Chamber may request the party concerned to resubmit the pleading in compliance with those requirements.

21. A failure to satisfy the conditions listed above may result in the pleading being considered not to have been properly lodged (see Rule 38 § 1 of the Rules of Court).

## PRACTICE DIRECTION<sup>1</sup>

### REQUESTS FOR INTERIM MEASURES

(Rule 39 of the Rules of Court)

Applicants or their legal representatives<sup>2</sup> 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.

Failure to do so may mean that the Court will not be in a position to examine such requests properly and in good time.

#### **I. Requests to be made by facsimile, e-mail or courier**

Requests for interim measures under Rule 39 in urgent cases, particularly in extradition or deportation cases, should be sent by facsimile or e-mail<sup>3</sup> or by courier. The request should, where possible, be in one of the official languages of the Contracting Parties. All requests should bear the following title which should be written in bold on the face of the request:

***“Rule 39 – Urgent/Article 39 – Urgent”***

Requests by facsimile or e-mail should be sent during working hours<sup>4</sup> unless this is absolutely unavoidable. If sent by e-mail, a hard copy of the request should also be sent at the same time. Such requests should not be sent by ordinary post since there is a risk that they will not arrive at the Court in time to permit a proper examination.

If the Court has not responded to an urgent request under Rule 39 within the anticipated period of time, applicants or their representatives should follow up with a telephone call to the Registry during working hours.

#### **II. Making requests in good time**

Requests for interim measures should normally be received as soon as possible after the final domestic decision has been taken to enable the Court and its Registry to have sufficient time to examine the matter.

However, in extradition or deportation cases, where immediate steps may be taken to enforce removal soon after the final domestic decision has been given, it is advisable to make submissions and submit any relevant material concerning the request before the final decision is given.

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003.

2. Full contact details should be provided.

3. To the e-mail address of a member of the Registry after having first made contact with that person by telephone. Telephone and facsimile numbers can be found on the Court’s website ([www.echr.coe.int](http://www.echr.coe.int)).

4. Working hours are 8am – 6pm, Monday -Friday. French time is one hour ahead of GMT.

Applicants and their representatives should be aware that it may not be possible to examine in a timely and proper manner requests which are sent at the last moment.

### **III. Accompanying information**

It is essential that requests be accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions together with any other material which is considered to substantiate the applicant's allegations.

Where the case is already pending before the Court, reference should be made to the application number allocated to it.

In cases concerning extradition or deportation, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official case-reference number.

## EXPLANATORY NOTE

for persons completing the Application Form  
under Article 34 of the Convention

### INTRODUCTION

These notes are intended to assist you in drawing up your application to the Court. **Please read them carefully before completing the form**, and then refer to them as you complete each section of the form.

**The completed form will be your application to the Court** under Article 34 of the Convention. It will be the basis for the Court's examination of your case. It is therefore important that you **complete it fully and accurately even if this means repeating information you have already given the Registry in previous correspondence**.

You will see that there are eight sections to the form. You should complete all of these so that your application contains all the information required under the Rules of Court. Below you will find an explanatory note relating to each section of the form. You will also find at the end of these notes the text of Rules 45 and 47 of the Rules of Court.

### NOTES RELATING TO THE APPLICATION FORM

#### **I THE PARTIES** – Rule 47 § 1 (a), (b) and (c) (1-13)

If there is more than one applicant, you should give the required information for each one, on a separate sheet if necessary.

An applicant may appoint a person to represent him. Such representative shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the Court. When an applicant is represented, relevant details should be given in this part of the application form, and the Registry will correspond only with the representative.

#### **II STATEMENT OF THE FACTS** – Rule 47 § 1 (d) (14)

You should give clear and concise details of the facts you are complaining about. Try to describe the events in the order in which they occurred. Give exact dates. If your complaints relate to a number of different matters (for instance different sets of court proceedings) you should deal with each matter separately.

#### **III STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS** – Rule 47 § 1 (e) (15)

In this section of the form you should explain as precisely as you can what your complaint **under the Convention** is. Say which provisions of the Convention you rely on and explain why you consider that the facts you have set out in Part II of the form involve a violation of these provisions.

You will see that some of the articles of the Convention permit interferences with the rights they guarantee in certain circumstances (see for instance sub-paragraphs (a) to (f) of Article 5 §§ 1 and 2 of Articles 8 to 11). If you are relying on such an article, try to explain why you consider the interference about which you are complaining is not justified.



**IV. STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION – Rule 47 § 2 (a)**  
(16-18)

In this section you should set out details of the remedies you have pursued before the national authorities. You should fill in each of the three parts of this section and give the same information separately for each separate complaint. In part 18 you should say whether or not any other appeal or remedy is available which could redress your complaints and which you have not used. If such a remedy is available, you should say what it is (e.g. name the court or authority to which an appeal would lie) and explain why you have not used it.

**V. STATEMENT OF THE OBJECT OF THE APPLICATION – Rule 47 § 1 (g)**  
(19)

Here you should state briefly what you want to achieve through your application to the Court.

**VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS – Rule 47 § 2 (b)**  
(20)

Here you should say whether or not you have ever submitted the complaints in your application to any other procedure of international investigation or settlement. If you have, you should give full details, including the name of the body to which you submitted your complaints, dates and details of any proceedings which took place and details of decisions taken. You should also submit copies of relevant decisions and other documents. Do not staple, seal with adhesive tape or bind documents.

**VII. LIST OF DOCUMENTS – Rule 47 § 1 (h)**  
(21)

**(NO ORIGINAL DOCUMENTS, ONLY PHOTOCOPIES)**

Do not forget to enclose with your application and to mention on the list all judgments and decisions referred to in Sections IV and VI, as well as any other documents you wish the Court to take into consideration as evidence (transcripts, statements of witnesses, etc.). Include any documents giving the reasons for a court or other decision as well as the decision itself. Only submit documents which are relevant to the complaints you are making to the Court. . Do not staple, seal with adhesive tape or bind documents.

**VIII. DECLARATION AND SIGNATURE – Rule 45 § 3**  
(22)

If the application is signed by the representative of the applicant, it should be accompanied by a form of authority signed by the applicant and the representative (unless this has already been submitted).

## **RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS**

### Chapter II

#### **Institution of Proceedings**

##### *Rule 45*

(Signatures)

1. Any application made under Articles 33 or 34 of the Convention shall be submitted in writing and shall be signed by the applicant or by the applicant's representative.
2. Where an application is made by a non-governmental organisation or by a group of individuals, it shall be signed by those persons competent to represent that organisation or group. The Chamber or Committee concerned shall determine any question as to whether the persons who have signed an application are competent to do so.
3. Where applicants are represented in accordance with Rule 36, a power of attorney or written authority to act shall be supplied by their representative or representatives.

##### *Rule 47*

(Contents of an individual application)

1. Any application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the President of the Section concerned decides otherwise. It shall set out

(a) the name, date of birth, nationality, sex, occupation and address of the applicant;

(b) the name, occupation and address of the representative, if any;

(c) the name of the Contracting Party or Parties against which the application is made;

(d) a succinct statement of the facts;

(e) a succinct statement of the alleged violation(s) of the Convention and the relevant arguments;

(f) a succinct statement on the applicant's compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention; and

(g) the object of the application;

and be accompanied by

(h) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

2. Applicants shall furthermore

(a) provide information, notably the documents and decisions referred to in paragraph 1 (h) of this Rule, enabling it to be shown that the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention have been satisfied; and

(b) indicate whether they have submitted their complaints to any other procedure of international investigation or settlement.

3. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The President of the Chamber may authorise anonymity in exceptional and duly justified cases.

4. Failure to comply with the requirements set out in paragraphs 1 and 2 of this Rule may result in the application not being examined by the Court.

5. The date of introduction of the application shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application. The Court may for good cause nevertheless decide that a different date shall be considered to be the date of introduction.

6. Applicants shall keep the Court informed of any change of address and of all circumstances relevant to the application.

## **Submitting a Complaint to the European Court of Human Rights: Eleven Common Misconceptions<sup>1</sup>**

Egbert Myjer

Nico Mol

Peter Kempees

Agnes van Steijn

Janneke Bockwinkel<sup>2</sup>

*Compared with many of the domestic systems of procedural law existing in Europe, the procedure of the European Court of Human Rights (ECHR) is quite straightforward and easy to use. Nonetheless, even Strasbourg procedure requires some understanding on the part of practitioners. Just as in domestic proceedings, an error can harm the interests of the applicant and, at worst, result in the loss of the case.*

*Many of the problems which applicants and their counsel encounter in proceedings before the ECHR can be traced back to a limited number of simple misconceptions. The Dutch judge recently appointed to the Court and the Dutch lawyers working in the Registry of the Court explain below how these problems can be avoided.*

### *Misconception 1: The ECHR is an appellate body*

Cases regularly occur in which applicants (or their lawyers) submit an application to the Court alleging that the domestic courts have incorrectly determined the facts of a case or have overlooked essential submissions of the applicant. Often such an application is based on the submission that Article 6 of the European Convention on Human Rights has been violated.

The function of the Court is to ensure observance of the Convention and its protocols. The Court does not have the function of rectifying errors made by domestic judges in applying domestic law. Nor does the Court take the place of domestic courts in assessing the evidence. It is incorrect to view the Court as a

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<sup>1</sup> This article originally appeared in Dutch in: Myjer, E., Mol, N., Kempees, P., van Steijn, A., and Bockwinkel, J. "Introduire une plainte auprès de la Cour européenne des Droits de l'Homme: onze malentendus fréquents" in *Annales du droit luxembourgeois*, volume 14-2004, p. 11 *et seq.* (Bruylant, Bruxelles, 2005).

<sup>2</sup> Professor Myjer is a judge of the European Court of Human Rights; Mr Mol, Mr Kempees and Ms Van Steijn are legal secretaries of the Court (Article 25 of the Convention); and Ms Bockwinkel is a trainee judge seconded to the Court by the Netherlands Ministry of Justice.

court of ‘fourth instance’ to which all aspects of a case can be referred<sup>3</sup>. Complaints that the domestic courts should have arrived at a different decision (i.e. a decision more favourable to the applicant) are declared inadmissible as being manifestly ill-founded.

It makes no difference if the complaint is couched in terms of a violation of Article 6 of the Convention. This article guarantees only a fair and public hearing of certain well-defined categories of disputes before an independent and impartial tribunal. It does not also guarantee that domestic proceedings will arrive at the correct result.

*Misconception 2: An initial letter is in any event sufficient to comply with the six-month period.*

The Court regularly receives letters submitting a complaint in general terms shortly before the expiry of the period prescribed by Article 35 § 1 of the Convention; sometimes these letters include a statement that the grounds of the complaint will be explained in more detail later. Often a copy of a judgment of a domestic court is enclosed with the letter.

How an application must be lodged is described in detail in a practice direction. This, together with other invaluable information, can be found on the Court’s website<sup>4</sup>.

Although the Court is indeed prepared to accept a simple letter for the purposes of compliance with the six-month rule, the letter must provide a sufficient description of the complaint: in other words, it must in any event set out the facts on which the application is based and specify the rights which are alleged to have been violated, whether or not with references to articles of the Convention and its protocols.

The Court treats the date of dispatch of the letter containing this information as the date of introduction of the application<sup>5</sup>. For this purpose, the Court is, in principle, prepared to accept the date of the letter itself, unless of course there is an inexplicable difference between the date of the letter and the date of dispatch as evidenced by the postmark. If the letter is undated and the postmark is illegible, the date of introduction will be the date of receipt at the Registry of the Court.

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<sup>3</sup> See the recent case of *Baumann v Austria*, no. 76809/01, § 49, 7 October 2004.

<sup>4</sup> <http://www.echr.coe.int/>

<sup>5</sup> See as a recent example *Latif et al. v. the United Kingdom* (admissibility decision), no. 72819/01, 29 January 2004.

A faxed application will be accepted provided that the signed original copy, bearing original signatures, is received by post within 5 days thereafter.

The six-month period prescribed by Article 35 (1) of the Convention is an absolute time-limit. No procedure for rectification of default is available.

An initial letter which merely states that an application will be submitted does not qualify as submission of an application, even if the documents from the file of the domestic proceedings are enclosed: it is therefore not sufficient to allege that the domestic proceedings were unfair and then refer to an enclosed file of the proceedings. Nor is it possible to expand the scope of a complaint after the expiry of the six-month period.

It should be noted for the sake of completeness that the six-month period runs from the day on which the applicant (or his counsel) becomes aware or could have become aware of the last domestic judgment. In principle, the period is therefore calculated from the date of the pronouncement, if public; where, however, the domestic law prescribes notification in written form the period is calculated from the date of service or dispatch of the judgment<sup>6</sup>. It is for the applicant to convince the Court that it should use a different date.

*Misconception 3: An application may be submitted within six months of a judgment on application for review or a judgment in a non-admissible appeal*

Cases sometimes occur in which an applicant lodges an appeal or appeal in cassation against a judgment or decision against which no appeal lies and then submits an application to the Court. There are also cases in which an applicant applies for an extraordinary remedy before applying to the Court.

In such cases the Court calculates the period of six months from the decision given at the conclusion of the ordinary proceedings. The applicant is, after all, expected to have exhausted every 'effective remedy'. A remedy which is available to him only in certain exceptional circumstances, a request for leave to exercise a discretionary power or a remedy not provided by domestic law cannot be deemed to be an effective remedy. A judgment on an application for revision of a final judgment, a judgment given on an appeal lodged by a public authority to safeguard the quality of the case-law or a decision on a petition for

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<sup>6</sup> See the recent case of *Sarıbek v. Turkey* (admissibility decision), no. 41055/98, 9 September 2004.

a pardon do not therefore interrupt the six-month period<sup>7</sup>. Even the reopening of ordinary proceedings does not suspend the running of the period, unless this is actually followed by a new substantive hearing of the case<sup>8</sup>.

*Misconception 4: If a complaint has been made in a letter, it is not necessary to file the application form.*

Rule 47 § 1 of the Rules of Court provides that individual applicants must make use of the form provided by the Registry unless the President of the Section concerned decides otherwise. This provision is strictly enforced.

The Registry sends the form to the applicant after receipt of the first letter. The form can also be found on the Court's website<sup>9</sup>.

If the complaint has already been set out fully in a letter, it is not necessary to repeat it verbatim in the form. In such a case it is sufficient merely to refer to the letter in the form.

Forms that are incomplete or unsigned are returned to the applicant. The consequences of any delay that occurs as a result are borne by the applicant.

*Misconception 5: A lawyer who states that he is acting on behalf of his client need not submit a written authority to act*

Rule 45 § 2 of the Rules of Court states that representatives must submit a power of attorney or written authority to act. No distinction is made for this purpose between representatives who are registered as advocate and other representatives.

If counsel does not supply a written authority to act, the case cannot be heard by the Court. In such cases the Registry sends a reminder. This causes delay (which can sometimes be costly for the applicant).

The Registry supplies a model form of authority whose use is not mandatory (i.e. unlike the application form) but is nonetheless recommended. This model provides for express acceptance of the authority by the legal representative. This model too can be found on the Court's website<sup>10</sup>.

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<sup>7</sup> See the recent case of *Berdzenishvili v. Russia* (admissibility decision), no. 31679/03, 29 January 2004.

<sup>8</sup> See, *inter alia*, *Boček v. the Czech Republic* (admissibility decision), no. 49474/99, 10 October 2000.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> See *supra* note 4.

Sometimes an applicant may have authorised a lawyer to act for him, but the lawyer's agreement is not evident from the documents. In such a case the Registry requests the applicant to arrange for his lawyer to acknowledge to the Court that he is acting. Until this has happened, the correspondence is continued with the applicant in person.

*Misconception 6: The applicant has a full year in which to supplement his complaint by means of the application form, written authority and supporting documents*

After receipt of the applicant's first communication, the Registry sends the applicant a letter enclosing the text of the Convention, the text of Rules 45 and 47 of the Rules of Court (detailing the formalities to be completed in respect of the application), a 'note for the guidance of persons wishing to apply to the Court' (explaining the admissibility criteria applied by the Court) and the application form with notes.

The last paragraph of the letter (English version) reads as follows:

'If the Registry receives no response from you, your complaints will be taken to have been withdrawn and the file opened in respect of the application will be destroyed – without further warning – one year after dispatch of this letter.'

The misconception occurs because the applicant (or his or her counsel) reads only this last paragraph. Elsewhere in the letter there is a warning about the consequences of unnecessary delay. The sanction imposed by the Court in this respect is that the date on which the application is filed is taken to be the date of the form (or an even later date if the form is not completed correctly) rather than the date of the letter of complaint. This may mean that the application is deemed to be filed after the six-month period.

The note for the guidance of prospective applicants (point 17) states that the Court wishes the form to be filed within six weeks. Although a request to extend this period may be made, the applicant is responsible for – and bears the risk of – ensuring that the Court receives a written document adequately explaining the complaint within six months of the last domestic decision<sup>11</sup>.

After the Court has received the application, the applicant can be requested to supplement it, where necessary, with any missing documentary evidence or other information. The Registry may set a time-limit for this purpose. Although

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<sup>11</sup> See for example *Latif et al. v. the United Kingdom* (admissibility decision), see *supra* note 3.



failure to comply with this time-limit does not necessarily invalidate the application, it is advisable to submit a reasoned request for an extension before the expiry of the period if it becomes clear that the time-limit cannot be met.

It should be emphasised that the period of a year specified in the last paragraph of the letter of the Registry is definitely not the period available to the applicant. The applicant cannot derive any rights from it. The file is kept for one year after the last communication from the applicant. If the applicant does not communicate within this period the file will be destroyed in order to make space in the Court's already overfull archives for applications that are pursued with greater diligence.

A complainant who contacts the court again after a long period of silence may be required to explain his silence, even if it has lasted for less than a year. The Court may attach consequences to such silence.

*Misconception 7: The entire proceedings can be conducted in the applicant's national language*

Unlike the Court of Justice of the European Communities, the Court of Human Rights in Strasbourg has only two official languages, namely English and French (Rule 34 § 1 of the Rules of Court).

The original application and the supporting documents attached to it can be submitted in a language other than English or French provided that the language used is an official language of one of the Contracting Parties, i.e. the States that are party to the Convention<sup>12</sup> (Rule 34 § 2 of the Rules of Court).

Until recently an applicant was allowed to use such another language until the Court decided on the admissibility of his or her application. However, as preparations are under way to introduce a concentrated procedure without a separate admissibility decision, in anticipation of the entry into force of Protocol No. 14<sup>13</sup>, the use of English or French has been made mandatory at an earlier stage in the proceedings, namely from the date on which the complaint is communicated to the respondent government.

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<sup>12</sup> We would, for practical reasons, advise caution in the use of uncommon regional or minority languages, regardless of whether they have the status of official language in a particular area, and generally recommend the use of more widely used languages if possible.

<sup>13</sup> *Protocol No. 14 to the Convention for the protection of human rights and fundamental freedoms* (Strasbourg, 13 May 2004); Council of Europe Treaty Series/ Série des Traités du Conseil de l'Europe no. 194.

The obligation subsequently to use one of the two official languages applies only to pleadings/observations submitted by or on behalf of the applicant. It follows that the applicant need not submit an unsolicited translation of documents from the domestic court file, unless of course these documents are drawn up in a language which is not an official language of one of the Contracting Parties.

If a hearing is held, the applicant should use one of the two official languages (Rule 34 § 2 of the Rules of Court). Hearings are held only very exceptionally and generally take place before the Court rules on admissibility.

The President may be asked to grant leave for the use of a language other than English or French. This is decided on a case-by-case basis. However, even if leave is given, the advocate is expected to have an adequate passive knowledge of English or French (Rule 36 § 5 of the Rules).

*Misconception 8: Rule 39 concerns interlocutory injunction proceedings*

Rule 39 of the Rules of Court, ‘Interim measures’, reads as follows:

“1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

...”

This expressly concerns interim measures. Unlike some ‘provisional’ measures ordered by domestic courts, which in many cases are in effect permanent, they apply only for the term of the proceedings in Strasbourg.

In practice, measures are adopted under Rule 39 only if there is a prima facie case that the applicant will otherwise suffer irreparable damage for which pecuniary compensation after the close of the proceedings will not provide satisfaction. This will be particularly true in the case of expulsions or extraditions to countries that are not party to the Convention, if there is likely to be a violation of Article 2 or 3 of the Convention or of Protocol No. 6.

There is therefore no point in applying, for example, for suspension of the execution of a prison sentence or remand in custody, temporary or permanent closure of a construction project, the issue of a temporary residence permit or an advance on social benefit or compensation.

For the sake of completeness, it should be noted that there is also no point in requesting application of Rule 39 if the complaint is obviously inadmissible for any reason whatever, for example because the effective domestic remedies have not been exhausted.

*Misconception 9: The identity of the applicant can be kept secret from the respondent government*

In principle, the procedure of the Court is public (with the exception of settlement negotiations, Article 38 § 2 of the Convention).

Rule 47 § 3 of the Rules of Court provides, however, for the possibility of concealing the identity of an applicant from the public. The applicant must give reasons when submitting such a request to the President.

Even if the President grants such a request, the identity is not concealed from the respondent government. The application and all documents relating to it are copied in full and sent to the representative of the government concerned.

Article 36 § 1 of the Convention is insufficiently known. It reads as follows:

‘In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.’

Under Rule 44 § 1 of the Rules of Court, when notice of an application is given to the respondent government and the applicant has the nationality of another State which is party to the Convention, a copy of the application will be transmitted to the government of that other Contracting Party. It is not the practice of the Court to withhold information from that other government.

There have been cases in which an applicant was on the point of being deported (extradited or expelled) from one Contracting Party to another Contracting Party of which he was a national. The Court has never concealed the identity of the applicant from the other State in such cases.

*Misconception 10: It is sufficient to make a request for compensation in the application form*

It is common knowledge that the Court may award ‘just satisfaction’ (pecuniary compensation) to an injured party (Article 41 of the Convention).

In the procedure followed as standard hitherto (in which a separate decision is made on admissibility) the applicant is required to submit his request for compensation after the admissibility decision. The applicant submits his request either in his observations on the merits of the application or – if he does not submit such observations – in a separate document which he must file within two months of the admissibility decision (Rule 60 § 1 of the Rules of Court).

Under the new concentrated procedure without a separate admissibility decision, which will now become the standard procedure, the applicant will be required to submit his request for just satisfaction after the complaint has been communicated to the respondent government.

The Registrar notifies the applicant by letter of the possibility of submitting such a request and of the period within which it must be submitted.

The Court disregards a request for just satisfaction which is submitted too early in the proceedings and is not repeated in the correct stage of the proceedings, or which is lodged out of time<sup>14</sup>.

The applicant must submit itemised particulars of all claims and costs together with relevant supporting documents (Rule 60 § 2 of the Rules), failing which the Court may reject the claims in whole or in part<sup>15</sup>.

*Misconception 11: Appeal against an admissibility decision that goes against the applicant lies to the Grand Chamber*

Article 28 of the Convention explicitly states that the decision of a committee of three judges is ‘final’. No such provision, it is true, exists in Article 29 of the Convention, which sets out the procedure if the complaint is not rejected by a committee.

According to the text of the Convention (Article 43 (1)), referral of the case to the Grand Chamber may be requested ‘within a period of three months from the date of the judgment of the Chamber’. Such a request is submitted to a panel of five judges. The panel accepts the request ‘if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance’ (Article 43 (2)).

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<sup>14</sup> See for example *Willekens v. Belgium*, no. 50859/99, § 27, 24 April 2003.

<sup>15</sup> See, for example, the recent case of *Cumpăna and Mazăre v. Romania* [Grand Chamber], no. 33348/96, § 134, 17 December 2004.

However, admissibility decisions are not ‘judgments’ within the meaning of Article 43 (1). This is evident just from Article 45 of the Convention, where a distinction is made between ‘judgments’ on the one hand and ‘decisions’ declaring applications admissible or inadmissible on the other.

In practice, a request for a case to be referred to the Grand Chamber on the basis of an admissibility decision is not submitted to a panel of five judges.

### *Final observations*

Finally, it is emphasised that counsel should apply to Strasbourg only if there has been a relatively serious violation of the Convention. The lack of self-restraint of applicants (whether or not legally represented) in many countries has greatly increased the workload of the Court. It should be noted in this connection that relatively few cases involve important matters of principle.

The governments of States that are parties to the Convention, which have the last word on the text of the Convention, have responded to this situation by drawing up a new admissibility criterion. When Protocol No. 14 enters into force, the Court will be able to turn applicants away if it considers that they have not suffered a significant disadvantage from an alleged violation, even if their complaints are in themselves well-founded (see Article 12 of Protocol No. 14).

Voir Note explicative  
*See Explanatory Note*

Numéro de dossier <i>File-number</i>
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COUR EUROPÉENNE DES DROITS DE L'HOMME  
*EUROPEAN COURT OF HUMAN RIGHTS*

Conseil de l'Europe – *Council of Europe*  
Strasbourg, France

REQUÊTE  
*APPLICATION*

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,  
ainsi que des articles 45 et 47 du règlement de la Cour

*under Article 34 of the European Convention on Human Rights  
and Rules 45 and 47 of the Rules of Court*

**IMPORTANT:** La présente requête est un document juridique et peut affecter vos droits et obligations.  
*This application is a formal legal document and may affect your rights and obligations.*

**I. LES PARTIES**  
***THE PARTIES*****A. LE REQUÉRANT/LA REQUÉRANTE**  
***THE APPLICANT***

(Renseignements à fournir concernant le/la requérant(e) et son/sa représentant(e) éventuel(le))  
(*Fill in the following details of the applicant and the representative, if any*)

- |     |   |  |        |                                   |                   |
|-----|---|--|--------|-----------------------------------|-------------------|
| 1.  | Nom de famille<br><i>Surname</i>  | <b>Doe</b>                             | 2.     | Prénom(s)<br><i>First name(s)</i> | <b>John</b>       |
|     | Sexe : masculin / féminin<br><i>Sex: male / female</i>                                  |  |        | <b>Male</b>                       |                   |
| 3.  | Nationalité<br><i>Nationality</i>   | <b>British</b>                         | 4.     | Profession<br><i>Occupation</i>   | <b>Unemployed</b> |
| 5.  | Date et lieu de naissance<br><i>Date and place of birth</i>                             | <b>1 January 1975, London, England</b> |        |                                   |                   |
| 6.  | Domicile<br><i>Permanent address</i>  | <b>123 Main Street, E00 0AB</b>        |        |                                   |                   |
| 7.  | Tel. N°   | <b>(0) 20 1234-5678</b>                |        |                                   |                   |
| 8.  | Adresse actuelle (si différente de 6.)<br><i>Present address (if different from 6.)</i> | <b>(Same)</b>                          |        |                                   |                   |
| 9.  | Nom et prénom du/de la représentant(e)*<br><i>Name of representative*</i>               | <b>Jane Smith</b>                      |        |                                   |                   |
| 10. | Profession du/de la représentant(e)<br><i>Occupation of representative</i>              | <b>Attorney</b>                        |        |                                   |                   |
| 11. | Adresse du/de la représentant(e)<br><i>Address of representative</i>                    | <b>456 Main Street, E00 0AB</b>        |        |                                   |                   |
| 12. | Tel. N°   | <b>(0) 20 8765-4321</b>                | Fax N° | <b>(0) 20 2345-6789</b>           |                   |

**B. LA HAUTE PARTIE CONTRACTANTE**  
***THE HIGH CONTRACTING PARTY***

(Indiquer ci-après le nom de l'Etat/des Etats contre le(s)quel(s) la requête est dirigée)  
(*Fill in the name of the State(s) against which the application is directed*)

13. **United Kingdom**

\* Si le/la requérant(e) est représenté(e), joindre une procuration signée par le/la requérant(e) et son/sa représentant(e).  
*If the applicant appoints a representative, attach a form of authority signed by the applicant and his or her representative.*

## **II. EXPOSÉ DES FAITS STATEMENT OF THE FACTS**

(Voir chapitre II de la note explicative)  
(See Part II of the Explanatory Note)

14. On 10 January 2002 my client (hereinafter referred to as “the applicant”) was arrested in the city centre of X by officers from the Anti-Terrorist Branch on suspicion of involvement in terrorist activities (see appendix A for a copy of the record of arrest) and was taken to the City Hospital for a medical examination. According to the medical report drawn up at the end of the examination, there were no signs of any injuries on his body (see appendix B). The applicant was then placed in the detention facility of the police station. During his detention the applicant was questioned by police officers on a number of occasions. When he denied the allegations against him, the police officers became agitated and subjected him to serious ill-treatment which included being stripped naked, hosed down with pressurised cold water, suspended from his arms and being beaten with a truncheon on his chest. Also, electric shocks were administered to his toes. On 13 January 2002, while he was being ill-treated, the applicant was forced to sign a statement in which he confessed to having committed terrorism-related offences (see appendix C).

14.1 On 14 January 2002 the police officers took the applicant back to the City Hospital where they remained in the room while he was being examined by a doctor. When the doctor asked the applicant to remove his clothes, the police officers told him not to do so. As a result, the doctor stated in a medical report that there were no signs of any ill-treatment on the applicant (see appendix D). The applicant was then taken to the court house where he informed the judge of his ordeal and informed the judge that he had been forced to sign a confession under ill-treatment. The judge ordered his release (see appendix E for a copy of the order of release).

14.2 On his release the applicant was met outside the court building by his father and a lawyer who took him to the applicant’s family doctor. The doctor recorded in his report that there were extensive bruises under his armpits which were compatible with the applicant’s account of having been suspended from his arms, and the marks on his chest were compatible with having been beaten with an object. Furthermore, the doctor also observed that the applicant’s toes bore signs of electric burns (see appendix F). According to the medical record, the injuries had been caused at least 24 hours previously.

14.3 On the same day the applicant went back to the court where he submitted a petition to the prosecutor in which he detailed the ill-treatment to which he had been subjected (see appendix G for a copy of the petition). With his petition he also enclosed copies of the three medical reports (i.e. appendices B, D and F). He asked the prosecutor to investigate his allegations and prosecute the police officers responsible for the ill-treatment. He further informed the prosecutor that his father and his lawyer would be willing to testify to the effect that he had been released with injuries.

14.4 On 21 January 2002 the prosecutor filed an indictment with the City Criminal Court in which he accused the applicant of membership in a terrorist organisation (see appendix H for a copy of the indictment). On 1 March 2002 a hearing was held in the City Criminal Court in the course of which the trial judge ordered the applicant’s detention on remand pending the outcome of the trial (see appendix I for a copy of the verbatim record of the hearing). The trial continued until 1 March 2005 during which time there were 12 hearings. Throughout the trial the applicant professed his innocence and told the court that his confession had been extracted under ill-treatment (see appendix J for copies of the



verbatim records of the 12 hearings). On 1 March 2005 the applicant was found guilty of the offences with which he had been charged and sentenced to a prison term of 12 years (see appendix K for a copy of the judgment). Within the statutory time limit the applicant appealed against his conviction and argued, *inter alia*, that the conviction was wrongful as it was based on the confession extracted from him under ill-treatment (see appendix L for a copy of the appeal petition). The applicant remained in detention on remand until his conviction was upheld by the Court of Appeal on 1 October 2005. The decision of the Court of Appeal was served on the applicant on 8 October 2005 (see appendix M for a copy of the Court of Appeal's decision). On 21 October 2005 the applicant was transferred to the County Prison to serve his prison sentence, and he is currently detained there.

14.5 During his detention on remand in the City Prison between 1 March 2002 and 21 October 2005, the applicant was kept in a cell measuring 20 square metres (m<sup>2</sup>) together with 19 other prisoners. As there were only 10 beds, the inmates had to take turns to sleep. There was only one window, measuring 75 x 120 cm. This window, which was the only source of fresh air and natural light, would only be open for two hours per day. The 20 prisoners had to share one toilet and one wash basin which were located in the corner of the cell and not enclosed by any sort of partition. The food would only be served once a day and was hardly edible. Moreover, the dirty crockery was not collected until the following day. As a result of the poor sanitary conditions, the cell was infested with rats, ants and lice. Once a fortnight the prisoners were allowed to take a shower which was limited to five minutes at most. The applicant was only allowed one hour of outdoor exercise in a small yard per day. As a result of the conditions in the prison the applicant's mental and physical health deteriorated and he is still suffering from serious health problems (see appendix N for the medical report, drawn up on 1 August 2005 showing the effects of the conditions of his detention). Although the problems the applicant suffered in the cell and his health problems were brought to the attention of the trial court as well as of the Court of Appeal on a number of occasions, no action was taken to remedy the situation, for example by moving the applicant to another prison or by releasing him pending the outcome of the trial.

14.6 In the meantime, on 30 October 2004 the applicant sent a letter to the prosecutor and asked for information about the investigation into his allegations of ill-treatment (see appendix O for a copy of the applicant's letter). The applicant enclosed with his letter two statements which were drawn up by his father and the lawyer who had met him outside the court house upon his release and in which they detailed the applicant's injuries and stated that they had taken the applicant to the family doctor immediately after his release (see appendix T). In his letter of 1 January 2005 the prosecutor informed the applicant that the investigation was classified as confidential and for this reason he could not disclose any details (see appendix P for a copy of the prosecutor's letter). On 1 April 2005 the applicant received the decision of the prosecutor not to prosecute the police officers. The prosecutor's decision was based on a report that had apparently been drawn up on 15 November 2004 by the police chief of the police station where the applicant had been detained and ill-treated. According to the police chief's report, the police officers involved had been questioned by their commanding officer and had vehemently denied any wrongdoing. The prosecutor's decision also stated that according to the medical report of the City Hospital (appendix D), there were no signs of any injury on the applicant's body. As to the medical report obtained from the applicant's family doctor (appendix F), the prosecutor decided to exclude it since it had been drawn up by a private practitioner as opposed to a doctor employed by the State. The decision also stated that it would become final if no appeal was lodged against it within the statutory period of two weeks (see appendix Q for a copy of the prosecutor's decision not to prosecute the police officers). On 4 April 2005 the applicant appealed against the prosecutor's decision not to prosecute the police officers (see appendix R for a copy of the appeal petition). The

appeal, which is the final remedy under domestic law, was dismissed on 1 September 2005 by the Assize Court (see appendix S for a copy of the decision). In accordance with the domestic procedure, the decision was served on the applicant on 30 September 2005.

### **III. EXPOSÉ DE LA OU DES VIOLATION(S) DE LA CONVENTION ET/OU DES PROTOCOLES ALLÉGUÉE(S), AINSI QUE DES ARGUMENTS À L'APPUI** **STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS**

(Voir chapitre III de la note explicative)  
(See Part III of the Explanatory Note)

15. The applicant submits that there have been three separate violations of Article 3 of the Convention as well as a violation of Article 13 of the Convention on account of the treatment to which he was subjected since his arrest on 10 January 2002. These arguments will be separately dealt with below.

#### **a) *Violation of Article 3 on Account of the Ill-treatment in Police Custody***

15.1 The applicant submits that the ill-treatment to which he was subjected whilst in the custody of the police officers was in breach of Article 3 of the Convention. In this connection the applicant refers to the established case-law of the European Court of Human Rights (hereinafter referred to as “the Court”) according to which “where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention” (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, 28 July 1999, § 87). The applicant was arrested and detained in police custody on 10 January 2002 (see appendix A) and remained there until his release on 14 January 2002 (see appendix E). According to the medical report drawn up on 10 January 2002, i.e. immediately after he was arrested and before he was placed in the police custody, his body bore no marks of ill-treatment (see appendix B). On the other hand, the report prepared by his family doctor within hours of his release on 14 January 2002 (see appendix F) details the extensive injuries on his body. It is submitted, therefore, that the injuries detailed in that medical report had been caused while the applicant was detained in the custody of the police.

15.2 The applicant argues that the medical report issued upon his release from police custody on 14 January 2002 (appendix D) cannot be relied on in evidence as discrediting his allegations of ill-treatment. That medical examination was carried out in the presence of police officers who had been responsible for the ill-treatment. Their presence prevented the applicant from informing the doctor about the ill-treatment and from showing the doctor his injuries. In this connection the applicant refers to the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards on Police Custody. According to these Standards, “medical examination of persons in police custody should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor’s conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer”. The Court has taken these Standards into account in evaluating medical reports in cases concerning allegations of ill-treatment (see, for example, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, § 118).

15.3 As regards the prosecutor's failure to take the medical report obtained from the applicant's family doctor (appendix F) into account because it was prepared by a private medical practitioner – as opposed to a doctor working for a State hospital – the applicant submits that medical reports drawn up by private medical practitioners are relevant for the Court's examinations of allegations of ill-treatment. Furthermore, the Court expects national investigating authorities to take such reports into account. In this connection the applicant refers to the Court's judgment in the case of *Dizman v. Turkey* in which the medical report obtained by Mr Dizman following his release formed the basis of the Court's conclusion that he had been ill-treated (*Dizman v. Turkey*, no. 27309/95, 20 September 2005, § 76). Like Mr Dizman had done, the applicant in the present application also brought the medical report to the attention of the investigating prosecutor and asked the prosecutor to prosecute the police officers. Furthermore, the applicant would draw the Court's attention to the fact that the independent medical report in question was obtained immediately after his release. There is no suggestion that the applicant suffered those injuries in that short time, i.e. after his release but before his examination by his family doctor. In any event, as can be seen in the applicant's petition submitted to the prosecutor on 14 January 2002 (appendix G), the applicant informed the prosecutor that his father and the lawyer were willing to testify to the effect that they had seen him released with injuries and had taken him immediately to the family doctor (see appendix T for copies of the statements). Furthermore, the medical report which states that the applicant's injuries were one day old places the timing of those injuries to the period of detention in police custody. No steps were taken by the prosecutor to question his father or the lawyer or to question the doctors who had drawn up the medical reports on 14 January 2002 to eliminate the contradictions between those reports.

15.4 In the light of the foregoing the applicant submits that he has satisfied the initial burden of proving that his injuries were caused in police custody. It follows, therefore, that the respondent Government's obligation is engaged to provide a plausible explanation of how the applicant's injuries were caused, failing which a clear issue arises under Article 3 of the Convention. To this end, the applicant maintains that the injuries were the consequence of the ill-treatment and reserves the right to respond to any arguments which may be advanced by the respondent Government and to adduce further evidence.

15.5 As regards the nature of his injuries, the applicant submits that they were serious and have been inflicted deliberately, thereby causing him very serious and cruel suffering (see *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, § 167). The ill-treatment included being stripped naked, hosed down with pressurised cold water, being suspended from his arms and being beaten up with a truncheon on his chest. Also, electric shocks were administered to his toes. According to the Court, being suspended from the arms "could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out" (see *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 64). Furthermore, the applicant draws the Court's attention to the fact that he was ill-treated in order to force him to sign a confession. In the light of the above, the applicant invites the Court to conclude that the ill-treatment to which he was subjected amounted to torture within the meaning of Article 3 of the Convention.

**b) Violation of Article 3 on Account of the Conditions of Detention on Remand**

15.6 The applicant submits that his suffering on account of the conditions of his detention on remand in the City Prison between 1 March 2002 and 21 October 2005 went beyond the inevitable element of suffering or humiliation involved in a given form of legitimate treatment or punishment and reached the threshold of severity necessary to classify it as inhuman and degrading. In this connection the applicant refers to the findings of the CPT following its delegates' visit to the City Prison in 2004 while the applicant was being detained there. According to the CPT's report, the conditions in the prison were inhuman and degrading. Furthermore, it was stated in the CPT's report that 7 m<sup>2</sup> per prisoner was an approximate and desirable guideline for a detention cell, whereas the applicant was only afforded 1 m<sup>2</sup> of personal space.

15.7 Prison conditions similar to those the applicant endured in the City Prison have already been found by the Court to be inhuman and degrading. In this connection the applicant refers in particular to the Court's judgments in the cases of *Kalashnikov v. Russia* (no. 47095/99, 15 July 2002, § 97) and *Labzov v. Russia* (no. 62208/00, 28 February 2002, §§ 44-46) in which the Court found that personal space afforded to prisoners measuring between 0.9 - 1.9 m<sup>2</sup> and 1 m<sup>2</sup>, respectively, in themselves gave rise to issues under Article 3 of the Convention. In the present application, the applicant was allowed 1 m<sup>2</sup> of personal space, in which he spent more than three years and seven months. The applicant submits that the fact that he was obliged to live, sleep and use the toilet in the same cell with so many other inmates is sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him.

15.8 The applicant invites the Court to take into account the cumulative effects of the conditions of his detention. As evidenced in the medical report of 1 August 2005 (appendix N) the conditions in the City Prison have adversely affected the applicant's mental and physical health.

15.9 In the light of the above, the applicant maintains that there has been a separate violation of Article 3 of the Convention on account of the unacceptable conditions of his detention.

**c) Violation of Article 3 on Account of the Lack of an Effective Investigation**

15.10 According to the Court's established case-law, "where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible" (*Assenov v. Bulgaria*, no. 24760/94, 28 September 1998, § 102; see also more recently *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, §§ 53-57).

15.11 Modalities of an effective investigation into allegations of ill-treatment, as identified in the Court's case-law, are summarised in the Court's judgment in the case of *Bati and Others v. Turkey* (nos. 33097/96 and

57834/00, 3 June 2004, §§ 133-137). According to the Court in *Bati and Others*, and in so far as relevant for the purposes of the present application, investigating authorities faced with allegations of ill-treatment must

- show due diligence by promptly initiating an investigation and by taking reasonable steps to expedite the investigation;
- take reasonable steps to secure the evidence;
- carry out the investigation in an independent and impartial manner; and
- enable the victim's effective access to the investigation.

15.12 In the present application no steps appear to have been taken in the investigation prior to the drafting of the report by the police chief on 15 November 2004, more than two years after the applicant brought his complaints to the prosecutor's attention (see appendix Q for a copy of the decision not to prosecute). Furthermore, no steps appear to have been taken between 15 November 2004 until 1 April 2005 when the prosecutor rendered his decision not to prosecute the police officers. Indeed, the report prepared by the police chief following his questioning of the police officers responsible for the ill-treatment remains the only step taken in the investigation which continued for a period of almost three years. Similarly, no consideration has been given by the trial court judge to the allegations of ill-treatment repeatedly voiced by the applicant in the course of the trial (see appendix J for copies of the verbatim records). It cannot be said, therefore, that the investigating authorities have acted promptly or that they have shown due diligence to expedite the investigation.

15.13 No steps have been taken by the prosecutor to secure the evidence. For example, no thought was apparently given to questioning the applicant or to having him examined by a doctor to obtain an additional medical certificate with a view to eliminating the contradictions between the two medical reports (see appendices D and F for copies of the medical reports). Similarly, no attempt has been made by the prosecutor to question the applicant's father and the lawyer who had met the applicant outside the court house upon his release and taken him to the family doctor (see appendix T).

15.14 It cannot be said that the investigation was independent or impartial. The police officers whom the applicant accused of having ill-treated him were questioned by their superior. On account of the hierarchical connection, the police chief cannot be regarded as an independent or impartial investigator. Strikingly, no steps were taken by the prosecutor to question the police officers directly.

15.15 Finally, there has been no public scrutiny of the investigation. In particular, the applicant has not been given any information about the investigation despite his request thereto (see appendix O). The applicant submits that the denial of information and access to the documents in the investigation file cannot be justified on account of the allegedly confidential nature of the investigation.

15.16 In the light of the foregoing, the applicant argues that the investigating authorities failed to carry out an effective investigation into his allegations of ill-treatment in violation of the positive obligation inherent in Article 3 of the Convention.

**d) Violation of Article 13 on Account of a Lack of an Effective Remedy**

15.17 The applicant submits that he has been denied an effective remedy in respect of his Convention complaints of ill-treatment. He maintains that the allegations of ill-treatment which he brought to the attention of the prosecutor was substantiated by adequate evidence and he had, therefore, an arguable claim for the purposes of Article 13 of the Convention (see, in particular, *Boyle and Rice v. the United Kingdom*, nos. 9659/82 and 9658/82, 27 April 1998, § 52-55). The authorities thus had an obligation to carry out an effective investigation into his allegations against the police officers. However, and as set out above, all his attempts to have criminal proceedings instituted against the police officers responsible for the ill-treatment have failed, and the authorities have thus deprived him of an effective remedy in violation of Article 13 of the Convention.

**IV. EXPOSÉ RELATIF AUX PRESCRIPTIONS DE L'ARTICLE 35 § 1 DE LA CONVENTION**  
**STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION**

(Voir chapitre IV de la note explicative. Donner pour chaque grief, et au besoin sur une feuille séparée, les renseignements demandés sous les points 16 à 18 ci-après)

*(See Part IV of the Explanatory Note. If necessary, give the details mentioned below under points 16 to 18 on a separate sheet for each separate complaint)*

16. Décision interne définitive (date et nature de la décision, organe – judiciaire ou autre – l'ayant rendue)  
*Final decision (date, court or authority and nature of decision)*

16.1 As regards the applicant's complaint concerning the ill-treatment to which he was subjected while in the custody of the police, the applicant applied to the prosecutor and asked the prosecutor to investigate his allegations (see appendix G). He also appealed against the prosecutor's decision not to prosecute the police officers (see appendix R). The appeal was rejected by the Assize Court on 1 September 2005, and the decision was communicated to the applicant on 30 September 2005 (see appendix S).

16.2 As regards the complaint concerning the conditions of his detention in the City Prison, the applicant informed the trial judge throughout the trial of the problems he was encountering in the prison (appendix J for copies of the verbatim records of the hearings). Furthermore the applicant also mentioned these problems in his appeal to the Court of Appeal (see appendix L). The appeal was rejected on 1 October 2005, and the decision was served on the applicant on 8 October 2005 (see appendix M).

15. Autres décisions (énumérées dans l'ordre chronologique en indiquant, pour chaque décision, sa date, sa nature et l'organe – judiciaire ou autre – l'ayant rendue)

*Other decisions (list in chronological order, giving date, court or authority and nature of decision for each of them)*

17.1 City Criminal Court's judgment of 1 March 2005 in which the applicant was convicted and sentenced to 12 years' imprisonment (appendix K).

168. Dispos(i)ez-vous d'un recours que vous n'avez pas exercé? Si oui, lequel et pour quel motif n'a-t-il pas été exercé?

*Is there or was there any other appeal or other remedy available to you which you have not used? If so, explain*

*why you have not used it.*

18.1 The appeal against the prosecutor's decision not to prosecute and the appeal against the decision of the City Criminal Court judgment constitute the final domestic remedies within the meaning of Article 35 § 1 of the Convention.

Si nécessaire, continuer sur une feuille séparée  
*Continue on a separate sheet if necessary*

**V. EXPOSÉ DE L'OBJET DE LA REQUÊTE**  
**STATEMENT OF THE OBJECT OF THE APPLICATION**

(Voir chapitre V de la note explicative)  
*(See Part V of the Explanatory Note)*

179. By introducing this application the applicant primarily seeks to obtain a finding from the Court that his rights under Articles 3 and 13 of the Convention have been violated. In the applicant's opinion, the most appropriate form of redress would be to re-open the investigation into his allegations of ill-treatment and to grant him a re-trial, disregarding the confession extracted from him under torture.

The applicant reserves the right to submit in due course his claims under Article 41 of the Convention for his costs and expenses associated with the bringing of his application as well as for his pecuniary and non-pecuniary damages.

**VI. AUTRES INSTANCES INTERNATIONALES TRAITANT OU AYANT TRAITÉ L'AFFAIRE**  
**STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS**

(Voir chapitre VI de la note explicative)  
*(See Part VI of the Explanatory Note)*

20. Avez-vous soumis à une autre instance internationale d'enquête ou de règlement les griefs énoncés dans la présente requête? Si oui, fournir des indications détaillées à ce sujet.  
*Have you submitted the above complaints to any other procedure of international investigation or settlement? If so, give full details.*
- 20.1 The applicant has not submitted his complaints to another procedure of international investigation or settlement.

**VII. PIÈCES ANNEXÉES**

**(PAS D'ORIGINAUX,  
UNIQUEMENT DES COPIES ;  
PRIERE DE N'UTILISER NI AGRAFE,  
NI ADHESIF, NI LIEN D'AUCUNE SORTE)**

***LIST OF DOCUMENTS***

***(NO ORIGINAL DOCUMENTS,  
ONLY PHOTOCOPIES,  
DO NOT STAPLE, TAPE OR BIND DOCUMENTS)***

(Voir chapitre VII de la note explicative. Joindre copie de toutes les décisions mentionnées sous ch. IV et VI ci-dessus. Se procurer, au besoin, les copies nécessaires, et, en cas d'impossibilité, expliquer pourquoi celles-ci ne peuvent pas être obtenues. Ces documents ne vous seront pas retournés.)

*(See Part VII of the Explanatory Note. Include copies of all decisions referred to in Parts IV and VI above. If you do not have copies, you should obtain them. If you cannot obtain them, explain why not. No documents will be returned to you.)*

181. a) Record of Arrest of 10 January 2002
- b) Medical report drawn up at the City Hospital on 10 January 2002
- c) The confession extracted from the applicant under torture on 13 January 2002
- d) Medical report drawn up at the City Hospital on 14 January 2002
- e) Judge's order of release of 14 January 2002
- f) Medical report drawn up by the family doctor on 14 January 2002
- g) Complaint petition submitted to the prosecutor on 14 January 2002
- h) Indictment of 21 January 2002
- i) Verbatim record of the first hearing held on 1 March 2002
- j) Verbatim records of the 12 hearings
- k) City Criminal Court's judgment of 1 March 2005 convicting the applicant
- l) The applicant's petition of appeal against his conviction
- m) Decision of the Court of Appeal dismissing the appeal
- n) Medical report of 1 August 2005
- o) The applicant's letter of 30 October 2004 addressed to the prosecutor
- p) The prosecutor's reply of 1 January 2005
- q) The prosecutor's decision of 1 April 2005 not to prosecute the police officers
- r) The petition of appeal of 4 April 2005 against the prosecutor's decision not to prosecute
- s) Assize Court's decision of 1 September 2005 dismissing the applicant's appeal
- t) Statements drawn up by the applicant's father and the lawyer.



**VIII. DÉCLARATION ET SIGNATURE**  
***DECLARATION AND SIGNATURE***

(Voir chapitre VIII de la note explicative)  
*(See Part VIII of the Explanatory Note)*

Je déclare en toute conscience et loyauté que les renseignements qui figurent sur la présente formule de requête sont exacts.

*I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.*

Lieu/Place .....

Date/Date 30 March 2006

(Signature du/de la requérant(e) ou du/de la représentant(e))  
*(Signature of the applicant or of the representative)*

## ANNEX I

### **Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>132</sup>**

The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment (hereafter referred to as torture or other ill-treatment) include the following: clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families, identification of measures needed to prevent recurrence and facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.<sup>132</sup>

States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated. Even in the absence of annex press complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission, investigations by impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards, and the findings shall be made public.

The investigative authority shall have the power and obligation to obtain all the

information necessary to the inquiry.<sup>133</sup> Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence. Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation and shall be entitled to present other evidence.

In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias or because of the apparent existence of a pattern of abuse, or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a

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<sup>132</sup> The Commission on Human Rights, in its resolution 2000/43, and the General Assembly, in its resolution 55/89, drew the attention of Governments to the Principles and strongly encouraged Governments to reflect upon the Principles as a useful tool in efforts to combat

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<sup>133</sup> Under certain circumstances professional ethics may require information to be kept confidential. These requirements should be respected.

commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.<sup>134</sup>

A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report shall be made public. It shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation, and, as appropriate, indicate steps to be taken in response.

Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and in particular shall obtain informed consent before any examination is undertaken. The examination must follow established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

The medical expert should promptly prepare an accurate written report. This report should include at least the following:

(a) The name of the subject and the name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention

center, clinic, house); and the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanor of those accompanying the prisoner, threatening statements to the examiner) and any other relevant factors;

(b) A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;

(c) A record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;

(d) An interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and further examination should be given;

(e) The report should clearly identify those carrying out the examination and should be signed.

The report should be confidential and communicated to the subject or a nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. It should also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report should not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such transfer.

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<sup>134</sup> See footnote above.

## ANNEX II

### Diagnostic tests

Diagnostic tests are being developed and evaluated all the time. The following tests were considered to be of value at the time of the writing of this manual. However, when additional supporting evidence is required, investigators should attempt to find up-to-date sources of information, for example by approaching one of the specialized centers for the documentation of torture (see chapter V.E.).

#### 1. Radiological imaging

In the acute phase of injury, various imaging modalities may be quite useful in providing additional documentation of skeletal and soft tissue injury. Once the physical injuries of torture have healed, however, the residual sequelae are generally no longer detectable by the same imaging methods. This is often true even when the survivor continues to suffer significant pain or disability from his or her injuries. Reference has already been made to various radiological studies in the discussion of the examination of the patient or in the context of various forms of torture. The following is a summary of the application of these methods. However, the more sophisticated and expensive technology is not universally available or at least not to a person in custody.

Radiological and imaging diagnostic examinations include routine radiographs (x-rays), radioisotopic scintigraphy, computerized tomography (CT), nuclear magnetic resonance imaging (MRI) and ultrasonography (USG). Each has advantages and disadvantages. X-rays, scintigraphy and computerized tomography use ionizing radiation, which may be a concern in cases of pregnant women and children. Magnetic resonance imaging uses a magnetic field. Potential biologic effects on fetuses and children are theoretical, but thought to be minimal. Ultrasound uses sound waves, and no biologic risk is known.

X-rays are readily available. Excluding the skull, all injured areas should have routine

radiographs as the initial examination. While routine radiographs will demonstrate facial fractures, computerized tomography is a superior examination as it demonstrates more fractures, fragment displacement and associated soft tissue injury and complications. When periosteal damage or minimal fractures are suspected, bone scintigraphy should be used in addition to x-rays. A percentage of x-rays will be negative even when there is an acute fracture or early osteomyelitis. It is possible for a fracture to heal, leaving no radiographic evidence of previous injury. This is especially true in children. Routine radiographs are not the ideal examination for evaluation of soft tissue.

Scintigraphy is an examination of high sensitivity, but low specificity. It is an inexpensive and effective examination used to screen the entire skeleton for disease processes such as osteomyelitis or trauma. Testicular torsion can also be evaluated, but ultrasound is better suited to this task. Scintigraphy is not a method to identify soft tissue trauma. Scintigraphy can detect an acute fracture within twenty-four hours, but it generally takes two to three days and may occasionally take a week or more, particularly in the case of the elderly. The scan generally returns to normal after two years. However, it may remain positive in cases of fractures and cured osteomyelitis for years. The use of bone scintigraphy to detect fractures at the epiphysis or metadiaphysis (ends of long bones) in children is very difficult because of the normal uptake of the radiopharmaceutical at the epiphysis. Scintigraphy is often able to detect rib fractures that are not apparent on routine x-ray films.

#### *(a) Application of bone scintigraphy to the diagnosis of Falanga*

Bone scans can be performed either with delayed images at about three hours or as a three-phase examination. The three phases are the radionuclide angiogram (arterial phase),

blood pool images (venous phase, which is soft tissue) and delayed phase (bone phase). Patients examined soon after *falanga* should have two bone scans performed at one-week intervals. A negative first delayed scan and positive second scan indicate exposure to *falanga* within days before the first scan. In acute cases, two negative bone scans at an interval of one week do not necessarily mean that *falanga* did not occur, but that the severity of the *falanga* applied was below the sensitivity level of the scintigraphy. Initially, if three-phase scanning is done, increased uptake in the radionuclide angiogram phase and the blood pool images and no increase uptake in the bone phase would indicate hyperaemia compatible with soft tissue injury. Trauma in the foot bones and soft tissue can also be detected with magnetic resonance imaging.<sup>135</sup>

#### (b) *Ultrasound*

Ultrasound is inexpensive and without biological hazard. The quality of an examination depends on the skill of the operator. Where computerized tomography is not available, ultrasound is used to evaluate acute abdominal trauma. Tendonopathy can also be evaluated by ultrasound, and it is a method of choice for testicular abnormalities. Shoulder ultrasound is carried out in the acute and chronic periods following suspension torture. In the acute period, oedema, fluid collection on and around the shoulder joint, lacerations and haematomas of the rotator cuffs can be observed by ultrasound. Re-examination with ultrasound and finding that the evidence in the acute period disappears over time strengthen the diagnosis. In such cases, magnetic resonance imaging, scintigraphy and other radiological examinations should be carried out together, and their correlation should be examined. Even lacking positive results from other examinations, ultrasound findings alone are adequate to prove suspension torture.

#### (c) *Computerized tomography*

Computerized tomography is excellent for imaging soft tissue and bone. However, magnetic resonance imaging is better for soft tissue than bone. Magnetic resonance imaging may detect an occult fracture before it can be imaged by either routine radiographs or scintigraphy. Use of open scanners and sedation may alleviate anxiety and claustrophobia, which are prevalent among torture survivors. Computerized tomography is also excellent for diagnosing and evaluating fractures, especially temporal and facial bones. Other advantages include alignment and displacement of fragments, especially spinal, pelvic, shoulder and acetabular fractures. It cannot identify bone bruising. Computerized tomography with and without intravenous infusion of a contrast agent should be the initial examination for acute, sub-acute and chronic central nervous system (CNS) lesions. If the examination is negative, equivocal or does not explain the survivor's CNS complaints or symptoms, proceed to magnetic resonance imaging. Computerized tomography with bone windows and a pre- and post-contrast examination should be the initial examination for temporal bone fractures. Bone windows may demonstrate fractures and ossicular disruption. The pre-contrast examination may demonstrate fluid and cholesteatoma. Contrast is recommended because of the common vascular anomalies that occur in this area. For rhinorrhea, injection of a contrast agent into the spinal canal should follow a temporal bone. Magnetic resonance imaging may also demonstrate the tear responsible for leakage of the fluid. When rhinorrhea is suspected, a computerized tomography of the face with soft tissue and bone windows should be performed. Then a computerized tomography should be obtained after a contrast agent is injected into the spinal canal.

#### (d) *Magnetic resonance imaging*

Magnetic resonance imaging is more sensitive than computerized tomography in detecting central nervous system abnormalities. The time course of central nervous system haemorrhage is divided into immediate,

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<sup>135</sup> See footnotes 82-84; also refer to standard radiology and nuclear medicine texts for further information.

hyperacute, acute, sub-acute and chronic phases and central nervous system haemorrhage has ranges that correlate with imaging characteristics of the haemorrhage. Thus, the imaging findings may allow estimation of the timing of head injury and correlation to alleged incidents. Central nervous system haemorrhage may completely resolve or produce sufficient hemosiderin deposits that the computerized tomography will be positive even years later. Haemorrhage in soft tissue, especially in muscle, usually resolves completely, leaving no trace, but, rarely, it can ossify. This is called heterotrophic bone formation or *myositis ossificans* and is detectable with computerized tomography.

## 2. Biopsy of electric shock injury

Electric shock injuries may, but do not necessarily, exhibit microscopic changes that are highly diagnostic and specific for electric current trauma. Absence of these specific changes in a biopsy specimen does not mitigate against a diagnosis of electric shock torture, and judicial authorities must not be permitted to make such an assumption. Unfortunately, if a court requests that a petitioner alleging electric shock torture submit to a biopsy for confirmation of the allegations, refusal to consent to the procedure or a negative result is bound to have a prejudicial impact on the court. Furthermore, clinical experience with biopsy diagnosis of torture-related electrical injury is limited, and the diagnosis can usually be made with confidence from the history and physical examination alone.

This procedure is, therefore, one that should be done in a clinical research setting and not promoted as a diagnostic standard. In giving informed consent for biopsy, the person must be informed of the uncertainty of the results and permitted to weigh the potential benefit against the impact upon an already traumatized psyche.

### (a) Rationale for biopsy

There has been extensive laboratory research measuring the effects of electric shocks

on the skin of anaesthetized pigs.<sup>136 137 138 139 140</sup>

<sup>141</sup> This work has shown that there are histologic findings specific to electrical injury that can be established by microscopic examination of punch biopsies of the lesions. However, further discussion of this research, which may have significant clinical application, is beyond the scope of this publication. The reader is referred to the above-cited references for additional information.

Few cases of electric shock torture of humans have been studied histologically.<sup>142 143</sup>

<sup>144 145</sup> Only in one case, where lesions were excised probably seven days after the injury,

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<sup>136</sup> Thomsen et al., "Early epidermal changes in he at and electrically injured pig skin: a light microscopic study", *Forensic Science International* (17 1981:133-43).

<sup>137</sup> Thomsen et al., "The effect of direct current, sodium hydroxide, and hydrochloric acid on pig epidermis: a light microscopic and electron microscopic study", *Acta path microbiol. immunol. Scand* (sect. A 91 1983:307-16).

<sup>138</sup> H. K. Thomsen, "Electrically induced epidermal changes: a morphological study of porcine skin after transfer of low-moderate amounts of electrical energy", dissertation (University of Copenhagen, F.A.D.L. 1984:1-78).

<sup>139</sup> T. Karlsmark et al., "Tracing the use of torture: electrically induced calcification of collagen in pig skin", *Nature* (301 1983:75-78).

<sup>140</sup> T. Karlsmark et al., "Electrically-induced collagen calcification in pig skin. A histopathologic and histochemical study", *Forensic Science International* (39 1988:163-74).

<sup>141</sup> T. Karlsmark, "Electrically induced dermal changes: a morphological study of porcine skin after transfer of low to moderate amounts of electrical energy", dissertation, University of Copenhagen, *Danish Medical Bulletin* (37 1990:507-520).

<sup>142</sup> L. Danielsen et al., "Diagnosis of electrical skin injuries: a review and a description of a case", *American Journal of Forensic Medical Pathology* (12 1991:222-226).

<sup>143</sup> F. Öztop et al., "Signs of electrical torture on the skin", *Treatment and Rehabilitation Centers Report 1994* (Human Rights Foundation of Turkey, HRFT Publication, 11 1994:97-104).

<sup>144</sup> L. Danielsen, T. Karlsmark, H. K. Thomsen, "Diagnosis of skin lesions following electrical torture", *Rom J. Leg. Med* (5 1997:15-20).

<sup>145</sup> H. Jacobsen "Electrically induced deposition of metal on the human skin", *Forensic Science International* (90 1997:85-92).

were alterations in the skin believed to be diagnostic of the electrical injuries observed (deposition of calcium salts on dermal fibres in viable tissue located around necrotic tissue). Lesions excised a few days after alleged electrical torture in other cases have shown segmental changes and deposits of calcium salts on cellular structures highly consistent with the influence of an electrical current, but they are not diagnostic since deposits of calcium salts on dermal fibres were not observed. A biopsy taken one month after alleged electrical torture showed a conical scar, 1-2 millimeters wide, with an increased number of fibroblasts and tightly packed, thin collagen fibres, arranged parallel to the surface, consistent with but not diagnostic of electrical injury.

(b) *Method*

After receiving informed consent from the patient, and before biopsy, the lesion must be photographed using accepted forensic methods. Under local anaesthesia, a 3-4 millimetre punch biopsy is obtained, and placed in buffered formalin or a similar fixative. Skin biopsy should be performed as soon as possible after injury. Since electrical trauma is usually confined to the epidermis and superficial dermis, the lesions may quickly disappear. Biopsies can be taken from more than one lesion, but the potential distress to the patient must be taken into account.<sup>146</sup> Biopsy material should be examined by a pathologist experienced in dermatopathology.

(c) *Diagnostic findings for electrical injury*

Diagnostic findings for electrical injury include vesicular nuclei in epidermis, sweat glands and vessel walls (only one differential diagnosis: injuries via basic solutions) and deposits of calcium salts distinctly located on collagen and elastic fibres (the differential

diagnosis, calcinosis cutis, is a rare disorder only found in 75 of 220,000 consecutive human skin biopsies, and the calcium deposits are usually massive without distinct location on collagen and elastic fibres).<sup>147</sup>

Typical, but not diagnostic, findings for electrical injury are lesions appearing in conical segments, often 1-2 millimetres wide, deposits of iron or copper on epidermis (from the electrode) and homogenous cytoplasm in epidermis, sweat glands and vessel walls. There may also be deposits of calcium salts on cellular structures in segmental lesions or no abnormal histologic observations.

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<sup>146</sup> S. Gürpınar, "Korur Fincancı ü, İnsan Hakları İhlalları ve Hekim Sorumluluğu" (Human Rights Violations and Responsibility of the Physician), *Birinci Basamak İçin Adli Tıp El Kitabı* (Handbook of Forensic Medicine for General Practitioners) (Ankara, Turkish Medical Association, 1999).

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<sup>147</sup> Danielsen et al. (1991).

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 25424/05

Ramzy

Applicant

v.

The Netherlands

Respondent

**WRITTEN COMMENTS**

**BY**

**AMNESTY INTERNATIONAL LTD., THE ASSOCIATION FOR THE PREVENTION OF  
TORTURE, HUMAN RIGHTS WATCH, INTERIGHTS, THE INTERNATIONAL  
COMMISSION OF JURISTS, OPEN SOCIETY JUSTICE INITIATIVE AND REDRESS  
PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN  
RIGHTS AND RULE 44 § 2 OF THE RULES OF THE EUROPEAN COURT OF HUMAN  
RIGHTS**

22 November 2005



## I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, Open Society Justice Initiative and REDRESS (“the Intervenors”) pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.<sup>1</sup>

2. Brief details of each of the Intervenors are set out in Annex 1 to this letter. Together they have extensive experience of working against the use of torture and other forms of ill-treatment around the world. They have contributed to the elaboration of international legal standards, and intervened in human rights litigation in national and international fora, including before this Court, on the prohibition of torture and ill-treatment. Together the intervenors possess an extensive body of knowledge and experience of relevant international legal standards and jurisprudence and their application in practice.

## II. OVERVIEW

3. This case concerns the deportation to Algeria of a person suspected of involvement in an Islamic extremist group in the Netherlands. He complains that his removal to Algeria by the Dutch authorities will expose him to a “real risk” of torture or ill-treatment in violation of Article 3 of the European Convention on Human Rights (the “Convention”). This case, and the interventions of various governments, raise issues of fundamental importance concerning the effectiveness of the protection against torture and other ill-treatment, including in the context of the fight against terrorism. At a time when torture and ill-treatment – and transfer to states renowned for such practices – are arising with increasing frequency, and the absolute nature of the torture prohibition itself is increasingly subject to question, the Court’s determination in this case is of potentially profound import beyond the case and indeed the region.

4. These comments address the following specific matters: (i) the absolute nature of the prohibition of torture and other forms of ill-treatment under international law; (ii) the prohibition of transfer to States where there is a substantial risk of torture or ill-treatment (“*non-refoulement*”)<sup>2</sup> as an essential aspect of that prohibition; (iii) the absolute nature of the *non-refoulement* prohibition under Article 3, and the approach of other international courts and human rights bodies; (iv) the nature of the risk required to trigger this prohibition; (v) factors relevant to its assessment; and (vi) the standard and burden of proof on the applicant to establish such risk.

5. While these comments take as their starting point the jurisprudence of this Court, the focus is on international and comparative standards, including those enshrined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”), the International Covenant on Civil and Political Rights (“ICCPR”), as well as applicable rules of customary international law, all of which have emphasised the absolute, non-derogable and peremptory nature of the prohibition of torture and ill-treatment and, through jurisprudence, developed standards to give it meaningful effect. This Court has a long history of invoking other human rights instruments to assist in the proper interpretation of the Convention itself, including most significantly for present purposes, the UNCAT.<sup>3</sup> Conversely, the lead that this Court has taken in the development of human rights standards in respect of *non-refoulement*, notably through the *Chahal v. the United Kingdom* (1996) case, has been followed extensively by other international

<sup>1</sup> Letter dated 11 October 2005 from Vincent Berger, Section Registrar to Helen Duffy, Legal Director, INTERIGHTS. The World Organization Against Torture (OMCT) and the Medical Foundation for the Care of the Victims of Torture provided input into and support with this brief.

<sup>2</sup> “Other ill-treatment” refers to inhuman or degrading treatment or punishment under Article 3 of the Convention and to similar or equivalent formulations under other international instruments. “*Non-refoulement*” is used to refer to the specific legal principles concerning the prohibition of transfer from a Contracting State to another State where there is a risk of such ill-treatment, developed under human rights law in relation to Article 3 of the Convention and similar provisions. Although the term was originally borrowed from refugee law, as noted below its scope and significance in that context is distinct. The term “transfer” is used to refer to all forms of removal, expulsion or deportation.

<sup>3</sup> *Aydin v. Turkey* (1997); *Soering v. the United Kingdom* (1989); *Selmouni v. France* (1999); and *Mahmut Kaya v. Turkey* (2000). For full reference to these and other authorities cited in the brief see Annex 2 Table of Authorities.

courts and bodies, and now reflects an accepted international standard.<sup>4</sup>

### III. THE ‘ABSOLUTE’ PROHIBITION OF TORTURE AND ILL-TREATMENT

6. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments.<sup>5</sup> All international instruments that contain the prohibition of torture and ill-treatment recognise its absolute, non-derogable character.<sup>6</sup> This non-derogability has consistently been reiterated by human rights courts, monitoring bodies and international criminal tribunals, including this Court, the UN Human Rights Committee (“HRC”), the UN Committee against Torture (“CAT”), the Inter-American Commission and Court, and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>7</sup>

7. The prohibition of torture and other forms of ill-treatment does not therefore yield to the threat posed by terrorism. This Court, the HRC, the CAT, the Special Rapporteur on Torture, the UN Security Council and General Assembly, and the Committee of Ministers of the Council of Europe, among others, have all recognised the undoubted difficulties States face in countering terrorism, yet made clear that all anti-terrorism measures must be implemented in accordance with international human rights and humanitarian law, including the prohibition of torture and other ill-treatment.<sup>8</sup> A recent United Nations World Summit Outcome Document (adopted with the consensus of all States) in para. 85 reiterated the point.

8. The absolute nature of the prohibition of torture under treaty law is reinforced by its higher, *jus cogens* status under customary international law. *Jus cogens* status connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, “intransgressible.”<sup>9</sup> There is ample international authority recognising the prohibition of torture as having *jus cogens* status.<sup>10</sup> The prohibition of torture also imposes obligations *erga omnes*, and every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.<sup>11</sup>

9. The principal consequence of its higher rank as a *jus cogens* norm is that the principle or rule cannot

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<sup>4</sup> See e.g. CAT Communication *T.P.S. v. Canada* (2000); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (2000); UN Special Rapporteur on Torture, *Reports to General Assembly* (2005, §§ 38-39; 2004, § 28; and 2002, § 32).

<sup>5</sup> Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples’ Rights (Article 5), Arab Charter on Human Rights (Article 13), UNCAT and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to the Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

<sup>6</sup> The prohibition of torture and ill-treatment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the UNCAT; Article 27(2) of the American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Articles 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>7</sup> See HRC General Comment No. 29 (2001); CAT’s Concluding observations on the Reports of: the Russian Federation (2001, § 90), Egypt (2002, § 40), and Spain (2002, § 59); Inter-American cases, e.g. *Castillo-Petruzzi et al. v. Peru* (1999, § 197); *Cantoral Benavides v. Peru* (2000, § 96); *Maritzá Urrutia v. Guatemala*, (2003, § 89); this Court’s cases, e.g. *Tomasi v. France*, (1992); *Aksoy v. Turkey*, (1996); and *Chabal v. the United Kingdom*, (1996); ICTY cases, e.g. *Prosecutor v. Furundžija* (1998).

<sup>8</sup> This Court, see e.g. *Klass and Others v. Germany* (1978); *Leander v. Sweden* (1987) and *Rotaru v. Romania* (2000); HRC, General Comment No. 29 (2001, § 7), and Concluding observations on Egypt’s Report, (2002, § 4); CAT Concluding observations on Israel’s Report (1997, §§ 2-3 and 24); Report to the General Assembly (2004, § 17) and *Statement in connection with the events of 11 September 2001* (2001, § 17); General Assembly Resolutions 57/27(2002), 57/219 (2002) and 59/191 (2004); Security Council Resolution 1456 (2003, Annex, § 6); Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (2002); Special Rapporteur on Torture, *Statement to the Third Committee of the GA* (2001). Other bodies pronouncing on the issue include, for example, Human Rights Chamber for Bosnia and Herzegovina (see e.g. *Boudellau and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 2003, §§ 264 to 267).

<sup>9</sup> Advisory Opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004, § 157). See also Article 5,3 Vienna Convention on the Law of Treaties (1969) which introduces and defines the concept of “peremptory norm.”

<sup>10</sup> See e.g. the first report of the Special Rapporteur on Torture to the UNHCR (1997, § 3); ICTY judgments *Prosecutor v. Delalic and others* (1998), *Prosecutor v. Kanarac* (2001, § 466), and *Prosecutor v. Furundžija* (1998); and comments of this Court in *Al-Adsani v. the United Kingdom* (2001).

<sup>11</sup> See ICJ Reports: *Barcelona Traction, Light and Power Company, Limited*, Second Phase (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996, § 31). See also Articles 40-41 of the International Law Commission’s Draft Articles on State Responsibility (“ILC Draft Articles”) and the commentary to the Draft Articles. See ICTY case *Prosecutor v. Furundžija*, (1998, § 151); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2000, § 155); and HRC General Comment 31(2004, § 2).

be derogated from by States through any laws or agreements not endowed with the same normative force.<sup>12</sup> Thus, no treaty can be made nor law enacted that conflicts with a *jus cogens* norm, and no practice or act committed in contravention of a *jus cogens* norm may be “legitimated by means of consent, acquiescence or recognition”; any norm conflicting with such a provision is therefore void.<sup>13</sup> It follows that no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law.

10. The fact that the prohibition of torture is *jus cogens* and gives rise to obligations *erga omnes* also has important consequences under basic principles of State responsibility, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognise acts that breach the prohibition.<sup>14</sup> Any interpretation of the Convention must be consistent with these obligations under broader international law.

#### IV. THE PRINCIPLE OF NON-REFOULEMENT

11. The expulsion (or ‘*refoulement*’) of an individual where there is a real risk of torture or other ill-treatment is prohibited under both international conventional and customary law. A number of States, human rights experts and legal commentators have specifically noted the customary nature of *non-refoulement*<sup>15</sup> and asserted that the prohibition against *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character. As the prohibition of all forms of ill-treatment (torture, inhuman or degrading treatment or punishment) is absolute, peremptory and non-derogable, the principle of *non-refoulement* applies without distinction.<sup>16</sup> Indicative of the expansive approach to the protection, both CAT and HRC are of the opinion that *non-refoulement* prohibits return to countries where the individual would not be directly at risk but from where he or she is in danger of being expelled to another country or territory where there would be such a risk.<sup>17</sup>

12. The prohibition of *refoulement* is explicit in conventions dedicated specifically to torture and ill-treatment. Article 3 of UNCAT prohibits States from deporting an individual to a State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 13(4) of the Inter-American Convention to Prevent and Punish Torture provides, more broadly, that deportation is prohibited on the basis that the individual “will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”

13. The principle of *non-refoulement* is also explicitly included in a number of other international instruments focusing on human rights, including the EU Charter of Fundamental Rights and Inter-American Convention on Human Rights (“I-ACHR”).<sup>18</sup> In addition, it is reflected in other international instruments addressing international cooperation, including extradition treaties, and specific forms of terrorism.<sup>19</sup> Although somewhat different in its scope and characteristics, the principle is also reflected in

<sup>12</sup> See Article 53 of the Vienna Convention on the Law of Treaties 1969; also ICTY *Furundzija* (1998, §§ 153-54).

<sup>13</sup> Jennings and Watts, *Oppenheim’s International Law* (Vol. 1, Ninth ed.) 8 (1996). See also Article 53, Vienna Convention.

<sup>14</sup> See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes*); see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, (2004, § 159). In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see Comment 31 (2004, § 2).

<sup>15</sup> See E. Lauterpacht and D. Bethlehem (2001, §§ 196-216).

<sup>16</sup> See e.g. HRC General Comment No. 20 (1992, § 9).

<sup>17</sup> CAT General Comment No. 1(1996, § 2); *Avedes Hamayak Korban v. Sweden* (1997); and HRC General Comment 31(2004).

<sup>18</sup> Article 19 EU Charter of Fundamental Rights; Article 22(8) I-ACHR; Article 3(1) Declaration on Territorial Asylum, Article 8 Declaration on the Protection of All Persons from Enforced Disappearances, Principle 5 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and Council of Europe Guidelines.

<sup>19</sup> Article 9 International Convention against the Taking of Hostages, Article 3 European Convention on Extradition, Article 5 European Convention on the Suppression of Terrorism, and Article 4(5) Inter-American Convention on Extradition contain a general clause on *non-refoulement*. See also Article 3 Model Treaty on Extraditions.

refugee law.<sup>20</sup>

14. This principle is also implicit in the prohibition of torture and other ill-treatment in general human rights conventions, as made clear by consistent authoritative interpretations of these provisions. In *Soering* and in subsequent cases, this Court identified *non-refoulement* as an ‘inherent obligation’ under Article 3 of the Convention in cases where there is a “real risk of exposure to inhuman or degrading treatment or punishment.” Other bodies have followed suit, with the HRC, in its general comments and individual communications, interpreting Article 7 of the ICCPR as implicitly prohibiting *refoulement*.<sup>21</sup> The African Commission on Human Rights and the Inter-American Commission on Human Rights have also recognised that deportation can, in certain circumstances, constitute such ill-treatment.<sup>22</sup>

15. The jurisprudence therefore makes clear that the prohibition on *refoulement*, whether explicit or implicit, is an inherent and indivisible part of the prohibition on torture or other ill-treatment. It constitutes an essential way of giving effect to the Article 3 prohibition, which not only imposes on states the duty not to torture themselves, but also requires them to “prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture.”<sup>23</sup> This is consistent with the approach to fundamental rights adopted by this Court, and increasingly by other bodies, regarding the positive duties incumbent on the state.<sup>24</sup> Any other interpretation, enabling states to circumvent their obligations on the basis that they themselves did not carry out the ill-treatment would, as this Court noted when it first considered the matter, ‘plainly be contrary to the spirit and intention of [Article 3].’<sup>25</sup>

### **The Absolute Nature of the Prohibition on Refoulement**

16. The foregoing demonstrates that the prohibition on *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment. UN resolutions, declarations, international conventions, interpretative statements by treaty monitoring bodies, statements of the UN Special Rapporteur on Torture and judgments of international tribunals, including this Court, as described herein, have consistently supported this interpretation. It follows from its nature as inherent to it, that the *non-refoulement* prohibition enjoys the same status and essential characteristics as the prohibition on torture and ill-treatment itself, and that it may not be subject to any limitations or exceptions.

17. The jurisprudence of international bodies has, moreover, explicitly given voice to the absolute nature of the principle of *non-refoulement*. In its case law, this Court has firmly established and re-affirmed the absolute nature of the prohibition of *non-refoulement* under Article 3 of the Convention.<sup>26</sup> In paragraph 80 of the *Chahal* case, this Court made clear that the obligations of the State under Article 3 are “equally absolute in expulsion cases” once the ‘real risk’ of torture or ill-treatment is shown. The CAT has followed suit in confirming the absolute nature of the prohibition of *refoulement* under Article 3 in the context of particular cases.<sup>27</sup> Likewise, other regional bodies have also interpreted the prohibition on torture and ill-treatment as

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<sup>20</sup> The principle of *non-refoulement* applicable to torture and other ill-treatment under human rights law is complementary to the broader rule of *non-refoulement* applicable where there is a well founded fear of ‘persecution’ under refugee law, which excludes those who pose a danger to the security of the host State. However, there are no exceptions to *non-refoulement*, whether of a refugee or any other person, when freedom from torture and other ill-treatment is at stake. See Articles 32 and 33 of the Convention Relating to the Status of Refugees, 1951, *Chahal* case (1996, § 80), the New Zealand case of *Zaoui v. Attorney General* (2005); and Lauterpacht and Bethlehem (2001, §§ 244 and 250).

<sup>21</sup> See HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12). For individual communications, see e.g. *Chitat Ng v. Canada*, (1994, § 14.1); *Cox v. Canada* (1994); *G.T. v. Australia* (1997).

<sup>22</sup> See African Commission on Human Rights, *Modise v. Botswana*, and I-A Comm. HR Report on *Terrorism and Human Rights* (2004).

<sup>23</sup> Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).

<sup>24</sup> See Special Rapporteur on Torture Report (1986, § 6) and Report (2004, § 27); HRC General Comments No. 7 (1982) and No. 20 (1992); Articles 40-42 and 48 of the ILC Draft Articles; ICTY *Furundzija* judgment (1998, § 148).

<sup>25</sup> *Soering v. UK* (1989, § 88).

<sup>26</sup> *Soering v. UK* (1989, § 88); *Ahmed v. Austria* (1996 § 41); *Chahal v. UK* (1996).

<sup>27</sup> See CAT *Tapia Paéz v. Sweden*, (1997, at § 9.8) and *Pauline Muzonzo Paku Kisoki v. Sweden* (1996).

including an absolute prohibition of *refoulement*.<sup>28</sup>

*Application of the non-refoulement principle to all persons*

18. It is a fundamental principle that *non-refoulement*, like the protection from torture or ill-treatment itself, applies to *all persons* without distinction. No characteristics or conduct, criminal activity or terrorist offence, alleged or proven, can affect the right not to be subject to torture and ill-treatment, including through *refoulement*. In the recent case of *N. v. Finland* (2005), this Court reiterated earlier findings that “[a]s the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration* (emphasis added).” The same principle is reiterated in other decisions of this Court and of other bodies.<sup>29</sup>

*Application of the non-refoulement principle in the face of terrorism or national security threat*

19. The jurisprudence of other regional and international bodies, like that of this Court, rejects definitively the notion that threats to national security, or the challenge posed by international or domestic terrorism, affect the absolute nature of the prohibition on *non-refoulement*. In *Chahal*, this Court was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the obligations arising from it (such as *non-refoulement*) in the context of terrorism. This line of reasoning has been followed in many other cases of this Court and other bodies including the recent case of *Agiza v. Sweden* in which CAT stated that “the Convention’s protections are absolute, even in the context of national security concerns.”<sup>30</sup>

20. Thus no exceptional circumstances, however grave or compelling, can justify the introduction of a “balancing test” when fundamental norms such as the prohibition on *non-refoulement* in case of torture or ill-treatment are at stake. This is evident from the concluding observations of both HRC and CAT on State reports under the ICCPR and UNCAT, respectively.<sup>31</sup> On the relatively few occasions when states have introduced a degree of balancing in domestic systems, they have been heavily criticised in concluding observations of CAT,<sup>32</sup> or the HRC.<sup>33</sup> This practice follows, and underscores, this Court’s own position in the *Chahal* case where it refused the United Kingdom’s request to perform a balancing test that would weigh the risk presented by permitting the individual to remain in the State against the risk to the individual of deportation.

***Non-Refoulement as Jus Cogens***

21. It follows also from the fact that the prohibition of *refoulement* is inherent in the prohibition of torture and other forms of ill-treatment, and necessary to give effect to it, that it enjoys the same customary law, and *jus cogens* status as the general prohibition. States and human rights legal experts have also specifically asserted that the prohibition against *non-refoulement* constitutes customary international law, and enjoys *jus cogens* status.<sup>34</sup> As noted, one consequence of *jus cogens* status is that no treaty obligation, or

<sup>28</sup> See *Modise* case and Report on Terrorism and Human Rights.

<sup>29</sup> See *inter alia* *Ahmed v. Austria* (1996); and CAT *Tapia Paéz v. Sweden* (1997, § 14.5); *M. B. B. v. Sweden* (1998, § 6.4).

<sup>30</sup> See CAT *Agiza v. Sweden* (2005, § 13.8); *Aemei v. Switzerland* (1997, § 9.8); *M.B.B. v. Sweden*, §6.4; *Arana v. France*, (2000, § 11.5).

<sup>31</sup> E.g. CAT’s Concluding Observations on Germany (2004), commending the reaffirmation of the absolute ban on exposure to torture, including through *refoulement*, even where there is a security risk.

<sup>32</sup> See CAT’s Concluding Observations on Sweden’s Report (2002, §14); and on Canada’s Report (2005, § 4(a)).

<sup>33</sup> See also HRC Concluding Observations on Canada’s Report (1999, §13) condemning the Canadian *Suresh* case, which upheld a degree of balancing under Article 3, based on national law, and *Mansour Abani v. Canada*, (2002, § 10.10) where HRC also clearly rejected Canada’s balancing test in the context of deportation proceedings.

<sup>34</sup> See Lauterpacht and Bethlehem (2001, § 195); Bruin and Wouters (2003, § 4.6); Allain (2002); Report of Special Rapporteur on Torture to the GA (2004); IACHR Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000, § 154). There has also been considerable support among Latin American States for the broader prohibition of *non-refoulement* in refugee law as

interpretation thereof, inconsistent with the absolute prohibition of *refoulement*, has validity under international law.

22. Certain consequences also flow from the *jus cogens* nature of the prohibition of torture itself (irrespective of the status of the *non-refoulement* principle), and the *erga omnes* obligations related thereto. The principle of *non-refoulement* is integral - and necessary to give effect - to the prohibition of torture. To deport an individual in circumstances where there is a real risk of torture is manifestly at odds with the positive obligations not to aid, assist or recognise such acts and the duty to act to ensure that they cease.<sup>35</sup>

## V. THE OPERATION OF THE RULE

### **The General Test**

23. When considering the obligations of States under Article 3 in transfer cases, this Court seeks to establish whether “*substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.*”<sup>36</sup> This test is very similar to those established by other bodies. Article 3 (1) of the UNCAT requires that the person not be transferred to a country where there are “*substantial grounds for believing that he would be in danger of being subjected to torture.*” The HRC has similarly affirmed that the obligation arises “*where there are substantial grounds for believing that there is a real risk of irreparable harm.*”<sup>37</sup> The Inter-American Commission for Human Rights has likewise referred to “*substantial grounds of a real risk of inhuman treatment.*”<sup>38</sup>

24. The legal questions relevant to the Court’s determination in transfer cases, assuming that the potential ill-treatment falls within the ambit of Article 3, are: first, the nature and degree of the risk that triggers the *non-refoulement* prohibition; second, the relevant considerations that constitute ‘substantial grounds’ for believing that the person faces such a risk; third, the standard by which the existence of these ‘substantial grounds’ is to be evaluated and proved. The comments below address these questions in turn.

25. A guiding principle in the analysis of each of these questions, apparent from the work of this Court and other bodies, is the need to ensure the effective operation of the *non-refoulement* rule. This implies interpreting the rule consistently with the human rights objective of the Convention; the positive obligations on States to prevent serious violations and the responsibility of the Court to guard against it; the absolute nature of the prohibition of torture and ill-treatment and the grave consequences of such a breach transpiring; and the practical reality in which the *non-refoulement* principle operates. As this Court has noted: “The object and purpose of the Convention as an instrument for the protection of individual human beings require that *its provisions be interpreted and applied so as to make its safeguards practical and effective.*”<sup>39</sup>

### **Nature and Degree of the Risk**

26. This Court, like the CAT, has required that the risk be “real”, “foreseeable”, and “personal”.<sup>40</sup> There is no precise definition in the Convention case law of what constitutes a “real” risk, although the Court has established that “mere possibility of ill-treatment is not enough”,<sup>41</sup> just as certainty that the ill-treatment will occur is not required.<sup>42</sup> For more precision as to the standard, reference can usefully be made to the jurisprudence of other international and regional bodies which also apply the ‘real and foreseeable’ test.

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“imperative in regard to refugees and in the present state of international law [thus it] should be acknowledged and observed as a rule of *jus cogens*” (Cartagena Declaration of Refugees of 1984, Section III, § 5).

<sup>35</sup> ILC Draft Articles, Article 16.

<sup>36</sup> *N v. Finland* (2005).

<sup>37</sup> HRC General Comment 31 (2004).

<sup>38</sup> *Report on Terrorism and Human Rights* (2002), *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, (2000, § 154).

<sup>39</sup> *Soering v. the United Kingdom*, (1989, § 87), emphasis added.

<sup>40</sup> CAT General Comment 1 (1997); *Soering v. the United Kingdom* (1989, § 86); *Shamayev and 12 others v. Russia* (2005).

<sup>41</sup> See *Vilvarajah*, (1991, § 111).

Notably, the CAT has held that the risk “must be assessed on grounds that go beyond mere theory or suspicion”, but this does not mean that the risk has to be “highly probable”.<sup>43</sup>

27. The risk must also be “personal”. However, as noted in the following section, personal risk may be deduced from various factors, notably the treatment of similarly situated persons.

### **Factors Relevant to the Assessment of Risk**

28. This Court and other international human rights courts and bodies have repeatedly emphasised that the level of scrutiny to be given to a claim for *non-refoulement* must be “rigorous” in view of the absolute nature of the right this principle protects.<sup>44</sup> In doing so, the State must take into account “all the relevant considerations” for the substantiation of the risk.<sup>45</sup> This includes both the human rights situation in the country of return and the personal background and the circumstances of the individual.

#### *General Situation in the Country of Return*

29. The human rights situation in the state of return is a weighty factor in virtually all cases.<sup>46</sup> While this Court, like CAT,<sup>47</sup> has held that the situation in the state is not sufficient *per se* to prove risk, regard must be had to the extent of human rights repression in the State in assessing the extent to which personal circumstances must also be demonstrated.<sup>48</sup> Where the situation is particularly grave and ill-treatment widespread or generalised, the general risk of torture or ill-treatment may be high enough that little is required to demonstrate the personal risk to an individual returning to that State. The significant weight of this factor is underlined in Article 3(2) of UNCAT: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

#### *Personal Background or Circumstances*

30. The critical assessment in *non-refoulement* cases usually turns on whether the applicant has demonstrated “specific circumstances” which make him or her personally vulnerable to torture or ill-treatment. These specific circumstances may be indicated by previous ill-treatment or evidence of current persecution (e.g. that the person is being pursued by the authorities), but neither is necessary to substantiate that the individual is ‘personally’ at risk.<sup>49</sup> A person may be found at risk by virtue of a characteristic that makes him or her particularly vulnerable to torture or other ill-treatment. The requisite ‘personal’ risk does not necessarily require information specifically about that person therefore, as opposed to information about the fate of persons in similar situations.

#### *Perceived Association with a Vulnerable Group as a Strong Indication of the Existence of Risk*

31. It is clearly established in the jurisprudence of the CAT that, in assessing the “specific circumstances” that render the individual personally at risk, particular attention will be paid to any evidence

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<sup>42</sup> *Soering*, (1989, § 94).

<sup>43</sup> See e.g. *CAT X.Y.Z. v. Sweden* (1998); *A.L.N. v. Switzerland* (1998); *K.N. v. Switzerland*; and *A.R. v. The Netherlands* (2003).

<sup>44</sup> *Chahal v. the United Kingdom*, 91996, § 79); *Jabari v. Turkey* (2000, § 39).

<sup>45</sup> UNCAT Article 33 (2).

<sup>46</sup> As held by CAT, the absence of a pattern of human rights violations “does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.” See e.g. *Seid Mortesa Aemei v. Switzerland* (1997).

<sup>47</sup> CAT has explained that although a pattern of systematic abuses in the State concerned is highly relevant, it “does not as such constitute sufficient ground” for a situation to fall under Article 3 because the risk must be ‘personal’.

<sup>48</sup> *Vilvarajah* (1991, § 108).

<sup>49</sup> See eg. *Shamayev and 12 others v. Russia* (2005, § 352); *Said v. the Netherlands* (2005, § 48-49).

that the applicant belongs, or is *perceived* to belong,<sup>50</sup> to an identifiable group which has been targeted for torture or ill-treatment. It has held that regard must be had to the applicant's political or social affiliations or activities, whether inside *or outside* the State of return, which may lead that State to identify the applicant with the targeted group.<sup>51</sup>

32. Organisational affiliation is a particularly important factor in cases where the individual belongs to a group which the State in question has designated as a "terrorist" or "separatist" group that threatens the security of the State, and which for this reason is targeted for particularly harsh forms of repression. In such cases, the CAT has found that the applicant's claim comes within the purview of Article 3 even in the absence of other factors such as evidence that the applicant was ill-treated in the past,<sup>52</sup> and even when the general human rights situation in the country may have improved.<sup>53</sup>

33. In this connection, it is also unnecessary for the individual to show that he or she is, or ever was, personally sought by the authorities of the State of return. Instead, the CAT's determination has focused on the assessment of a) how the State in question treats members of these groups, and b) whether sufficient evidence was provided that the State would believe the particular individual to be associated with the targeted group. Thus in cases involving suspected members of ETA, *Sendero Luminoso*, PKK, KAWA, the People's Mujahadeen Organization and the Zapatista Movement, the CAT has found violations of Article 3 on account of a pattern of human rights violations against members of these organisations, where it was sufficiently established that the States concerned were likely to identify the individuals with the relevant organisations.<sup>54</sup>

34. In respect of proving this link between the individual and the targeted group, the CAT has found that the nature and profile of the individual's activities in his country of origin *or abroad*<sup>55</sup> is relevant. In this respect, human rights bodies have indicated that a particularly important factor to be considered is the extent of publicity surrounding the individual's case, which may have had the effect of drawing the negative attention of the State party to the individual. The importance of this factor has been recognized both by this Court and the CAT.<sup>56</sup>

### **Standard and Burden of Proving the Risk**

35. While the Court has not explicitly addressed the issue of standard and burden of proof in transfer cases, it has held that in view of the fundamental character of the prohibition under Article 3, the examination of risk "must necessarily be a thorough one".<sup>57</sup> It has also imposed on States a positive obligation to conduct a 'meaningful assessment' of any claim of a risk of torture and other ill-treatment.<sup>58</sup> This approach is supported by CAT,<sup>59</sup> and reflects a general recognition by this and other tribunals that, because of the specific nature of torture and other ill-treatment, the burden of proof cannot rest alone with the person alleging it, particularly in the view of the fact that the person and the State do not always have equal access to the evidence.<sup>60</sup> Rather, in order to give meaningful effect to the Convention rights under Article 3 in transfer cases, the difficulties in obtaining evidence of a risk of torture or ill-treatment in another

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<sup>50</sup> It is not necessary that the individual *actually* is a member of the targeted group, if believed so to be and targeted for that reason. See CAT *A. v. The Netherlands* (1998).

<sup>51</sup> See CAT General Comment 1 (1997, § 8 (e)).

<sup>52</sup> *Gorki Ernesto Tapia Paez v. Sweden* (1997).

<sup>53</sup> See *Josu Arkauz Arana v. France* (2000), finding that gross, flagrant or mass violations were unnecessary in such circumstances.

<sup>54</sup> See *inter alia* CAT, *Cecilia Chipana v. Venezuela* (1998); *Ahmed Hussein Mustafa Kamil Agiza v. Sweden* (2005); *Kaweb Yaragh Tala v. Sweden* (1998); *Seid Mortesa Aemei v. Switzerland* (1996).

<sup>55</sup> See e.g. *Seid Mortesa Aemei v. Switzerland* (1997); *M.K.O. v. The Netherlands* (2001).

<sup>56</sup> *N v. Finland* (2005, § 165); *Venkadajalasarma v. the Netherlands* (2004); *Said v. the Netherlands* (2005, § 54); *Thampibillai v. the Netherlands* (2004, § 63). See also CAT *Sadiq Shek Elmi v. Australia* (1999, § 6.8).

<sup>57</sup> *Said v. the Netherlands* (2005, § 49); *N. v Finland* (2005); *Jabari v. Turkey* (2000, § 39).

<sup>58</sup> See *Jabari v. Turkey* (2000).

<sup>59</sup> E.g. CAT General Comment 1 (1997, § 9(b)).



State - exacerbated by the inherently clandestine nature of such activity and the individual's remoteness from the State concerned - should be reflected in setting a reasonable and appropriate standard and burden of proof and ensuring flexibility in its implementation.

36. The particular difficulties facing an individual seeking to substantiate an alleged risk of ill-treatment have been recognized by international tribunals, including this Court. These are reflected, for example, in the approach to the extent of the evidence which the individual has to adduce. The major difficulties individuals face in accessing materials in the context of transfer is reflected in the Court's acknowledgment that substantiation only "to the greatest extent practically possible" can reasonably be required.<sup>61</sup> Moreover, CAT's views have consistently emphasised that, given what is at stake for the individual, lingering doubts as to credibility or proof should be resolved in the individual's favour: "even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, [the Committee] must ensure that his security is not endangered."<sup>62</sup> In order to do this, it is not necessary that all the facts invoked by the author should be proved.<sup>63</sup>

37. An onus undoubtedly rests on individuals to raise, and to seek to substantiate, their claims. It is sufficient however for the individual to substantiate an 'arguable' or '*prima facie*' case of the risk of torture or other ill-treatment for the *refoulement* prohibition to be triggered. It is then for the State to dispel the fear that torture or ill-treatment would ensue if the person is transferred. This approach is supported by a number of international tribunals addressing questions of proof in transfer cases. For example, the CAT suggests that it is sufficient for the individual to present an '*arguable case*' or to make a '*plausible allegation*'; then it is for the State to prove the lack of danger in case of return.<sup>64</sup> Similarly, the HRC has held that the burden is on the individual to establish a '*prima facie*' case of real risk, and then the State must refute the claim with 'substantive grounds'.<sup>65</sup> Most recently, the UN Sub-Commission for the Promotion of Human Rights considered that once a general risk situation is established, there is a 'presumption' the person would face a real risk.<sup>66</sup>

38. Requiring the sending State to rebut an arguable case is consistent not only with the frequent reality attending individuals' access to evidence, but also with the duties on the State to make a meaningful assessment and satisfy itself that any transfer would not expose the individual to a risk of the type of ill-treatment that the State has positive obligation to protect against.

### **An Existing Risk Cannot be Displaced by "Diplomatic Assurances"**

39. States may seek to rely on "diplomatic assurances" or "memoranda of understanding" as a mechanism to transfer individuals to countries where they are at risk of torture and other ill-treatment. In practice, the very fact that the sending State seeks such assurances amounts to an admission that the person would be at risk of torture or ill-treatment in the receiving State if returned. As acknowledged by this Court in *Chahal*, and by CAT in *Agiza*, assurances do not suffice to offset an existing risk of torture.<sup>67</sup> This view is shared by a growing number of international human rights bodies and experts, including the UN Special

<sup>60</sup> See e.g. HRC, *Albert Womah Mukong v. Cameroon* (1994); I-ACHR, *Velasquez Rodriguez v. Honduras* (1988, § 134 *et seq.*).

<sup>61</sup> E.g. *Said v. the Netherlands* (2005, § 49); *Bahaddar v. the Netherlands*, (1998, § 45).

<sup>62</sup> Emphasis added.

<sup>63</sup> *Seid Mortesa Aemei v. Switzerland* (1997).

<sup>64</sup> CAT General Comment 1 (1997, § 5): "The burden of proving a danger of torture is upon the person alleging such danger to present an 'arguable case'. This means that there must be a factual basis for the author's position sufficient to require a response from the State party." In *Agiza v. Sweden* (2005, § 13.7) the burden was found to be on the State to conduct an "effective, independent and impartial review" once a 'plausible allegation' is made. Similarly, in *A.S. v. Sweden* (2000, § 8.6) it was held that if sufficient facts are adduced by the author, the burden shifts to the State "to make sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture."

<sup>65</sup> See HRC, *Jonny Rubin Byaburanga v Denmark*, (2004, §§ 11.2-3).

<sup>66</sup> UN Sub-Commission for the Promotion and Protection of Human Rights, Resolution 2005/12 on Transfer of Persons, (2005, § 4); see similarly, European Commission for Human Rights in the *Cruz Varas* case (1991).

<sup>67</sup> *Chahal v. the UK* (1996, § 105); *Agiza v. Sweden* (2005, § 13.4).

Rapporteur on Torture,<sup>68</sup> the Committee for Prevention of Torture,<sup>69</sup> the UN Sub-Commission,<sup>70</sup> the Council of Europe Commissioner on Human Rights,<sup>71</sup> and the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>72</sup> Most recently, the UN General Assembly, by consensus of all States, has affirmed “that diplomatic assurances, where used, do not release States from their obligations, under international human rights, humanitarian and refugee law, in particular the principle of *non-refoulement*.”<sup>73</sup> Reliance on such assurances as sufficient to displace the risk of torture creates a dangerous loophole in the *non-refoulement* obligation, and ultimately erodes the prohibition of torture and other ill-treatment.

40. Moreover, assurances cannot legitimately be relied upon as a factor in the assessment of relevant risk. This is underscored by widespread and growing concerns about assurances as not only lacking legal effect but also as being, in practice, simply unreliable, with post-return monitoring mechanisms incapable of ensuring otherwise.<sup>74</sup> While effective system-wide monitoring is vital for the long-term prevention and eradication of torture and other ill-treatment, individual monitoring cannot ameliorate the risk to a particular detainee.

41. The critical question to be ascertained by the Court, by reference to all circumstances and the practical reality on the ground, remains whether there is a risk of torture or ill-treatment in accordance with the standards and principles set down above. If so, transfer is unlawful. No ‘compensating measures’ can affect the peremptory *jus cogens* nature of the prohibition against torture, and the obligations to prevent its occurrence, which are plainly unaffected by bilateral agreements.

## VI. CONCLUSION

42. The principle of *non-refoulement*, firmly established in international law and practice, is absolute. No exceptional circumstances concerning the individual potentially affected or the national security of the State in question can justify qualifying or compromising this principle. Given the inherent link between the two, and the positive nature of the obligation to protect against torture and ill-treatment, no legal distinction can be drawn under the Convention between the act of torture or ill-treatment and the act of transfer in face of a real risk thereof. Any unravelling of the *refoulement* prohibition would necessarily mean an unravelling of the absolute prohibition on torture itself, one of the most fundamental and incontrovertible of international norms.

43. International practice suggests that the determination of transfer cases should take account of the absolute nature of the *refoulement* prohibition under Article 3, and what is required to make the Convention’s protection effective. The risk must be real, foreseeable and personal. Great weight should attach to the person’s affiliation with a vulnerable group in determining risk. Evidentiary requirements in respect of such risk must be tailored to the reality of the circumstances of the case, including the capacity of the individual to access relevant facts and prove the risk of torture and ill-treatment, the gravity of the potential violation at stake and the positive obligations of states to prevent it. Once a *prima facie* or arguable case of risk of torture or other ill-treatment is established, it is for the State to satisfy the Court that there is in fact no real risk that the individual will be subject to torture or other ill-treatment.

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<sup>68</sup> See Report of Special Rapporteur on Torture to the General Assembly, (2004, § 40).

<sup>69</sup> See CPT 15<sup>th</sup> General Report, (2004-2005, §§ 39-40).

<sup>70</sup> See above note 70, at § 4.

<sup>71</sup> Report by Council of Europe Commissioner for Human Rights (2005, §§ 12-3).

<sup>72</sup> Report of the UN Independent Expert (2005, §§ 19-20).

<sup>73</sup> See UN Declaration (2005, § 8).

<sup>74</sup> Courts in Canada (*Mahjoub*), the Netherlands (*Kaplan*), and the United Kingdom (*Zakaev*) have blocked transfers because of the risk of torture despite the presence of diplomatic assurances. There is credible evidence that persons sent from Sweden to Egypt (*Agiza & Al-Zari*) and from the United States to Syria (*Arar*) have been subject to torture and ill-treatment despite assurances: for more information on practice, see Human Rights Watch, ‘Still at Risk’ (2005); Human Rights Watch, ‘Empty Promises’ (2004).

# Analysis of Article 3 Jurisprudence of the European Court of Human Rights<sup>1</sup>

## 1.1 Introduction

This section seeks to unravel the vast body of jurisprudence which the Court has generated in addressing and defining torture and inhuman or degrading treatment or punishment. By tracking the development of the Court's judicial reasoning in relation to Article 3, practitioners will not only gain a deeper understanding of how to approach the Court with allegations of ill-treatment, but will also acquire a sense of the direction in which the Court is heading in adjudicating cases of torture and inhuman or degrading treatment or punishment. Although the situations referred to in this section cover almost the entire spectrum of cases in which Article 3 has been held to be applicable, the list is not exhaustive and is growing by the day.

In this connection, the judgment in the case of *Ülke v. Turkey*, which was adopted on 24 January 2006 and which does not fit into any of the situations dealt with below, illustrates the wide spectrum of situations in which Article 3 of the Convention has been held to apply. The applicant in the *Ülke* case was a conscientious objector; in Turkey, military service is compulsory for men and there is no possibility for alternative service for persons in Mr Ülke's situation. The applicant was convicted of "persistent disobedience" on account of his refusal to wear military uniform on no less than eight occasions. During that period he was also twice convicted of desertion, having failed to rejoin his regiment. In total, the applicant served 701 days of imprisonment as a result of these convictions and he was wanted by the security forces in order to serve the remainder of his sentence. At the time of adoption of the judgment, he was still in hiding. The Court noted that the applicant would have to live the rest of his life with the risk of being sent to prison if he persisted in his refusal to perform compulsory military service. It concluded that the numerous criminal prosecutions against the applicant were calculated to repressing his intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. The clandestine life which the applicant had been compelled to adopt, amounting almost to "civil death", was incompatible with the punishment regime of a democratic society. Consequently, the Court considered that, taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant had caused him severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constituted degrading treatment within the meaning of Article 3<sup>2</sup>.

## 1.2 Definitions of the Terms

### 1.2.1 Torture

The Court defines torture as "deliberate inhuman treatment causing very serious and cruel suffering"<sup>3</sup>. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court has regard to the distinction, embodied in Article 3 of the Convention, between this notion and that of inhuman or degrading treatment. It has held that it was the intention of the drafters that the Convention should, by means of this distinction, attach a

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<sup>1</sup> Written by Uğur Erdal (OMCT) and Dr Reinhard Marx (Deutsches Institut für Menschenrechte)

<sup>2</sup> *Ülke v. Turkey*, no. 39437/98, 24 January 2006, §§ 62-63. Significantly, the Court did not deem it necessary to give a separate ruling on the complaints under Articles 5, 8 and 9 of the Convention.

<sup>3</sup> *Ireland v. the United Kingdom*, cited above, § 167.

special stigma to deliberate inhuman treatment causing very serious and cruel suffering<sup>4</sup>. In the Court's view, the distinction between torture and inhuman and degrading treatment derives principally from a difference in intensity of the suffering inflicted.

Indeed, as has been noted by the Court, such a distinction also exists in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987. The UN Convention defines torture as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ...”<sup>5</sup>.

In determining whether the ill-treatment inflicted on an individual can be defined as “severe” within the meaning of Article 1 of the United Nations Convention, the Court considered that

“this ‘severity’ is, like the ‘minimum severity’ required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”<sup>6</sup>.

Finally, the Court considers that certain acts which in the past have been classified as “inhuman and degrading treatment” as opposed to “torture” may be classified differently in future: “[I]t takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”<sup>7</sup>.

The Court has held that ill-treatment rises to the level of torture in the following cases: hanging by the arms leading to paralysis, rape and severe physical battery. Such cases attract the special stigma associated with torture.

#### **i. “Palestinian Hanging”**

In *Aksoy v. Turkey*, the applicant, was taken into custody for suspected involvement in the PKK. He was subjected to “Palestinian hanging”, that is, he had been stripped naked, with his arms tied together behind his back and suspended by his arms. The Court found that this treatment required a certain amount of preparation and exertion and was thereby deliberately inflicted in view of extracting information. Apart from the severe physical pain endured at the time of the treatment, the Court also considered the medical evidence which confirmed that it led to prolonged paralysis of the applicant's arms which could only be described as of such a serious and cruel nature that it amounts to torture<sup>8</sup>.

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<sup>4</sup> *Ibid.*

<sup>5</sup> See also *Selmouni v. France*, cited above, § 97; see also *Akkoç v. Turkey*, cited above, § 115.

<sup>6</sup> *Selmouni v. France*, cited above, § 100.

<sup>7</sup> *Ibid.*, § 101.

<sup>8</sup> *Aksoy v. Turkey*, cited above, § 64.

## ii. Rape

In *Aydın v. Turkey*, the Court found it established that the applicant – a 17 year-old girl – had been raped in a gendarmerie station. The Court began its analysis by considering the applicant’s age, sex and the circumstances in which she was held. Consequently, the Court considered this form of ill-treatment to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. The Court also considered that the applicant experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. In addition, the applicant had been detained at the same place for a period of three days, during which, the Court found, she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She had also been paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high pressure water while being spun around in a tyre. The accumulation of these acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted, in the Court’s view, to torture. The Court further stated that it would have reached this conclusion on either of these grounds taken separately<sup>9</sup>.

## iii. Severe Physical Battery

In *Selmouni v. France*, during his detention at a police station in France, the applicant had been dragged along by his hair and made to run along a corridor with police officers positioned on either side to trip him up. He had been threatened with a blowlamp and a syringe and made to kneel down in front of a young woman to whom someone said: “Look, you’re going to hear somebody sing”, one police officer had then showed him his penis, saying “Look, suck this”, before urinating over him. He had also received a large number of blows. The Court found that the treatment was inflicted deliberately to make the applicant confess to the drug offence for which he was placed in custody. The Court held that physical and mental violence, considered as a whole, committed against the applicant’s person caused “severe” pain and suffering and was particularly serious and cruel so as to be regarded as acts of torture for the purposes of Article 3 of the Convention<sup>10</sup>.

### 1.2.2 Inhuman or Degrading Treatment or Punishment

Both torture and inhuman or degrading treatment encompass premeditated acts, whether or not in view of extracting a confession or information. However, the Court has emphasised that torture is an “*aggravated* and *deliberate* form of cruel, inhuman or degrading punishment or treatment”<sup>11</sup>. Generally, the Court examines the deliberate nature of intention, the purpose of treatment, the intensity of pain suffered and lasting damage inflicted on the victim, in order to identify whether the acts in question warrant the special stigma which demarcates torture from other forms of ill-treatment.

<sup>9</sup> *Aydın v Turkey*, cited above, §§ 80-88.

<sup>10</sup> *Selmouni v. France*, cited above, § 105. See also, Niels Uildriks, “Police Torture in France”, 17 *NQHR* (1999). See also the recent report drafted by Mr Alvaro Gil-Robles, the Council of Europe’s Commissioner for Human Rights, “On the Effective Respect for Human Rights in France”, where, among others, police brutality in France was documented. The report can be accessed online at [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2006\)2&Sector=secCommDH&Language=lanEnglish&Ver=final&BackColorInternet=99B5AD&BackColorIntranet=FABF45&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2006)2&Sector=secCommDH&Language=lanEnglish&Ver=final&BackColorInternet=99B5AD&BackColorIntranet=FABF45&BackColorLogged=FFC679)

<sup>11</sup> *Ireland v. United Kingdom*, cited above

In *Ireland v. the United Kingdom*, the Court held that ill-treatment which does not occasion suffering of the particular intensity and cruelty implied by the word torture, may be categorised as inhuman treatment even if the victim has been subjected to such treatment with the aims of extracting confessions, naming others and/or providing information and even if that ill-treatment has been used systematically. The ill-treatment in question consisted of the infamous “five interrogation techniques” which included wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink<sup>12</sup>.

Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also “degrading” because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a particular form of treatment is “degrading”, the Court considers whether its object is to humiliate and debase the individual and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of this provision<sup>13</sup>.

In order for a punishment to be “degrading”, the humiliation or debasement involved must, in the Court’s view, attain a particular level and must in any event be other than the usual humiliation brought about by the mere fact of being criminally convicted. The assessment is relative and depends on all the circumstances of the case and, in particular, the nature and context of the punishment itself and the manner and method of its execution<sup>14</sup>.

The distinction between “inhuman” and “degrading” treatment or punishment mentioned in Article 3 is not clear cut; it is not always possible to define with precision whether a particular type of ill-treatment constitutes “inhuman” or “degrading” treatment or punishment; there is a certain degree of overlap between the two types of ill-treatment. Where the degree of overlap is significant, the Court may not attempt to categorise the ill-treatment as falling into one or the other category. For example, in its judgment in the case of *McGlinchey v. the United Kingdom*, the Court concluded that the prison authorities’ treatment of Judith McGlinchey contravened the prohibition against *inhuman or degrading treatment* contained in Article 3 of the Convention (emphasis added)<sup>15</sup>. The Court adopted a similar approach in its judgments in the cases of *Van der Ven v. the Netherlands* and *Lorsé v. the Netherlands*<sup>16</sup> and concluded that the combination of routine strip-searching and other stringent security measures in the high-security prisons “amounted to inhuman or degrading treatment” in breach of Article 3 of the Convention. Conversely, in a number of cases the treatment in question was held by the Court to be both inhuman *and* degrading<sup>17</sup>.

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<sup>12</sup> It may be speculated that, had the case been brought by individuals and not by another Contracting Party, the Court – like the Commission had done – would have defined the ill-treatment as “torture” and not “inhuman”. See Fionnuala Ní Aoláin, cited above, at p. 216 where it is argued that the judgment in the case of *Ireland v. the United Kingdom* “needs to be read in the context of its time as a highly sensitive political case – a leading Western democracy being accused of systematic torture, in the context of a fraught internal conflict in Northern Ireland to which the British Government had committed its military forces. In such a context, the decision needs to be read as much in terms of its political weight as the practices being examined”.

<sup>13</sup> See, *inter alia*, *Kalashnikov v Russia*, no. 47095/99, 15 July 2002, § 95.

<sup>14</sup> *Tyrer v the United Kingdom*, cited above, §§ 28-30.

<sup>15</sup> *McGlinchey v. the United Kingdom*, cited above, § 58.

<sup>16</sup> See §§ 63 and 74 respectively.

<sup>17</sup> See, more recently, *Bekos and Koutropoulos v. Greece*, no. 15250/02, 13 December 2005, § 51.

Moreover, in a number of recent judgments, having established that the ill-treatment in question had reached the minimum severity necessary for Article 3 to come into play, the Court found a violation of that provision without attempting to define whether the ill-treatment in question amounted to inhuman or degrading treatment. For example, in *Khudoyorov v. Russia*, noting that “the applicant’s detention conditions went beyond the threshold tolerated by Article 3 of the Convention” and that “the treatment to which the applicant was subjected during his transport to and from the Vladimir Regional Court exceeded the minimum level of severity”, the Court found two separate violations of Article 3 without any qualifications such as inhuman or degrading<sup>18</sup>. Similarly, in the judgment in the case of *Yavuz v. Turkey*, having found that the injuries on the applicant’s body were the result of treatment for which the Government bore responsibility, the Court did not proceed to examine the extent of those injuries to establish whether they amounted to inhuman or degrading treatment or torture before concluding that there had been a violation of Article 3<sup>19</sup>.

The increasing tendency of the Court not to categorise ill-treatment as inhuman or degrading is to be welcomed. Given the number of subjective elements which the Court must take into account when ascertaining the degree of suffering before it can categorise it as degrading or inhuman – such as the feelings of inferiority, fear, anguish, humiliation, debasement, etc., that may or may not be harboured by the victim –, it cannot be said with absolute certainty that throughout its history the Court has been consistent in its categorisations<sup>20</sup>.

The Court’s determination of whether a particular ill-treatment has reached the required threshold of severity depends on all the circumstances of the case, including, in particular, objective elements such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. The new practice of the Court is an indication that the Court is able to examine adequately whether a given ill-treatment has reached the required threshold of severity without seeking guidance from, or referring to the criteria of distinguishing one category of ill-treatment from another. It follows that, when viewed from the standpoint of the ultimate aim sought to be achieved by Article 3 of the Convention, i.e. that of prohibiting ill-treatment, a lack of categorisation becomes irrelevant<sup>21</sup>.

### 1.3 Article 3 in Context

Article 3 cases have been divided into the following categories. This categorisation aims to familiarise practitioners with the wide range of situations and legal problems associated with identifying when and how ill-treatment amounts to a serious violation of fundamental human rights.

#### 1.3.1 Arrest and Interrogation

The Court has held that injuries and treatment inflicted during arrest and interrogation will only cross the threshold of ill-treatment if the use of force was not made “strictly necessary” by the victim’s own conduct.

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<sup>18</sup> *Khudoyorov v. Russia*, no. 6847/02, 8 November 2005, §§ 109 and 120.

<sup>19</sup> *Yavuz v. Turkey*, no. 67137/01, 10 January 2006, §§ 43-44.

<sup>20</sup> For an interesting review of the Court’s approach to defining the terms, see Fionnuala Ní Aoláin, “The European Convention on Human Rights and its Prohibition on Torture” in Sandford Levinson (Ed.) *Torture* (Oxford University Press, 2004).

<sup>21</sup> Although, obviously, it is not excluded that the Court would continue to distinguish torture from less serious forms of ill-treatment.

As pointed out at **10.2.1** of Volume 1, the Court stated in the case of *Ribitsch v. Austria* that

“in respect of a person deprived of liberty, any recourse to physical force which has not been made strictly necessary by his own conduct, diminishes human dignity and is in principle an infringement of the right set forth in Article 3”<sup>22</sup>.

The Court interprets the phrase “strictly necessary by the victim’s own conduct” in a restrictive manner. For example, use of force by law enforcement personnel in the course of an arrest will only be justified if that arrest is resisted by violent means. In such circumstances, an injury caused by the use of force, provided that it is strictly necessary under the circumstances, may fall outside Article 3 of the Convention. The burden of proving that the use of force was made necessary by the victim’s own conduct and that it was not excessive rests with the respondent Government. In this connection, it is well illustrated in a recent judgment that the lack of an entry in the arrest documents showing that the police officers had to resort to force when arresting the applicant before she was placed in detention, will subsequently prevent the respondent Government from successfully arguing that the injuries found on the applicant’s body after her release from detention had been caused during her arrest<sup>23</sup>. The same judgment also illustrates that the failure to have an arrestee undergo a medical examination upon an arrest during which – according to the Government – the person concerned resisted, will also damage the Government’s case.

The Court has dealt with a large number of complaints concerning the deliberate use of force by law enforcement personnel, such as the police, members of the army and the gendarmerie. These complaints included, *inter alia*, beatings, being subjected to electric shocks, hosing with pressurised water, being suspended from the arms (also known as “Palestinian hanging”), and sexual assaults.

### **1.3.2 Detention and Associated Issues**

Where an individual is detained, the Court has ruled that Article 3 ensures their right to be held in conditions which are compatible with the respect for their human dignity. Conditions of detention will be characterised as ill-treatment in violation of Article 3 upon reaching the requisite minimum level of severity whose determination is assessed relatively; taking into account “the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim”<sup>24</sup>.

Given that detention in prison or in a detention facility involves an inevitable element of suffering or humiliation, such suffering and humiliation must go beyond the inevitable before it can attract the protection provided in Article 3 of the Convention. As pointed out at **2.6.3b** of Volume 1, the execution of detention in itself does not raise issues under Article 3. Furthermore, Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to place him or her in a civil hospital to enable the detainee to obtain a particular kind of medical treatment<sup>25</sup>. Nevertheless, the Court requires States to ensure that a person is detained in conditions which are compatible with respect for human

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<sup>22</sup> *Ribitsch v. Austria*, cited above § 38.

<sup>23</sup> *Yavuz v. Turkey*, cited above § 40.

<sup>24</sup> *Kudła v. Poland* [GC], cited above, § 91.

<sup>25</sup> *Kudła v. Poland* [GC], cited above, § 93.



dignity, that the manner and method of the execution of the measure do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the detainee's health and well-being are adequately secured by, among other things, providing him or her with the requisite medical assistance<sup>26</sup>. Furthermore, although public order considerations may lead States to introduce high-security prisons for particular categories of detainees where the conditions may be harsher than those of an ordinary prison, the persons detained in such facilities should also benefit from the above mentioned protection and they should also be detained in conditions which are compatible with respect for their human dignity<sup>27</sup>.

A number of aspects of detention have become the subject matter of the Court's examination and these will be examined below.

### **i. Conditions of Detention**

When assessing conditions of detention, the Court weighs up considerations dealing with the physical environment of detention (size of cell, number of cellmates, sleeping and sanitary conditions, medical attention); the length of detention; and the prisoner's particular health concerns living in such conditions. Account is taken of the cumulative effect of those conditions, as well as the specific allegations made by the applicant<sup>28</sup>. The Court also takes into consideration reports compiled by the CPT on the relevant detention facility as well as the extent to which the applicant was personally affected<sup>29</sup>. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, nevertheless the Court has held that the absence of a positive intention in view of this purpose cannot conclusively rule out a violation of Article 3<sup>30</sup>.

As will be seen below, overcrowding, poor sanitary conditions, lack of adequate freedom of movement within the detention facility, poor sleeping arrangements, lack of access to fresh air and natural light, inadequate supply of food and finally the excessive length of detentions in such unsatisfactory conditions are all shortcomings which have the potential to have adverse affects on a detainee's well-being and they are, therefore, relevant for the Court's examination. It appears that most of the above mentioned shortcomings in detention facilities emanate from a lack of financial resources. However, the Court has consistently held that such a lack of resources cannot, in principle, justify detention conditions which are so poor as to reach the threshold of severity contrary to Article 3 from which no derogation is possible.

The Court found the prison conditions in Greece to be in breach of Article 3 in a case where the applicant had to spend a considerable part of each day practically confined to his bed in a cell measuring 7m<sup>2</sup> and shared with another inmate, with no ventilation and no window, which in summer months became unbearably hot. The applicant also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell mate. The Court concluded that the effects of the applicant's detention diminished his human dignity and amounted to degrading treatment<sup>31</sup>.

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<sup>26</sup> *Ibid* § 94; see also *Aerts v. Belgium*, no. 25357/94, 30 July 1998, § 64.

<sup>27</sup> See *Van der Ven v. the Netherlands*, cited above, § 50 and the cases cited therein.

<sup>28</sup> *Dougoz v. Greece*, cited above, § 46.

<sup>29</sup> *Lorsé and Others v. the Netherlands*, cited above, § 65.

<sup>30</sup> *Peers v. Greece*, cited above, § 74; *Van der Ven v. the Netherlands*, cited above, § 48.

<sup>31</sup> *Peers v. Greece*, cited above, § 75.

In its judgment in the case of *Kalashnikov v. Russia*, the Court examined the problem of overcrowding in prisons. The Court recalled that the CPT had set 7m<sup>2</sup> per prisoner as an approximate, desirable guideline for a detention cell, i.e. 56m<sup>2</sup> for eight inmates. In the instant case, however, the applicant was detained in a cell measuring between 17m<sup>2</sup> (according to the applicant) and 20.8m<sup>2</sup> (according to the Government). It was equipped with bunk-beds and was designed for eight inmates. Furthermore, although the cell was meant for eight persons, the applicant claimed that at times he had had to share it with 17-23 other inmates. This acute overcrowding meant that the inmates in the cell had to sleep taking turns, on the basis of eight-hour shifts of sleep per prisoner. Furthermore, the cell was infested with pests, inmates were allowed to smoke and the applicant had to use the toilet in the presence of other inmates and be present while the toilet was being used by his cell mates. Throughout his detention the applicant contracted various skin diseases and fungal infections and suffered from neurocirculatory dystonia, astheno-neurotic syndrome, chronic gastroduodenitis and was also detained on occasions with persons suffering from syphilis and tuberculosis. Although the Court did not see any indication that there was a positive intention to humiliate or debase the applicant, it considered that the conditions of detention, which the applicant had to endure for four years and ten months, and in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment<sup>32</sup>.

In another case against Russia the focal point of the Court's analysis once again centred on the amount of space afforded to an applicant in prison. Throughout his detention, the applicant was afforded between 2-3m<sup>2</sup> of personal space. The detainees, including the applicant, had to share the sleeping facilities, taking turns to rest. Save for one hour of daily outdoor exercise, for the remainder of the day the applicant was locked in the cell which contained all the facilities used by prisoners on a daily basis, including the washbasin, lavatory and eating utensils. The applicant was held in these conditions for more than four years and three months. The Court considered the fact that the applicant was obliged to live, sleep and use the toilet in the same cell with so little personal space, was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and to arouse within him feelings of anguish and inferiority capable of humiliating and debasing him. These feelings were further exacerbated by the inordinate length of his detention. The Court concluded that that there had been a violation of Article 3<sup>33</sup>.

By contrast, in its judgment in the case of *Valašinas v. Lithuania*<sup>34</sup>, in which the applicant complained of the conditions in the two prison cells where he was detained, measuring between 2.7 and 3.2m<sup>2</sup>, the Court found that the conditions of the applicant's detention did not attain the minimum level of severity because the restricted space of the sleeping facilities was compensated by the freedom of movement from which the detainees benefited during the day<sup>35</sup>.

In a recent judgment, the Court observed that the applicant had spent more than six months in a cell of 20m<sup>2</sup>, occupied by two to four detainees during different periods of time. Furthermore, the material and sanitary conditions in the cell were apparently very unsatisfactory: no beds were provided and the detainees had to sleep on the cement floor which they covered with dirty blankets; during the winter the temperature in the cell was 10-12 degrees Celsius; and ventilation was very poor. As no possibility for outdoor or out-of-cell activities was provided,

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<sup>32</sup> *Kalashnikov v. Russia*, cited above, §§ 97-103.

<sup>33</sup> *Khudoyorov v. Russia*, cited above, §§ 99-109.

<sup>34</sup> *Valašinas v. Lithuania*, cited above, §§ 103-111.

<sup>35</sup> See also *Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004.

the applicant had to spend practically all his time in the cell – which had no window and was lit by a single electric bulb –, except for two short visits per day to the sanitary facilities or the occasional taking out for questioning or going to court. The Court found that the fact that the applicant had been confined to his cell for practically twenty-four hours a day during more than six months without exposure to natural light and without any possibility for physical and other out-of-cell activities must have caused him intense suffering. Indeed, the domestic courts themselves had described the conditions as inhuman and degrading. The Strasbourg Court held that, in the absence of compelling security considerations, there was no justification for subjecting the applicant to such limitations. As regards the financial difficulties invoked by the Government, the Court observed that many of the shortcomings outlined above could have been remedied even in the absence of considerable financial means. In any event, the lack of resources could not in principle justify detention conditions which were so poor as to reach the threshold of severity contrary to Article 3. In conclusion, having regard to the cumulative effects of the unjustifiably stringent regime to which the applicant was subjected and the material conditions in which he was kept, the Court concluded that the distress and hardship he had endured exceeded the unavoidable level of suffering inherent in detention and the resulting anguish went beyond the threshold of severity under Article 3<sup>36</sup>.

In *Alver v. Estonia*, the lack of adequate personal space afforded to the applicant in a detention facility was exacerbated by his inability to leave his cell for more than one hour per day and by lack of natural light and fresh air and lack of adequate furniture. Furthermore, food was only served once a day and its quality was poor. The cell was cold and damp and rats came out of the hole used as a toilet. The CPT had described these conditions as being inhuman and degrading. The applicant was diagnosed with tuberculosis more than two years after he had been taken into custody and the Court found it to be most probable that he had been infected while in detention. Although this fact in itself did not imply a violation of Article 3 given, in particular, the fact that the applicant had received treatment, the Court considered it to be a characteristic element of the overall conditions of the applicant's detention. The Court found that the conditions of the applicant's detention as described above, in particular the overcrowding, inadequate lighting and ventilation, impoverished regime, poor hygiene conditions and state of repair of the cell facilities, combined with the applicant's state of health and the length of the period during which he had been detained in such conditions, were sufficient to cause distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention<sup>37</sup>.

## ii. Solitary Confinement

In many Contracting States stringent security arrangements exist for dangerous prisoners and in principle, the removal of a prisoner who poses a high security risk from association with other prisoners for security, disciplinary or protective reasons, does not in itself amount to inhuman treatment or degrading punishment. Nevertheless, according to the Court's case-law, complete sensory isolation, coupled with total social isolation, can destroy the personality and constitute a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. In assessing whether such a measure may fall within the ambit of Article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned<sup>38</sup>.

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<sup>36</sup> *Iochev v. Bulgaria*, no. 41211/98, 2 February 2006, §§ 121-138.

<sup>37</sup> *Alver v. Estonia*, no. 64812/01, 8 November 2005, §§ 41-57.

<sup>38</sup> See *Van der Ven v The Netherlands*, cited above, § 51 and the cases cited therein.

In *Van der Ven v. the Netherlands*, the applicant, who was considered extremely likely to escape from detention facilities with a less strict regime and, were he to escape, he was deemed to pose an unacceptable risk to society in terms of committing further serious violent crimes, was detained in a high-security prison. Throughout his detention the applicant was subjected to very stringent security measures. His social contacts were strictly limited: he was prevented from having contact with more than three fellow inmates at a time, direct contact with prison staff was limited, and, apart from highly regulated monthly visits from members of his immediate family, he could only meet visitors behind a glass partition. Comparing the applicant's situation to that of the applicant in the case of *Messina v. Italy*<sup>39</sup>, the Court concluded that it was unable to find that the applicant had been subjected either to sensory isolation or to total social isolation. As a matter of fact, the Italian special regime had been significantly more restrictive both regarding association with other prisoners and frequency of visits: association with other prisoners was entirely prohibited and only family members were allowed to visit, once a month and for one hour<sup>40</sup>.

As mentioned at 2.6.3 of Volume 1, the Court, in its judgment in the case of *Valašinas*, found that the applicant's complaints concerning his detention in solitary confinement for a short fifteen-day period did not attain the minimum level of severity amounting to treatment contrary to Article 3. In the case of *Mathew v. the Netherlands*, the detention in solitary confinement for a period of over two years of an applicant with health problems was sufficient for the Court to hold that the period was excessive and unnecessarily protracted in violation of Article 3<sup>41</sup>.

### iii. Strip-searches

Where strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the Court has held that they must be conducted in an appropriate manner in order not to diminish human dignity<sup>42</sup>. To this end, the Court will not only consider the necessity and effect of the strip-searches themselves- including examination of the frequency with which they are performed and any adverse consequences upon the applicant's mental health-, but will also consider the overall regime of security measures applied to the applicant and their ensuing effects upon him or her.

In *McFeeley and Others v. the United Kingdom*, the so-called "close body" searches, including anal inspections, were carried out at intervals of seven to ten days, before and after visits and before prisoners were transferred to a new wing of the Maze Prison in Northern Ireland, where dangerous objects had in the past been found concealed in the recta of protesting prisoners. The Commission held that such searches did not amount to degrading treatment having regard to the security threat involved in the IRA killing campaign against prison officers<sup>43</sup>.

In *Valašinas*, the Court concluded that obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands, showed a clear lack of respect for the applicant, and diminished in effect his human dignity. According to the Court that treatment must have left the applicant with feelings of anguish and inferiority capable of

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<sup>39</sup> *Messina v. Italy (dec.)*, no. 25498/94, 8 June 1999.

<sup>40</sup> *Van der Ven v. the Netherlands*, cited above, §§ 52-55; see also *Lorsé v. the Netherlands*, cited above, §§ 64-67. The Court did find a violation of Article 3 of the Convention in these cases on account of combination of routine strip-searching and the other stringent security measures, see below.

<sup>41</sup> *Mathew v. the Netherlands*, cited above, § 217.

<sup>42</sup> See *Valašinas v. Lithuania*, cited above, § 117 and *Iwańczuk v. Poland*, no. 25196/94, 15 November 2001, § 59.

<sup>43</sup> *McFeeley and Others v. the United Kingdom*, no. 8317/77, Commission Decision of 15 May 1980.

humiliating and debasing him. The Court concluded that the search had amounted to degrading treatment within the meaning of Article 3.

Similarly in *Van der Ven*, in the absence of convincing security needs and on top of a great number of surveillance measures to which he was already subjected, the Court considered that the practice of weekly strip-searches applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. The Court concluded that the combination of routine strip-searching and the other stringent security measures in the high-security prison amounted to inhuman or degrading treatment in breach of Article 3<sup>44</sup>.

In another case against the Netherlands, *Baybaşın*, in which the applicant complained about having been subjected to a number of strip-searches during his detention in the same high-security prison, the Court observed that some of the applicant's complaints of strip-searches, i.e. those carried out between 21 November 2002 and 1 March 2003, had been accepted as well-founded by the Appeals Board in the Netherlands in the light of the Strasbourg Court's findings in the cases of *Van der Ven* and *Lorsé* and that the applicant had thereafter been awarded compensation. Holding that the applicant was deprived of his victim status as the national authorities had acknowledged a breach of Article 3 and provided redress, these complaints were declared inadmissible as being incompatible *ratione personae*. A number of other instances of strip-searches carried out between 16 July 2001 and 21 November 2002, for which the applicant was not awarded compensation, were communicated to the respondent Government.

As regards the strip-searches to which this applicant had been subjected after 1 March 2003, the Court considered that the applicant's situation differed from the situation examined in the above-cited cases of *Van der Ven* and *Lorsé* on two important points. In the first place, it no longer concerned weekly routine checks but centred on random checks and, secondly, the frequency of such checks, in principle, was not to exceed an average of twice a month. The Court further found that, unlike the situation in the cases of *Van der Ven* and *Lorsé*, it had not been demonstrated that the random strip-searches to which the applicant was subjected after 1 March 2003 had had such adverse consequences on his mental health that it had given rise to grave concerns at the material time. In particular, it did not appear from the case file that, during his stay in the high-security prison, the applicant had sought to consult a social worker or a mental health professional on account of any mental health problems developed by him in the facility. Although the Court accepted that the applicant, having already been subjected to a great number of stringent control measures, may have perceived both the random strip-searches and incidental strip-searches based on particular reasons carried out after 1 March 2003 as awkward, debasing and humiliating, it did not find – in the particular circumstances of the applicant's case – that being subjected to random strip-searches with a frequency not exceeding an average of twice a month or to the incidental strip-searches should be regarded, in themselves or on account of having had such adverse effects on the applicant's mental health, as amounting to treatment attaining the minimum level of severity required in order to fall within the scope of Article 3<sup>45</sup>.

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<sup>44</sup> *Van der Ven v. the Netherlands*, cited above, §§ 62-63; see also *Lorsé v. the Netherlands*, cited above, § 74.

<sup>45</sup> *Baybaşın v. the Netherlands* (dec.), no. 13600/02, 6 October 2005.

#### iv. Transport of Prisoners

Although the issue of transport of detainees to and from detention places and what may occur in between has not been the subject of extensive case-law, there has been a number of cases in which the Court has considered complaints concerning issues such as blindfolding and handcuffing of detainees and the facilities used when transporting detainees. The complaints are assessed in relation to what is considered reasonably necessary in the circumstances. Where measures are not made necessary by the applicant's conduct and exceed the usual degree of humiliation inherent in detention or arrest, the minimum level of severity required for Article 3 will apply.

In *Khudoyorov v. Russia*, the applicant claimed that the conditions of transport between the detention facility and the court where he was being tried were inhuman and degrading. He argued that the "assembly cells" and passenger compartments were severely overcrowded and gave no access to natural light or air. He was not given food nor drink for the entire day and the cumulative effect of these conditions was mental and physical exhaustion. On the days of court hearings he was transported to the courthouse by a prison van in which he shared a 1m<sup>2</sup> individual compartment with another prisoner, with the two of them taking turns to sit on each other's lap. He received no food during the entire day and missed out on outdoor exercise and, on occasions, the chance to take a shower. The Court observed that the applicant had to endure these cramped conditions twice a day, on the way to and from the courthouse, and that he had been transported in that van no fewer than 200 times in four years of detention. It was also relevant to the Court's assessment that the applicant continued to be subjected to such treatment during his trial or at the hearings of applications for his detention to be extended, that is when he most needed his powers of concentration and mental alertness. Considering that the treatment to which the applicant was subjected during his transport to and from the trial court exceeded the minimum level of severity, the Court found a violation of Article 3 of the Convention<sup>46</sup>. In reaching its conclusion the Court also had regard to the CPT's observations on transport facilities in various Council of Europe Member States<sup>47</sup>.

In *Raninen v. Finland*, the applicant argued that he was handcuffed while being taken from the prison to the hospital and complained that he had thus been the victim of "degrading treatment" in violation of Article 3. The applicant stressed that the handcuffing occurred in the context of unlawful deprivation of liberty and thus had an element of arbitrariness causing him to feel distressed. There had been nothing in his conduct when arrested and detained nor in the past suggesting that he might resist the measures. Nor had any reasons been given for the handcuffing at the material time; the sole purpose of the handcuffing had been to degrade, humiliate and frighten him, in order to discourage him from objecting to military service and substitute service. The two hours' duration of the treatment had been significant. Few months after the event, he had been diagnosed as suffering from an undefined psychosocial problem and had been declared unfit for military service. This clearly indicated that the unlawful detention and handcuffing had had adverse mental effects on him.

In the opinion of the Commission, the recourse to physical force by handcuffing the applicant for some two hours had not been made strictly necessary by his own conduct or by any other legitimate consideration and had been imposed while the applicant could be seen by the public, including his own supporters. In sum, the measure had diminished his human dignity and amounted to "degrading treatment" in violation of Article 3.

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<sup>46</sup> *Khudoyorov v. Russia*, cited above, §§ 110-120.

<sup>47</sup> *Ibid*, § 117.

The Court held that handcuffing did not normally give rise to an issue under Article 3 where such a measure is imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. The handcuffing of the applicant had, as conceded by the Government, not been made necessary by his own conduct. Apart from the fact that the measure was itself unjustified, it had been imposed in the context of unlawful arrest and detention. However, the Court – unlike the Commission – was not convinced by the applicant’s allegation that his handcuffing had adversely affected his mental state. There was nothing in the evidence to suggest that a causal link existed between the impugned treatment and his “undefined psychosocial problem”, which in any event had been diagnosed only several months later and which the applicant contested before the Commission. Nor had the applicant made out his allegation that the handcuffing had been aimed at debasing or humiliating him. Finally, it had not been contended that the handcuffing had affected the applicant physically. In light of these considerations, the Court concluded that the treatment in issue had not attained the minimum level of severity required by Article 3 of the Convention<sup>48</sup>.

In *Douglas-Williams v. the United Kingdom*, the applicant’s brother threatened the police officers who wanted to arrest him with a knife, to which the police officers responded by hitting him with their truncheons, tackling him to the ground, on his front with his hands restrained behind his back, and handcuffing him. It was in that position that he was also transferred to the police station in a police car. The applicant’s brother died of positional asphyxia within one hour and ten minutes of his arrest. The Court declared this case inadmissible because it concluded that the use of restraint techniques was justified by the applicant’s brother’s violence<sup>49</sup>.

In *Öcalan v. Turkey*, the Grand Chamber of the Court examined the applicant’s allegations under Article 3 on account of his being handcuffed and blindfolded from the moment of his arrest in Kenya until his arrival at the prison on the island of İmralı in Turkey. The Grand Chamber held that artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure. However, it endorsed the findings of the Chamber and held that the applicant, who was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish security forces, was considered dangerous. It accepted the Government’s submission that the sole purpose of requiring the applicant to wear handcuffs as one of the security measures taken during the arrest phase was to prevent him from attempting to abscond or causing injury or damage to himself or others. In regards to the blindfolding of the applicant during his journey from Kenya to Turkey, the Court observed that this was a measure taken by the members of the security forces in order to avoid being recognised by the applicant. They also considered that it was a means of preventing the applicant from attempting to escape or injuring himself or others. The Court accepted the Government’s explanation that the purpose of that precaution was not to humiliate or debase the applicant but to ensure that the transfer proceeded smoothly; in view of the applicant’s character and the reactions to his arrest, considerable care and proper precautions were necessary if the operation was to be a success. The Court concluded that it had not been established beyond all reasonable doubt that the applicant’s arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that is inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply<sup>50</sup>.

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<sup>48</sup> *Raninen v. Finland*, cited above, §§ 52-59.

<sup>49</sup> *Douglas-Williams v. the United Kingdom* (dec.), cited above.

<sup>50</sup> *Öcalan v. Turkey* [GC], cited above, §§ 176-185.

#### v. Medical Treatment and Detention of the Mentally Ill

As pointed out at 11.5.1 of Volume 1, the Contracting Parties owe a duty to provide medical care to detainees and to those for whose health problems the national authorities themselves are responsible. Withholding medical care from such persons may amount, therefore, to treatment contrary to Article 3. This provision cannot be interpreted, however, as laying down a general obligation to release a detainee on health grounds or to place him or her in a civil hospital in order to obtain a particular kind of medical treatment. Nevertheless, under this provision, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured by, among other things, providing the detainee with the requisite medical assistance<sup>51</sup>. The national authorities must also take into consideration the detainee's vulnerability and inability to complain coherently, or at all, about how they are being affected by any particular treatment.

In its judgment in the case of *McGlinchey and Others v. the United Kingdom*, the Court examined a complaint under Article 3 concerning the prison authorities' failure to provide adequate medical assistance to a detainee suffering from heroin withdrawal and asthma. The evidence indicated to the Court that Judith McGlinchey, a heroin addict whose nutritional state and general health were poor upon admission to prison, had subsequently suffered serious weight loss and dehydration. This was the result of a week of largely uncontrolled vomiting and an inability to eat or hold down fluids. This situation, in addition to causing Judith McGlinchey distress and suffering, posed very serious risks to her health, as demonstrated by her subsequent collapse. Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons, the Court found that there was a failure to meet the standards imposed by Article 3. In this context, the Court noted the failure of the prison authorities to provide accurate means of establishing Judith McGlinchey's weight loss- a factor that should have alerted the prison to the seriousness of her condition- was largely discounted due to a discrepancy of the scales. There was a gap in the monitoring of her condition by a doctor over the weekend when a further significant drop in her weight had occurred and the prison failed to take effective steps to treat her condition, such as admitting her to hospital to ensure the intake of medication and fluids intravenously, or obtaining additional expert assistance in order to control the vomiting. The Court concluded that the prison authorities' treatment of Judith McGlinchey contravened the prohibition against inhuman or degrading treatment contained in Article 3<sup>52</sup>.

In the case of *Keenan v. the United Kingdom*, which concerned a prisoner whom the authorities knew was suffering from a chronic mental disorder that involved psychotic episodes and feelings of paranoia, the Court concluded that the lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk, and thus found a violation of Article 3 of the Convention<sup>53</sup>.

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<sup>51</sup> *Kudia v Poland*, cited above, §§ 93-94.

<sup>52</sup> *McGlinchey v. the United Kingdom*, cited above, §§ 57-58.

<sup>53</sup> *Keenan v. the United Kingdom*, cited above, § 116.



Apart from the above mentioned cases where the complaints concerned lack of medical care, the detention of a person who is seriously ill may, on its own, raise issues under Article 3 of the Convention. Health, age and severe physical disability are among the factors to be taken into account under Article 3 in assessing a person's suitability for detention. For example, in *Price v. the United Kingdom* the Court held that detaining the applicant, who was four-limb deficient, in conditions inappropriate to her state of health amounted to degrading treatment<sup>54</sup>.

Similarly in *Mouisel v. France*, the Court considered that the health of the applicant, who was a cancer sufferer and who was being detained in prison was found to be giving more and more cause for concern. The applicant's health concerns became increasingly incompatible with detention due to the fact that the prison was scarcely equipped to deal with it and no special measures were taken by the prison authorities to do so. Such measures could have included admitting the applicant to hospital or transferring him to any other institution where he could be monitored and kept under supervision, particularly at night. The conditions in which the applicant was taken to hospital also raised a number of issues; he was kept in chains while under escort, although the chains started to be applied less tightly once the doctors advised against using restraints. Having regard to the applicant's health, to the fact that he was being taken to hospital, to the discomfort of undergoing a chemotherapy session and to his physical weakness, the Court considered that the use of handcuffs was disproportionate to the needs of security. In conclusion, the Court considered that the national authorities had not taken sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3. His continued detention undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer. He had thus been subjected to inhuman and degrading treatment on account of his continued detention in the conditions as examined by the Court and in violation of Article 3<sup>55</sup>.

Detention of persons with mental illnesses may also raise issues under Article 3. As a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading in the Court's view. However, as held in *Herczegfalvy v. Austria*, the Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist<sup>56</sup>. The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. In principle, however, it is for the medical authorities to decide, on the basis of the recognised rules of science, which therapeutic methods are to be used, and if necessary by force, in order to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. Such persons nevertheless remain under the protection of Article 3.

#### **vi. Hunger Strike and Force Feeding**

Complaints concerning measures to force feed may require the Court to carry out a balancing exercise between, on the one hand, the Contracting Parties' obligation to protect the right to life under Article 2 of the Convention and, on the other hand, the individuals' right to physical integrity protected in Article 3.

In its judgment in the case of *Nevmerzhitskiy v. Ukraine*, which concerned the force-feeding by the authorities of the applicant who was on hunger strike, the Court reiterated the above mentioned principle adopted in *Herczegfalvy v. Austria*, i.e. that a measure which is of

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<sup>54</sup> *Price v. the United Kingdom*, no. 33394/96, 10 July 2001, § 30.

<sup>55</sup> *Mouisel v. France*, cited above, §§ 31-48.

<sup>56</sup> *Herczegfalvy v. Austria*, no. 10533/83, 24 September 1992, § 83.

therapeutic necessity from the point of view of established principles of medicine cannot, in principle, be regarded as inhuman and degrading. It further held that the same could be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. However, the Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist. Furthermore, the Court deems it necessary to ascertain that the procedural guarantees for the decision to force-feed have been complied with. Moreover, the manner in which a detainee is subjected to force-feeding during the hunger strike should not go beyond the threshold of the minimum level of severity envisaged by the Court's case law under Article 3.

Applying these principles to the case at hand, the Court concluded in its judgment that the force-feeding of the applicant, without any medical justification having been shown by the Government, and by means of equipment foreseen in applicable legislation but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture within the meaning of Article 3<sup>57</sup>. The Court observed that in force-feeding the applicant the authorities had used handcuffs, a mouth-widener and a special rubber tube inserted into the food channel<sup>58</sup>.

The case of *Balyemez v. Turkey* concerned an applicant who was diagnosed as suffering from Wernicke-Korsakoff syndrome, brought on by a hunger strike while he was detained in prison. A stay of execution of his sentence was ordered but it had subsequently been concluded that, in view of the applicant's state of health, the stay was no longer justified and a warrant was accordingly issued for his arrest. As requested by the Court in Strasbourg, the public prosecutor decided to withdraw the arrest warrant.

A committee of experts, together with a delegation of judges and lawyers from the Court, examined the applicant and concluded that he was not suffering from any neurological or neuropsychological disorders that made him unfit to live in prison conditions, however it was recommended that he receive psychological therapy. Subsequently, in examining the applicant's complaint that his return to prison would constitute inhuman and degrading treatment and punishment because he would still be suffering from Wernicke-Korsakoff syndrome, the Court held that it did not consider it established that the applicant's return to prison would in itself constitute inhuman or degrading treatment within the meaning of Article 3. Nevertheless, in view of the experts' recommendation of psychological therapy, the Court expressed itself inclined to any measures that the Turkish authorities might take to help the applicant, either to ease the psychological effects of his possible future detention or to release him again as soon as circumstances so required, it being born in mind that there was nothing to prevent the applicant from returning to the Court if he felt that was necessary<sup>59</sup>.

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<sup>57</sup> *Nevmerzhitsky v. Ukraine*, cited above, § 98.

<sup>58</sup> See also the report of 15 February 2006 of the United Nations Economic and Social Council entitled "Situation of Detainees at Guántanamo Bay". In the report, drafted by six rapporteurs including Mr Manfred Novak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, a reference was made to the Court's judgment in the case of *Nevmerzhitsky v. Ukraine*. It was concluded in § 88 of the report that the force feeding of detainees on hunger strike in Guántanamo Bay "must be assessed as amounting to torture as defined in Article 1 of the Convention against Torture". The report can be accessed online at [http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120\\_.pdf](http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf)

<sup>59</sup> *Balyemez v. Turkey*, no. 32495/03, 22 December 2005, §§ 78-96.

## vii. Death Penalty

The Court's position on the death penalty has undergone a considerable evolution; the *de facto* abolition noted in the case *Soering* has developed into a *de jure* abolition, culminating in the establishment of a jurisdiction free of capital punishment.

In effect, in *Soering*, the Court did not consider that the imposition of the death penalty in itself was contrary to Article 3; indeed, the death penalty is allowed in Article 2 § 1 of the Convention and, as the Court acknowledged, Article 3 cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1.

Nevertheless, in *Öcalan* the applicant requested the Grand Chamber to pursue the reasoning of the Chamber as regards the abolitionist trend established by the practice of the Contracting States and to take it a stage further by concluding that the States had, by their practice, abrogated the exception set out in the second sentence of Article 2 § 1 of the Convention and that the death penalty was now to be seen as constituting inhuman and degrading treatment within the meaning of Article 3. However, the Court rejected the applicant's request and reached a similar conclusion to the one in the case of *Soering*. It noted that by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States had chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. The Court concluded that

“[f]or the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war.”<sup>60</sup>

Despite this, the Court observed that Article 2 of the Convention required that a deprivation of life be pursuant to the “execution of a sentence of a court”, and that the most rigorous standards of fairness should be observed in the criminal proceedings both at first instance and on appeal. Noting that the death penalty had been imposed on the applicant following an unfair procedure – and in violation of Article 6 of the Convention – which could not be considered to conform with the strict standards of fairness required in cases involving a capital sentence, and noting moreover, that the applicant had to suffer the consequences of the imposition of that sentence for nearly three years, the Court concluded that the imposition of the death sentence on the applicant amounted to inhuman treatment in violation of Article 3<sup>61</sup>.

The issue of the death penalty was once again the subject matter of the Court's examination in its recent judgment in the case of *Bader and Others v. Sweden* in which the first applicant, who had been sentenced to death in Syria, argued that Sweden would be in breach of its obligations if it were to deport him to Syria. The Court concluded that the first applicant had a justified and well-founded fear that the death sentence against him would be executed if he was forced to return to his home country. Moreover, since executions were carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause the first applicant considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out.

<sup>60</sup> *Öcalan v. Turkey* [GC], cited above, §§ 164-165.

<sup>61</sup> *Ibid*, §§ 174-175.

Accordingly, the Court found that the deportation of the applicants to Syria, if implemented, would give rise to violations of Articles 2 and 3 of the Convention<sup>62</sup>.

### **viii. Incommunicado Detention**

The Court has examined complaints concerning incommunicado – or unacknowledged – detentions from the standpoint of Article 5 of the Convention which guarantees, *inter alia*, the right to security of person. According to the Court, by introducing Article 5 the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty. Article 5 therefore guarantees a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention. In this connection, the Court regards the unacknowledged detention of an individual as a complete negation of these guarantees and a most grave violation of Article 5. Nevertheless, having assumed control over an individual, the Court has held that it is incumbent on the authorities to account for his or her whereabouts<sup>63</sup>.

### **1.3.3 Extradition, Deportation and Expulsion**

With regard to extradition, deportation and expulsion, the principle of non-refoulement is invoked where an individual risks to be subjected to ill-treatment in the receiving state. The Court has repeatedly stressed that it would hardly be compatible with the “common heritage of political tradition, ideals, freedom and the rule of law”, were a Contracting State knowingly to surrender a person to another state where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or inhuman or degrading treatment or punishment<sup>64</sup>. It is not normally for the Court to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him or her would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting state, a departure from this principle is necessary<sup>65</sup>.

Contrary to other circumstances in which the individual’s conduct may justify the use of physical force or certain security measures, the Court has held that extradition or deportation on account of criminal or terrorist activity by the individual cannot be justified upon demonstration of a real risk of ill-treatment or punishment in the receiving state, irrespective of the applicant’s involvement in criminal or terrorist activities. In considering such allegations, the Court will have regard to the credibility and consistency of the claims, supported by corroborating evidence such as medical reports and country reports. Article 3 considerations will be examined in more detail below in relation to extradition, expulsion relating to rejected asylum claims and that resulting from national security concerns.

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<sup>62</sup> *Bader and Others v. Sweden*, no. 13284/04, 8 November 2005, § 48. See also the concurring opinion of Judge Cabral Barreto who stated that the Court should have found a violation of Article 1 of Protocol No. 13 – which was already ratified by Sweden – and not of Article 2 of the Convention.

<sup>63</sup> *Kurt v. Turkey*, cited above, §§ 123-124.

<sup>64</sup> *Soering v the United Kingdom*, cited above, § 88; *Einhorn v France*, cited above, *Jabari v. Turkey*, no. 40035/98, 11 July 2000, §§ 33-42.

<sup>65</sup> *Soering v. the United Kingdom*, cited above, §§ 87, 90.

## **i. Extradition**

*Soering v. the United Kingdom* concerned the intended extradition by the British authorities of the applicant – a German national – to the United States of America where the authorities wanted to put him on trial for murder. If convicted, the applicant was liable to be sentenced to death. Mr Soering argued that his surrender to the authorities of the United States might, if implemented, give rise to a breach by the United Kingdom of Article 3 of the Convention because he would be exposed to the so-called “death row phenomenon” which, he alleged, constituted treatment contrary to that provision.

The Court observed in its judgment that a person sentenced to death in the United States had to endure for between 6 to 8 years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death. Having regard to the very long period of time to be spent on death row in such extreme conditions, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the Court concluded that the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3<sup>66</sup>.

The Court’s finding in *Soering* placed the Contracting Parties under an obligation to reject requests for extradition of persons to countries where they could be subjected to the death penalty and where there was the risk that they would be placed on death row. This has led at least one Contracting Party to obtain sufficient diplomatic guarantees from the authorities of the United States that the death penalty would not be sought, imposed or carried out<sup>67</sup>.

## **ii. Rejected Asylum Claims**

As pointed out elsewhere in this Handbook, it is for the applicant to prove that there are substantial grounds for believing that, if expelled, he or she would face a real risk of being subjected to a treatment contrary to Article 3<sup>68</sup>.

In an application concerning removal from the territory of a Contracting Party, the applicant must first show that he or she is a victim within the meaning of Article 34 of the Convention. This will not be the case, for example, if the national authorities have merely issued a deportation order that serves as a notification but cannot, without a subsequent expulsion order, be executed. In the event of an expulsion order, the applicant must make use of any available domestic remedy in order to have the expulsion order suspended<sup>69</sup>.

The Court has held that the Contracting Parties have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or in its Protocols. It is not within the Court’s duties or powers, therefore, to examine asylum claims or to monitor the Contracting Parties’ performance with regard to their observance of the obligations under the 1951 Refugee Convention<sup>70</sup>. However, it is well-established in the case-law of the Court that extradition and

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<sup>66</sup> *Soering v. the United Kingdom*, cited above, § 111.

<sup>67</sup> *Einhorn v France*, cited above.

<sup>68</sup> *Cruz Varas and Others v Sweden*, cited above, §§ 69-70; *Vilvarajah and Others v the United Kingdom*, cited above, § 103; and *Chahal v the United Kingdom*, cited above, § 74.

<sup>69</sup> *Vijayanathan and Pusparajah v. France*, nos. 17550/90 and 17825/91, 27 August 1992, § 46.

<sup>70</sup> *TI v the United Kingdom*, No 43844/98, Decision of 7 March 2000.

expulsion by a Contracting Party may nevertheless give rise to an issue under Article 3 of the Convention, and may thus engage the responsibility of that Party under the Convention<sup>71</sup>.

In determining whether there is a real risk that the applicant, if expelled to the receiving country, would be subjected to ill-treatment, the Court requires the applicant to show that a “real risk” exists. The standard of a “real risk” in expulsion cases lies somewhere between “certainty” and “possibility” and can at times be fairly high, although the standard must comply with the broader principles of effective protection and the prevention of irreparable damage<sup>72</sup>.

In its examination of complaints under this heading, the Court must assess all the material placed before it. Furthermore, the material point in time for the assessment of the alleged risk is the date of the Court’s consideration of the case<sup>73</sup>. Although the historical situation is of interest in so far as it may shed light on the current situation, it is the present conditions which are decisive<sup>74</sup>. The Court considers reports of governmental and of intergovernmental bodies on the situation of the country of destination, i.e. reports by the United Nations, the United States Department of State<sup>75</sup>, and, for example, Amnesty International<sup>76</sup>. However, the primary focus is on the individual circumstances viewed in the light of the general situation in the country of destination as described by reports of the named organisations. Applicants must thus demonstrate that there exists both a “real risk” of ill-treatment in the receiving state, and that such ill-treatment attains a “minimum level of severity”. The credibility and consistency of the applicant’s allegations are of the utmost importance.

For example, in *Cruz Varas* the Court considered the complete silence as to the applicant’s alleged clandestine activities and torture by the Chilean police until more than eighteen months after his initial interview in the national asylum procedure as a strong indication that his statement lacked credibility<sup>77</sup>. In *Hilal*, although the domestic authorities concluded that the claim lacked credibility, the Court accepted that the applicant had been arrested and detained in the past by referring to the medical record of the hospital where the applicant had been treated, thereby concluding that the apparent failure of the applicant to mention torture at his first immigration interview became less significant and far less incredible<sup>78</sup>.

The Court pays particular attention to past persecutions. For example, medical reports which strongly support an applicant’s claim that he or she has been subjected to ill-treatment in the past play a role in the Court’s examination. In this connection, the Court has held that

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<sup>71</sup> See, for example, *Soering v the United Kingdom*, cited above, §§ 90-91; *Vilvarajah and Others v the United Kingdom*, cited above, § 103; *Chahal v the United Kingdom*, cited above, §§ 73-74; *Jabari v Turkey*, cited above, § 38.

<sup>72</sup> Yutuka Arai-Takahashi, “Uneven, But in the Direction of Enhanced Effectiveness” – A Critical Analysis of “Anticipatory Ill-treatment” under Article 3 ECHR, 20 *NQHR* 5 at 19 (2002); see also Walter Suntinger, The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg? 49 *Austrian J. Public Intl.* 203 (1995); Ralf Alleweldt, Schutz vor Abschiebung bei drohender Folter oder unmenschlicher oder erniedrigender Behandlung oder Strafe, 1996.

<sup>73</sup> *Chahal v the United Kingdom*, cited above, § 97; See also *Ahmed v Austria*, no. 25964/94, 17 December 1996, § 43.

<sup>74</sup> *Chahal v the United Kingdom*, cited above, § 86.

<sup>75</sup> See Judge Loucaides’ separate opinion in *Said v. the Netherlands*, cited above, where he criticised the Court’s reliance on the United States Department of State Country Reports as a reliable source of information on the human rights situation in the receiving country. Judge Loucaides further stated that he did not consider such reports to be credible sources of information on human rights in any part of the world because “they are not prepared by an independent and impartial institution but by a purely political government agency, which promotes and expresses the foreign policy of the United States”.

<sup>76</sup> *Ibid* §§ 29-34.

<sup>77</sup> *Cruz Varas and Others v Sweden*, cited above, § 75.

<sup>78</sup> *Hilal v the United Kingdom*, cited above, §§ 62-64.

photographs of scars of injuries on an applicant's body might give rise to concerns that he or she could face ill-treatment if he or she was to be returned to the country of origin.<sup>79</sup> In *Hilal*, the Court accepted that the applicant had been arrested and detained because he had been a member of an opposition party. It found that he had been ill-treated during that period of detention by, *inter alia*, being suspended upside down, causing him severe haemorrhaging through the nose. His allegations were consistent with general information about the situation in Tanzania and were further supported by his wife who informed the authorities in her asylum determination proceedings that the police had come to her house on a number of occasions looking for her husband and making threats<sup>80</sup>.

The Court takes into account the prevailing conditions in the country of destination as a whole rather than limiting its examination to one province only. In *Chahal*, where the applicant was a well-known supporter of Sikh separatism, the Court assessed that he would be most at risk from the Punjab security forces acting either within or outside state boundaries, but serious human rights violations by security forces were a recalcitrant and enduring problem throughout India<sup>81</sup>.

In its judgment in the case of *Jabari v. Turkey*, which concerned an applicant who was to be deported to Iran where she feared to be subjected to punishment for an adulterous relationship, the Court observed that her punishment would include the stoning of the applicant. Considering this type of punishment to be contrary to Article 3, the Court held that if the applicant were to be returned to Iran, there would be a violation of this provision<sup>82</sup>.

### iii. National Security Concerns

Of particular interest relating to the current trend of adopting stricter immigration and anti-terrorism measures in some Contracting Parties in the post-September 11 era, is the fact that the identity of the person who is subject to removal is irrelevant. If there is a real risk that the person in question would be subjected to treatment contrary to the Convention in the receiving country, the removal of that person will violate the Convention even if the person in question is a suspected or convicted terrorist or war criminal. In *Chahal*, the British Government argued that the reason for the intended deportation was national security, and that in this connection the guarantees afforded by Article 3 were not absolute. The Court refused to uphold the Government's defence and endorsed that Article 3 enshrines one of the most fundamental values of democratic societies. Although the Court conceded that States in modern times are faced by immense difficulties in protecting their communities from terrorist violence, it concluded that even in these circumstances, the Convention prohibited in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct<sup>83</sup>.

The Council of Europe's willingness to uphold the protections guaranteed in the Convention and, in particular, its unwillingness to compromise on the protection which has been afforded to individuals since the 1950s, is further illustrated in the recent Information Memorandum prepared by the Council of Europe's Committee on Legal Affairs and Human Rights. The memorandum sets out the allegations and the available information concerning CIA's secret

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<sup>79</sup> *TI v the United Kingdom*, cited above.

<sup>80</sup> *Hilal v the United Kingdom*, cited above, §§ 64-66.

<sup>81</sup> *Chahal v the United Kingdom*, cited above, §§ 104-105.

<sup>82</sup> *Jabari v. Turkey*, no. 40035/98, 11 July 2000, §§ 33-42.

<sup>83</sup> *Ibid*, where, according to the respondent Government, the applicant was a suspected terrorist whose presence in the United Kingdom posed serious threats to national security.

prisons in some Council of Europe Member States and that agency's transfer of alleged terrorists over the airspace of the Council of Europe Member States<sup>84</sup>.

Furthermore, the Communication which the Secretary General of the Council of Europe submitted to the Contracting Parties, in accordance with Article 52 of the Convention, is another indication of the Council of Europe's resolution to keep Europe a torture-free zone and to prevent its Member States from being accomplices in extra-judicial activities<sup>85</sup>.

### 1.3.4 Rape

According to the Court's case-law, rape of a detainee constitutes torture within the meaning of Article 3. The first case in which the Court found a violation of Article 3 on this ground was the case of *Aydın v. Turkey* which has been examined in 1.2.1 above.

Proving rape and other forms of sexual assault in detention with adequate evidence presents unique difficulties<sup>86</sup>; although a number of allegations of rape in police custody have been brought to the attention of the Court, they were found to be unsubstantiated. The Court has, however, acknowledged the difficulties for persons to obtain evidence of rape committed while they were in police custody, particularly in view of their vulnerable position<sup>87</sup>. Such difficulties have further been acknowledged by the Court in a recent judgment in which it did not find it necessary "to assess whether the other allegations of sexual or psychological abuse are true, particularly in view of the difficulty of proving such treatment"<sup>88</sup>, having already established that the findings of a medical report matched the applicant's allegations of having been hit on the back – which was sufficient for the Court to find a violation of Article 3 of the Convention.

Rape perpetrated by private persons – as opposed to agents of the State – may also raise issues under Article 3. As the Court stated in its judgment in the case of *M.C. v. Bulgaria*, States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution<sup>89</sup>. After having examined the criminal proceedings brought against the persons who had allegedly raped the applicant, the Court concluded in this case that the investigation had fallen short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual

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<sup>84</sup> The memorandum, which was drafted by Mr Dick Marty and which was submitted to the Council of Europe's Parliamentary Assembly on 22 January 2006, can be accessed online at [http://assembly.coe.int/CommitteeDocs/2006/20060124\\_Jdoc032006\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf)

<sup>85</sup> The Communication is included in the appendix of the above mentioned memorandum drafted by Mr Marty. In his Communication the Secretary General requested information on "whether, in the period running from 1 January 2002 (or from the moment of entry in force of the Convention if that occurred on a later date) until the present, any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission - in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency..."

<sup>86</sup> In *Aydın*, the Commission and the Court were able to establish the accuracy of the applicant's allegations of rape following a fact-finding hearing held in Turkey during which the applicant and a number of other persons, including the doctors who had examined her following her release from the custody of the gendarmerie, were questioned by the Commission's delegates and cross-examined by the representatives of the parties. A report obtained from a pathologist, which had been drawn up in the light of the medical reports compiled by the doctors who examined the applicant following her detention, was also submitted to the Commission to support the applicant's allegations; see the Commission's Report of 7 March 1996, §§ 86, 88, 178.

<sup>87</sup> *Zeynep Avcı v. Turkey*, no. 37021/97, 6 February 2003, § 65.

<sup>88</sup> *Yavuz v. Turkey*, cited above, § 39.

<sup>89</sup> *M.C. v. Bulgaria*, cited above, § 153.



abuse. In rejecting the Government's objection to the admissibility of the case on the basis of the applicant's failure to bring a civil action for damages, the Court held that effective protection against rape and sexual abuse required measures of a criminal-law nature<sup>90</sup>.

The defence of marital rape immunity, which was rejected by the trial court in two cases concerning the applicants' criminal convictions for rape of their wives, was confirmed abandoned by the Court which stated that the unacceptable idea of a husband being immune against prosecution for rape of his wife was not in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom<sup>91</sup>.

### 1.3.5 Disappearances

Article 3 has been invoked by the relatives of individuals who have disappeared after being seen taken into custody; it being advanced that the disappeared individual was subsequently subjected to torture or other ill-treatment. The Court has been cautious in finding a violation of Article 3 in relation to victims of forced disappearances where there is insufficient supporting evidence that they have suffered ill-treatment. Nevertheless, having assumed control over an individual, the Court has held that it is incumbent on the authorities to account for his or her whereabouts<sup>92</sup>. Allegations of disappearances additionally raise issues under Articles 2 and 5 of the Convention. Complaints concerning disappearances have also been raised under Article 3 in relation to the suffering caused to the family of a disappeared person.

#### i. Disappeared Persons

The case of *Kurt v. Turkey* is one of the first cases to come before the Court which concerned the disappearance of a person in the hands of soldiers. In its judgment the Court held that unacknowledged detention of an individual is a complete negation of guarantees set forth in Article 5 and a grave violation of this provision. Having assumed control over that individual, it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.<sup>93</sup> In *Kurt*, the Commission and the Court were not convinced beyond reasonable doubt that the applicant's son, who had disappeared after having been detained by soldiers, had been killed. However, in the light of the fact that his detention had been unacknowledged and that nothing had been heard from him for a period of almost four and a half years, the Court concluded that there had been a particularly grave violation of the right to liberty and security of person guaranteed under Article 5, raising serious concerns about his welfare<sup>94</sup>.

In its judgment in the case of *Timurtaş v. Turkey*, adopted some two years after *Kurt*, the Court stated that issues under Article 2 are raised regarding the failure on the part of national authorities to provide a plausible explanation as to a detainee's fate in the absence of a body, depending on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence based on concrete elements, from which it may be concluded to the

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<sup>90</sup> *Ibid* § 186.

<sup>91</sup> *C.R. v. the United Kingdom*, no. 20190/92, 22 November 1995, § 42; *S.W v. the United Kingdom*, no.20166/92, §42

<sup>92</sup> *Kurt v. Turkey*, cited above, §§ 123-124.

<sup>93</sup> *Kurt v Turkey*, cited above, § 124.

<sup>94</sup> *Ibid* §129.

requisite standard of proof that the detainee must be presumed to have died in custody<sup>95</sup>. In *Timurtaş*, the relevant considerations for the Court to conclude that the applicant's disappeared son had died in detention, included, *inter alia*, the period of time during which nothing had been heard from him. According to the Court, the more time which goes by without any news of the detained person, the greater the likelihood that he or she has died. In this case nothing had been heard from the applicant's son for six and a half years at the time of adoption of the judgment. Furthermore, the applicant's son was a person wanted by the authorities for his alleged PKK activities. According to the Court, in the general context of the situation in south-east Turkey in 1993, it could by no means be excluded that an unacknowledged detention of such a person would be life-threatening<sup>96</sup>. Having thus established that the applicant's son had died after having been detained, the Court next examined whether the respondent Government had satisfied their burden of explaining his death<sup>97</sup>. Noting that the authorities had not provided any explanation as to what occurred after the apprehension of the applicant's son and that they had not relied on any ground of justification in respect of any use of lethal force by their agents, the Court concluded that liability for the death of the applicant's son was attributable to the respondent State in violation of Article 2 of the Convention<sup>98</sup>.

In its judgment in the inter-state case of *Cyprus v Turkey*, which was adopted on 10 May 2001, i.e. almost one year after the adoption of the judgment in *Timurtaş*, the Court examined the applicant Government's allegations under Article 2 on account of a number of Greek-Cypriot persons who had gone missing after the war in Cyprus in 1974. The applicant Government had argued – and the Commission and the Court agreed – that the persons had disappeared in life-threatening circumstances. Furthermore, Mr Denktaş, the head of the Turkish Republic of Northern Cyprus, had admitted in a broadcast statement in 1996 that the Turkish army had handed over Greek-Cypriot prisoners to Turkish-Cypriot fighters under Turkish command and that these prisoners had then been killed. Finally, at the time of the Court's examination of the case, nothing had been heard from the missing persons for a period of almost twenty-seven years. In summary, the elements which were relevant for the Court in *Timurtaş* to reach a finding of presumption of death were also present in *Cyprus v. Turkey*. Indeed, it may be argued that the likelihood of the disappeared persons in Cyprus of having met their death was significantly higher than that of the applicant's son in *Timurtaş*. The Court concluded, however, that although the evidence adduced confirmed a very high incidence of military and civilian deaths during the military operations of July and August 1974, it could not speculate as to whether any of the missing persons had in fact been killed by either the Turkish forces or Turkish-Cypriot paramilitaries into whose hands they might have fallen<sup>99</sup>. In any event – and as the Court itself acknowledged<sup>100</sup> – the evidence given of killings carried out directly by Turkish soldiers or with their connivance related to a period which was outside the scope of the application. It follows that a finding by the Court that the missing persons had been killed by agents of the respondent State would have prevented the Court from examining the allegation

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<sup>95</sup> *Timurtaş v Turkey*, cited above, § 82.

<sup>96</sup> *Ibid* § 85.

<sup>97</sup> It must be repeated that, as pointed out at 11.5.1 of Volume 1, when a person is detained in good health but is found to be injured at the time of release, or if he or she dies in detention, the burden shifts on to the State to provide a plausible explanation of how those injuries were caused, or how the individual has met with his or her death, failing which a clear issue arises under Articles 2 and/or 3 of the Convention. See 11.5.1 above for issues relating to the burden of proof in the Court's proceedings.

<sup>98</sup> *Timurtaş v. Turkey*, cited above, § 86. See also, *inter alia*, *İpek v. Turkey* and *Akdeniz v. Turkey*, both cited above; *Gongadze v. Ukraine*, no. 34056/02, 8 November 2005; *Akdeniz and Others v. Turkey*, no. 23954/94 31 May 2001; *Çiçek v. Turkey*, no. 25704/94, 27 February 2001; and *Orhan v. Turkey*, no. 25656/94, 18 June 2002, all of which concerned disappearance of the applicants' relatives.

<sup>99</sup> *Cyprus v. Turkey*, no. 25781/94, 10 May 2001, § 129.

<sup>100</sup> *Ibid* § 130.

under Article 2 of the Convention. Instead, the Court concluded that there had been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances<sup>101</sup>.

As pointed out above, disappearances also raise issues under Article 3. In the disappearance cases referred to above, the applicants invoked Article 3 and argued, firstly, that their relatives had been subjected to ill-treatment while in detention and, secondly, that the suffering that they had had to endure following the disappearance of their close relatives represented ill-treatment in relation to themselves.

As regards the first type of complaints, the Court requires applicants to substantiate their claims by adequate evidence. For example, in *Çiçek v. Turkey*, the Court held that

“where an apparent forced disappearance is characterised by a total lack of information, whether the person is alive or dead or the treatment which he or she may have suffered can only be a matter of speculation ... Moreover, the applicant has not presented any specific evidence that her sons were indeed the victims of ill-treatment in breach of Article 3; nor can the allegation that her sons were the victims of an officially tolerated practice of disappearances and associated ill-treatment of detainees be said to have been substantiated”<sup>102</sup>.

Given the nature of an unacknowledged detention and the subsequent disappearance, it is not surprising that in the great majority of such cases the applicants have been unable to produce adequate evidence<sup>103</sup>.

## ii. Relatives of Disappeared Persons

As regards the second type of complaint, the Court accepted for the first time that the suffering by close family members may constitute a violation of Article 3 in disappearance cases in the above mentioned *Kurt* judgment. The question whether a family member of a disappeared person is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. According to the Court, the essence of such a violation does not so much lie in the fact of the

<sup>101</sup> See, by contrast, the decision in the case of *Karabardak and Others v. Turkey* (no. 76575/01, 22 October 2002) in which the Court concluded that the relatives of the Turkish-Cypriot persons who had disappeared during the same events in 1974 had waited too long before introducing their application with the Court and therefore not complied with the six-month rule.

<sup>102</sup> *Çiçek v. Turkey*, cited above, § 155.

<sup>103</sup> One of the notable exceptions is the case of *Akdeniz v. Turkey*, cited above, in which the Court found it established, on the basis of statements taken by the investigating prosecutor from a number of eye-witnesses, that the applicant's son had been beaten up both at the time of his arrest and also subsequently while he was in the detention facility. Noting that neither the authenticity nor the accuracy of the contents of these statements had been challenged by the Government, the Court concluded that the applicant's son had been subjected to ill-treatment, which, at the least, reached the threshold of inhuman and degrading treatment and disclosed in that respect a violation of Article 3 of the Convention; §§ 117-120.

“disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct<sup>104</sup>.

### 1.3.6 Destruction of Property

When the Turkish army was fighting against terrorism in south-east Turkey in the early 1990s, they had information that some villagers were being forced by members of the PKK to provide the latter with shelter and food. In a very large number of instances the army’s response was to evict these villagers from their homes and in some of those instances, to burn down the villagers’ houses and belongings. A number of such cases – referred to as the village-destruction cases – have been examined by the Court, which found that the deliberate destruction of houses and the forcing of the inhabitants to flee constituted a serious interference with the right to respect for family life and home as well as with the peaceful enjoyment of possessions. Noting that no justification had been proffered by the respondent Government – which had confined their response to denying any security force involvement in the incidents – the Court concluded that there had been violations of Article 8 of the Convention and of Article 1 of Protocol No. 1 to the Convention<sup>105</sup>.

In the village-destruction cases, the applicants also argued that the destruction of their houses represented ill-treatment within the meaning of Article 3. In *Akdıvar, Menteş, Orhan and Özkan*, having already established that the applicants’ right to respect for their family lives and homes and/or their right to peaceful enjoyment of their possessions had been violated, the Court did not deem it necessary to examine separately the complaints under Article 3.

In *Selçuk and Asker*, on the other hand, the Court, mindful in particular of the manner in which the applicants’ homes and their personal circumstances had been destroyed, found that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3. Although neither the Commission nor the Court made any finding relating to the underlying motive for the destruction of the applicants’ property, the Court stated that even if the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes from being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment. The approach of the Court in *Selçuk and Asker* was followed in the cases of *Bilgin, Dulaş, Yöyler, Ayder, Altun* and subsequently in *Hasan İlhan*.

In *Moldovan and Others v. Romania*, the Court found that police officers had been involved in the destruction of houses and belongings of the applicants – Romanian citizens of Roma origin. However, the destruction had taken place before Romania ratified the Convention and for that reason the Court could not examine the complaint concerning the destruction of the houses. However, it noted that

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<sup>104</sup> See, *inter alia*, *İpek v. Turkey* cited above, §§ 178-183 and the cases referred to therein.

<sup>105</sup> See *Akdıvar and Others v. Turkey*, cited above, the first village-destruction case decided by the Court. See also, *Menteş v. Turkey*, cited above; *Selçuk and Asker v. Turkey*, nos. 23184/94 and 23185/94, 24 September 1998; *Bilgin v. Turkey*, no. 23819/94, 16 November 2000; *Dulaş v. Turkey*, no. 25801/94, 30 January 2001; *Orhan v. Turkey*, cited above; *Yöyler v. Turkey*, no. 26973/95, 24 July 2003; *Ayder and Others v. Turkey*, cited above; *Özkan and Others v. Turkey*, no. 21689/93, 6 April 2004; *Altun v. Turkey*, no. 24561/94, 1 June 2004 and *Hasan İlhan v. Turkey*, no. 22494/93, 9 November 2004.

“following this incident, having been hounded from their village and homes, the applicants had to live, and some of them still live, in crowded and improper conditions – cellars, hen-houses, stables, etc. - and frequently changed address, moving in with friends or family in extremely overcrowded conditions.”<sup>106</sup>

The Court concluded that the destitute conditions in which the applicants had to live following the destruction of their houses and belongings, coupled with “the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities”, constituted an interference with their human dignity which, in the special circumstances of the case, amounted to “degrading treatment” within the meaning of Article 3<sup>107</sup>.

### 1.3.7 Threats

The mere threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may itself be in conflict with that provision. Thus, to threaten an individual with torture may, in some circumstances, constitute at least “inhuman treatment”<sup>108</sup>.

In its establishment of the accuracy of allegations of ill-treatment, the Court has in a large number of cases dealt with allegations of threats made, for example, by police officers to strip the applicant naked in the presence of her husband<sup>109</sup>; threats of rape against the wife of a detainee<sup>110</sup> and threats of death and torture directed against detained persons<sup>111</sup>.

The issue of threats, whether emanating from a State agent or from another private individual, may also be relevant for the purposes of the Contracting States’ positive obligation to protect individuals within their jurisdictions from harm. As explained in the preceding sections of this Handbook, a Contracting Party’s positive obligation extends, in appropriate circumstances, to the taking of preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual<sup>112</sup>. Thus, in a number of cases which concern the right to life protected by Article 2, the Court has examined the applicants’ allegations that their relatives had been threatened prior to being killed and that the authorities who had been informed about those threats had not taken any steps to investigate them<sup>113</sup>. In the case of *Akkoç v. Turkey*, the applicant was able to prove that her husband had received telephone calls during which he had been threatened with death and that these telephone calls had subsequently been reported in their petitions submitted to the national investigating authorities before he was killed. In the proceedings before the Court in Strasbourg the respondent Government disputed the seriousness of the threatening telephone calls. The Court, on the contrary, attached importance to the threats and found it “rather significant that the public prosecutor took no steps in response to the petitions lodged by the applicant and her husband”; the Court was satisfied that the authorities must be regarded as being aware of the risks to the life of the applicant’s husband<sup>114</sup>.

<sup>106</sup> *Moldovan and Others v. Romania*, cited above, § 103.

<sup>107</sup> *Ibid* § 113.

<sup>108</sup> *Campbell and Cosans v the United Kingdom*, nos. 7511/76 and 7743/76, 25 February 1982, § 143 *et al.*

<sup>109</sup> *Süheyla Aydın v. Turkey*, cited above, § 187.

<sup>110</sup> *Elçi and Others v. Turkey*, cited above, § 21.

<sup>111</sup> *Ibid*, §§ 16, 28, 58, 657.

<sup>112</sup> See 10.2.2b of Volume 1

<sup>113</sup> See, *inter alia*, *Nuray Şen v. Turkey (2)*, no. 25354/94, 30 March 2004, §§ 12, 28-29, 41, 56, 58-59, 132, 143-144, 171; *Adalı v. Turkey*, cited above; *Koku v. Turkey*, cited above, § 19.

<sup>114</sup> *Akkoç v. Turkey*, cited above, §§ 18, 74, 80, 82.

### 1.3.8 Racial Discrimination

The Court has found that discriminatory treatment based on race can reach the minimum level of severity to invoke degrading treatment pursuant to Article 3. Additionally, the Court has held that failure to accord investigative care to allegations of racial discrimination may constitute a violation of the procedural duty of Article 14.

According to the Commission, discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3<sup>115</sup>. The Commission's view was adopted by the Court in *Cyprus v. Turkey* where it found that

“it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The Court would further note that it is the policy of the respondent State to pursue discussions within the framework of the inter-communal talks on the basis of bi-zonal and bi-communal principles... The respondent State's attachment to these principles must be considered to be reflected in the situation in which the Karpas Greek Cypriots live and are compelled to live: isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community. The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members... In the Court's opinion, and with reference to the period under consideration, the discriminatory treatment attained a level of severity which amounted to degrading treatment”<sup>116</sup>.

More recently, and with reference to the above mentioned *East African Asians* case, the Court has held in *Moldovan and Others v. Romania* that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 and that [racist] remarks should therefore be taken into account as an aggravating factor in the examination of applicants' complaint under this article. On the basis of the circumstances of the case, the Court found that the racial discrimination to which the applicants had been publicly subjected, and the way in which their grievances were dealt with by the various authorities, constituted an interference with their human dignity which, in the special circumstances of this case, amounted to “degrading treatment” within the meaning of Article 3 of the Convention<sup>117</sup>.

In the vast majority of cases, allegations of racial discrimination have been examined from the standpoint of Article 14 of the Convention which prohibits discriminatory treatment. In a landmark judgment the Court considered that

“any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it

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<sup>115</sup> See *East African Asians v. the United Kingdom*, nos. 4403/70 et seq, Commission Report of 14 December 1973.

<sup>116</sup> *Cyprus v Turkey*, cited above, §§ 309-311.

<sup>117</sup> *Moldovan and Others v. Romania*, cited above, § 113.

must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives”<sup>118</sup>.

It follows from this judgment that the Contracting Parties are now under an obligation to carry out investigations into allegations of use of force triggered by racial motives. Although in the facts of the *Nachova* case the issue of racial discrimination was examined from the standpoint of Article 2 as it concerned the killing of a person, it can by no means be excluded that the Contracting Parties’ positive obligation in this area extends to ensuring that allegations of ill-treatment triggered by racial motives are also properly investigated.

### 1.3.9 Post-Mortem Mutilation

On at least two occasions the Court has examined allegations of post-mortem mutilation of bodies of persons killed in military operations. It must be stressed that mutilations are not only prohibited by Article 3, but also by other international treaties. According to Article 15 of the first Geneva Convention of 1949, applicable in international conflicts, and also common Article 3 of the four Geneva Conventions of 1949, applicable in non-international conflicts, even in time of war, the dead should not be despoiled or mutilated. Violations of common Article 3 are crimes of universal permissive jurisdiction.

In the case of *Akkum and Others v. Turkey*, the Court was able to establish on the basis of forensic evidence that the ears of one of the applicants’ sons, who had been killed in an area where a military operation had been conducted, had been cut off after his death. Although it was not clear who had killed the applicant’s son or who had severed his ears – due to the respondent Government’s refusal to hand over to the Court a number of important documents relating to the military operation – the Court concluded that the burden of explaining the death and the mutilation of the person in question rested with the Government<sup>119</sup>. Noting that no such explanations had been proffered by the Government, the Court concluded that there had been a violation of Article 2. The applicant also complained that the mutilation of his son represented inhuman treatment contrary to Article 3 of the Convention in relation to him, and that the mutilation of a body was offensive to a Muslim, given that he had had to bury an incomplete and mutilated body. The Court concluded that the anguish caused to the applicant as a result of the mutilation of the body of his son amounted to degrading treatment contrary to Article 3 of the Convention<sup>120</sup>.

In another case which concerned the post-mortem mutilation of the applicant’s brother following the latter’s death during a military operation, the Court examined the complaint from the standpoint of the positive obligation inherent in Article 3 to carry out effective investigations into allegations of ill-treatment. After having reiterated that the mutilation of the body of a person represents degrading treatment in relating to his or her close relatives, the Court considered that the Government had not been able to show that the Turkish authorities had done everything in their power to identify and question the soldiers who had taken an active part in the fighting during which the applicant’s brother had died. That was sufficient ground to reach the conclusion that the investigation had not been effective. Consequently, the Court held unanimously that there had been a violation of Article 3, in respect of the applicant, on account of the inadequacy of the investigation conducted into the mutilation<sup>121</sup>.

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<sup>118</sup> *Nachova v. Bulgaria* [GC], cited above, §§ 162-168.

<sup>119</sup> See 11.5.1 of Volume 1.

<sup>120</sup> *Akkum and Others v. Turkey*, cited above, §§ 252-259.

<sup>121</sup> *Kanlıbaş v. Turkey*, no. 32444/96, 8 December 2005, §§ 61-70.

### 1.3.10 Inhuman and Degrading Punishment

Certain forms of physical punishment, such as corporal punishment, flogging, stoning, etc., may reach the severity of ill-treatment prohibited by Article 3. In determining if Article 3 is invoked, the Court will consider the way in which the punishment was carried out and whether the victim felt degraded, not only in the eyes of others, but “in his own eyes.”<sup>122</sup> Further, the Court has extended the application of Article 3 beyond acts perpetrated by state agents, thereby invoking the state’s obligation to protect individuals from torture, inhuman or degrading treatment or punishment, “including such ill-treatment administered by private individuals”<sup>123</sup>.

In the case of *Tyrer v. the United Kingdom*, the Court ruled that corporal punishment amounts to degrading punishment within the meaning of Article 3. In reaching that conclusion it stated that

“the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender”<sup>124</sup>.

It is irrelevant whether such corporal punishment is carried out in private and without making the name of the offender public as the Court held that although publicity may be a relevant factor in assessing whether a punishment is “degrading”, the absence of publicity will not necessarily prevent a given punishment from falling into that category; it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others<sup>125</sup>.

As mentioned above in 1.3.3, in *Jabari v. Turkey*, the Court found that the applicant would be subjected to the judicial punishment of stoning for having committed adultery, were she deported to Iran. The Court held that if the deportation was executed, the applicant would be exposed to treatment contrary to Article 3<sup>126</sup>.

The prohibition of corporal punishment in Article 3 has also been extended to apply not only to state authorities, but also to private individuals. As discussed at 10.3.2 of Volume 1, in *A v. the United Kingdom*, the Court found the State party in breach of Article 3 for not taking the proper measures to afford real and effective protection to the child applicant whose stepfather had caned him on several occasions. The stepfather had been acquitted by a jury despite the severity of the treatment to which the applicant had been subjected. The Court concluded that

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<sup>122</sup> *Tyrer v. the United Kingdom*, cited above, § 31

<sup>123</sup> *A v. the United Kingdom*, no. 11/1997/884/1096, 23 September 1998, § 22

<sup>124</sup> *Tyrer v. the United Kingdom*, cited above, § 33.

<sup>125</sup> See also *Campbell and Cosans v. the United Kingdom*, cited above, § 143 concerning the use of corporal punishment in schools.

<sup>126</sup> *Jabari v. Turkey*, no. 40035/98, 11 July 2000, §§ 33-42.



the law had therefore failed to provide adequate protection to the applicant against treatment or punishment contrary to Article 3.

In order to invoke Article 3, the punishment need reach the requisite minimum level of severity. It would appear that “whacks” with a rubber-soled gym shoe against the clothed bottom of the applicant by the school headmaster does not reach the minimum threshold of severity<sup>127</sup>. Nor does the threat of corporal punishment fall into the ambit of Article 3 provided that the risk of punishment being applied is neither sufficiently real nor immediate<sup>128</sup>. In coming to these conclusions, the Court had regard to the absence of evidence attesting adverse or long-lasting effects of the punishment, or threat of punishment, upon the applicants.

### 1.3.11 Acts of Ill-treatment by Private Individuals

As discussed at 10.2.2b of Volume 1 and above, State parties carry a positive obligation to take measures to ensure that individuals within their jurisdiction are protected from acts of ill-treatment administered by private individuals. In finding a violation of Article 3, the Court will have regard to the vulnerability of the applicant and to the awareness of the state authorities to the risks of ill-treatment incurred by applicants.

Where applicants are children, and therefore particularly vulnerable, the obligation to protect them from acts of ill-treatment administered by private individuals is heightened. Accordingly, where children have been subjected to serious neglect and abuse of which the local authorities were aware, such inaction discloses a breach of Article 3<sup>129</sup>. Similarly, in *E. and Others v. the United Kingdom*, where children had been subjected to sexual abuse administered by a convicted sex offender and the social services had knowledge that he continued to frequent the home of the children applicants, the Court found a violation of Article 3. The Court stated that “failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”<sup>130</sup>.

Private acts of violence, such as rape, also fall in the scope of Article 3 where a State party has failed to establish and implement effectively a criminal justice system punishing all forms of rape and sexual abuse. As examined above at 10.2.2b of Volume 1 and 1.3.4 above, in the case of *M.C. v. Bulgaria*, the Court pronounced a new positive obligation inherent in Article 3 to protect attack upon an individual’s sexual autonomy. By relying on the development of international and comparative standards, the Court affirmed that this obligation requires the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. Prior to this case, the Court had limited its consideration of private acts of sexual violence to the grounds of Article 8<sup>131</sup>. In *M.C. v. Bulgaria*, the Court carries out an expansion of Article 3; private acts of sexual violence are now deemed as ill-treatment, invoking the responsibility of the State to establish and apply measures of a criminal law nature.

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<sup>127</sup> *Costello-Roberts v. the United Kingdom*, no. 13134/87, 25 March 1993

<sup>128</sup> *Campbell and Cosans v. the United Kingdom*, nos. 7511/76; 7743/76, 25 February 1982

<sup>129</sup> *Z. & Others v. the United Kingdom*, no. 29392/95, 10 May 2001

<sup>130</sup> *E. & Others v. the United Kingdom*, no. 33218/96, 26 November 2002, §99

<sup>131</sup> *X & Y v. the Netherlands*, no. 8978/80, 26 March 1985

# European Mechanisms for the Prevention of Torture and Other forms of Ill-treatment

by Dr Reinhard Marx<sup>1</sup>

- I. The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (ECPT)
- II. Council of Europe Commissioner for Human Rights
- III. Organisation of Security and Co-operation in Europe (OSCE)
- IV. European Union (EU)

## I. The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (ECPT)

### Purpose of the Convention

On 26 June 1987, the Committee of Ministers of the Council of Europe adopted the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) which entered into force on 1 February 1989 and at the time of writing has been ratified by 46 states. It is the Council of Europe's main tool for *preventing the violation* of the prohibition of torture and ill-treatment. The ECPT does not establish new norms, but strengthens states' obligations to prevent torture from occurring. It contains *no complaint mechanism*.

"Prevention of torture" refers to the identification and the eradication of the underlying causes of torture. The first step of prevention is the identification of indicators showing the future risks of torture. A special nexus exists between torture and detention because ill-treatment usually takes place when individuals are deprived of their liberty. The ECPT, therefore, provides a *non-judicial preventive machinery* aimed at identifying indicators and causes of torture of detainees.

The ECPT mandated the creation of the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT). The CPT carries out the practical mechanism of the Convention; the system of country visits. The CPT is limited to prevention and as such is not empowered to apply, or initiate procedures intending to apply existing law to any malpractices it may find. This also means that the CPT has no mandate to interpret Article 3 of the ECHR.<sup>2</sup> Nor does the CPT handle individual cases and is not bound by treaty provisions, although it may take as references human rights instruments and the jurisprudence of international and regional courts. The CPT intervenes *ex officio* through periodic or *ad hoc* visits and does not need to have been petitioned in order to carry out visits. The findings of delegations' visits are recorded in CPT reports which may, if appropriate, contain recommendations for state action to correct unacceptable conditions or behaviour.

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<sup>1</sup> Deutsches Institut für Menschenrechte

<sup>2</sup> Explanatory Note to the ECPT, par. 27.

The CPT complements the ECtHR which operates *a posteriori* and gives rulings on individual complaints of torture and ill-treatment. Moreover, the case-law on Article 3 of the ECHR, provides a source of guidance for the CPT on the legal standards to apply in assessing its visits to centres of detention. In fact, the CPT is designed to be an integral part of the Council of Europe system for the protection of human rights, placing a non-judicial mechanism alongside the existing judicial mechanism of the ECtHR.<sup>3</sup>

Although the CPT is a non-judicial body, its findings can have significant political implications when its findings are drawn upon by the relevant bodies within the Council of Europe.<sup>4</sup>

In its first general report, the CPT elaborated the main differences between the ECPT and the ECHR mechanisms. The report confirms that unlike the ECtHR, the CPT is *not a judicial body* empowered to settle legal disputes concerning alleged violations of treaty obligations. Rather, the CPT is first and foremost a mechanism to prevent ill-treatment from occurring, though in special cases it may also intervene after the event. Consequently, whereas the ECtHR's activities aim at "conflict solution" at the legal level, the CPT's activities aim at "conflict avoidance" on the practical level. Whereas the ECtHR is charged with enforcing legal rules and redressing legal wrongs, the CPT is concerned only with fact-finding investigations.<sup>5</sup> Its task is not to publicly criticise states but rather – based on the two fundamental principles of co-operation and confidentiality - to assist them in finding ways of strengthening the "cordon sanitaire" that separates acceptable and unacceptable treatment of detainees. At the same time, the CPT it is not bound by the case-law of judicial or quasi-judicial bodies acting in the same field, but may make use of these as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries.

### Concepts and Working Methods of the CPT

The CPT is not a committee which sits in an ivory tower in Strasbourg, but a body continuously having to make judgements – and develop standards - regarding the evidence and legality of the various practices it discovers.<sup>6</sup> As a result, its standards are often more difficult to get to grips with than other codes, e.g. the *United Nations Standard Minimum Rules for the Treatment of Prisoners* and the *European Prison Rules*. The CPT's standards are not static statements but are detailed, nuanced and dynamic.<sup>7</sup> The body of standards developed so far by the CPT is significantly different from the well-known codes of custodial standards promulgated by the United Nations and the Council of Europe.

Since the CPT is not limited by the jurisprudence of Article 3 of the ECHR, it has developed its own autonomous understanding of what the terms "torture" and "ill-treatment" signify and has followed an unorthodox approach in doing so.<sup>8</sup> The CPT has clearly reserved torture to

<sup>3</sup> CPT, 13<sup>th</sup> General Report on the CPT's Activities, September 2003, p. 3 (accessible at: [www.cpt.coe.int](http://www.cpt.coe.int)).

<sup>4</sup> Mark Kelly, Perspectives from the CPT, in: 21 *HRLJ* 301 at. 303 (2000).

<sup>5</sup> Antonio Cassese, "A New Approach to Human Rights: The ECPT", 83 *AJIL* 130 at.136 (1989)

<sup>6</sup> Rod Morgan/ Malcolm Evans, *Combating Torture in Europe*, 2000, p. 153.

<sup>7</sup> Rod Morgan/ Malcolm Evans, *ibid.*, p. 160.

<sup>8</sup> Rod Morgan/ Malcolm Evans, *ibid.*, p. 33.

describe the deliberate and purposive use (to date almost exclusively perpetrated by the police) of severe ill-treatment to elicit information or confessions, or to intimidate, punish, or humiliate. Hence, the word “torture” has been reserved for methods of ill-treatment which involve a degree of deliberate preparation such as disguising the identity of the involved officers, or of using implements which have no legitimate purpose in a custody area. The consequence, viewed in the context of "severity", is that a very high threshold has been set by the CPT. Severe beatings with fists or batons, even in cases where a prisoner has been rendered defenceless by having his hands handcuffed behind his back, have not been designated torture. By contrast the terms "inhuman" and "degrading", used either separately or in combination, have been reserved by the CPT for forms of "*environmental ill-treatment*" where the purposive element - meaning that ill-treatment is being directed against a particular individual - is lacking or disguised.<sup>9</sup>

It is important to understand the methods and rules of evidence employed by the CPT in determining whether ill-treatment is prevalent in the detention centres of a particular country. If the CPT finds that a certain member state practices torture or ill-treatment, this becomes powerful evidence which may serve to corroborate claims that NGOs have been making for some time yet with little impact.

The CPT is called upon to hold inquiries, in particular in the context of *ad hoc* visits following serious allegations of torture. Although the Committee attempts to ascertain whether or not allegations are well-founded, in such cases the purpose and results of the visits are of a broader nature; the visiting CPT delegation look into the general conditions surrounding alleged abuses.<sup>10</sup> Their activities are based on the concept of so-called "*environmental ill-treatment*".<sup>11</sup> This means that the delegation examines not only whether abuses are actually occurring; but also pay attention to the “indicators” or “early signs” pointing to possible future abuses. For instance, the experts scrutinise the physical conditions of detention (the space available to detainees, lighting and ventilation, washing and toilet facilities, eating and sleeping arrangements, medical care provided by the authorities, etc.) as well as the social conditions (relationship with other detainees and law enforcement personnel, links with families, social workers, the outside world in general, etc.).

Regarding the *evidential question* of whether an act of ill-treatment has taken place in a given State, the CPT has developed a set of criteria on the basis of which it determines the credibility of allegations of ill-treatment which are brought to its attention. Once the degree of credibility has been established the result is converted into a generalised risk assessment which is then weighed against the number of allegations in order to produce the assessment of the general risk of ill-treatment. In doing so, the CPT has developed what can be called a "*risk-continuum*" which unfortunately introduces terminological nuances which are often misunderstood by recipients and readers of the CPT reports.

The Committee also has adopted what may be termed a *triangulation methodology* to deal with allegations. This permits the CPT to approach the question of ill-treatment from several angles, and if several indicators cross-check positively then the Committee is often willing to

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<sup>9</sup> Malcolm D. Evans/ Rod Morgan, *ibid*, pp. 215, 253 – 255; *ibid.*, p. 66.

<sup>10</sup> Barbara Bernath, *The Prevention of Torture in Europe. The CPT: History, Mandate and Composition*, Brochure No. 3, 1999, p. 19

<sup>11</sup> Malcolm D. Evans/ Rod Morgan, *Preventing Torture*, 1998, p. 254.

be correspondingly firm in its findings. Where such evidence is lacking, the Committee's conclusions are typically couched in more tentative terms.<sup>12</sup>

## The visit system of the Convention

### Preparing visits

The most important aspect of the preventive nature of the CPT's work lies in the very objective of the visits. Visits themselves are unlikely to prevent torture and ill-treatment, though doubtless they may act as a deterrent. The real objective of the visit is to pave the way for a dialogue with the State concerned.<sup>13</sup> The CPT conducts visits in order to prevent torture from occurring. The CPT must therefore establish whether conditions or circumstances exist which are likely to deteriorate into acts of torture. The Committee does not concern itself with the reasons why people have been deprived of their liberty, or whether the decision to deprive a person of his or her liberty was proper or not.

It was not an easy task to convince states to accept that international CPT experts could, at any time and unannounced, enter places which are by definition closed to all outsiders. It is safe to say that today the CPT has succeeded in establishing itself as a reliable partner in the eyes of the authorities and its value is widely recognised.<sup>14</sup> This progress in the system of human rights protection can hardly be overestimated, particularly, if one takes into account that the ICRC may only visit places of detention with the consent of states but that the Geneva Conventions do not oblige states to permit such visits.

The CPT carries out three kinds of visits – *periodic visits*, *ad hoc visits* and *follow-up visits*. Periodic visits are carried out in all member states on a regular basis. Ad hoc visits are organised in those states where they appear to the Committee “to be required in the circumstances” (Article 7 par. 1 of the Convention). In a *follow-up visit*, the CPT returns to places previously visited in order to assess progress in implementing recommendations.

Each member state must permit visits to any place within its jurisdiction “where persons are deprived of their liberty by a public authority” upon notification (Articles 2 and 8 par. 1). Only on one occasion in the early life of the Convention did one member State require a delegation to obtain a visa. However, this early diplomatic discourtesy appears not to have been repeated.<sup>15</sup> The CPT can carry out visits without being bound to any prerequisites. The CPT's mandate extends *beyond prisons and police stations* to encompass, for example, *psychiatric institutions, detention areas at military barracks, holding centres for asylum seekers* or other categories of foreigners, airport facilities and places in which young persons may be deprived of their liberty by judicial or administrative order.<sup>16</sup> The key criteria lies in the nature of the detaining authority. The CPT enjoys a right of access even if the place of detention is in fact private. Thus, access may even extend to private hospitals and private homes where, for example, a person is held under house arrest.<sup>17</sup>

<sup>12</sup> Malcolm D. Evans/ Rod Morgan, *ibid*, p. 215.

<sup>13</sup> Rod Morgan/ Malcolm Evans, *ibid*, p. 29.

<sup>14</sup> Barbara Bernath, *ibid*, p. 53

<sup>15</sup> Malcolm D. Evans/ Rod Morgan, *ibid* p. 339.

<sup>16</sup> CPT, 13<sup>th</sup> General Report on the CPT's Activities, September 2003, p. 3.

<sup>17</sup> Rod Morgan/ Malcolm Evans *ibid.*, p. 28.

The CPT's access to airport facilities has been contested, as states argue that immigrants, who are denied access to their territory, remain at liberty to leave the country. The CPT has always held that this possibility is not a real alternative and this view was confirmed by the ECtHR which has held that the mere fact that it is possible for asylum-seekers to voluntarily leave the country from where they wish to claim asylum, does not by itself exclude a restriction on liberty. In such cases the Court concluded that holding the applicants in the transit zone is equivalent in practice to a deprivation of liberty, in view of the restrictions suffered.<sup>18</sup>

The CPT examines how detainees are treated and, if necessary, recommends improvements to states. When carrying out a visit, the CPT enjoys extensive powers under the Convention: access to the territory of the state concerned and the right to travel without restrictions; unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restrictions, access to other information available to the state which is necessary for the CPT to carry out its task.

The CPT prepares an annual programme of periodic visits. Detailed preparations are made by each delegation. The members of the delegation meet, elect a head of delegation and plan the details of the visit, such as exact duration of the visit, institutions to visit, areas of competence already covered by members and experts needed, whom to meet during the visit, and the need to split up into sub-groups during the visit. During the preparatory stage, it is important that the state party in question nominates a liaison officer and that he or she co-operates with the CPT in a satisfactory manner. The CPT is required under Article 8 par. 1 of the Convention to “*notify* the government of the party concerned of its intention to carry out a visit. After such notification, it may at any time visit any place referred to in Article 2.” Neither the Convention nor the Explanatory Report specify the *notification period*. The CPT has to strike a balance between the need to allow States to prepare a visit and the necessity of preventing the cover up of abuses, thus retaining a certain element of surprise. Therefore, it has devised a *three-step notification process for period visits*. First, as soon as the CPT has decided upon its programme of periodic visits the Secretariat informs the state party concerned. Second, about two weeks before the visit takes place, the state party is informed of the date when the visit will start, its probable length and the composition of the delegation. Third, a few days before the actual start of the visit, notice is given of the places that the CPT intends to visit. This period is considered to be sufficiently short to undertake substantial changes to material prison conditions. The list of places is provisional and, in the course of the visit, the delegation may, and usually does, decide to visit places without advance notice. These places are typically police stations, airport transit areas and other small institutions. In the case of *ad hoc visits*, the CPT notifies the state party only shortly beforehand that it plans to undertake a visit and informs it of the composition of the delegation. It need not specify the time between notification and the actual visit which, in exceptional circumstances, may be carried out immediately after notification.<sup>19</sup>

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<sup>18</sup> *Amuur v France*, Reports 1996-III, par. 43.

<sup>19</sup> Ursula Kriebaum, *Prevention of Torture in Europe. CPT Modus Operandi*, Brochure No. 4, 2002, pp. 20.

## Conducting visits

Visits usually begin with private meetings with representatives of local NGOs and individuals such as university professors and lawyers, who, it is felt, can provide the delegation with recent information. These meetings are generally arranged only a few days before the visit starts. On the following day, usually only the head of the delegation will meet the national authorities. After the initial meeting, the delegation immediately sets out to visit places of detention. It often splits into sub-groups. Article 8 of the Convention obliges States to provide the CPT with full information on the places of detention and alike. In practice, there have been examples, both in police and prison establishments, of delays in obtaining access to documents in detainees' files held by the police or the judicial authorities, in being able to consult detainees' medical records and in seeing staff lockers, etc. The CPT has attributed this to inadequate knowledge about the CPT on the part of the authorities in question. Undue delays in gaining access to detention facilities are in contradiction with the duty to co-operate with the CPT. While the CPT estimates that a certain amount of time may be necessary to check the identity of the members of the delegation, it rightly qualifies delays of one hour or more as violations of Article 8 of the Convention.<sup>20</sup> Only in exceptional circumstances may States, pursuant to Article 9 of the Convention, argue for the postponement of a visit to a particular place though this provision has never been invoked. On average, the delegation spends one and a half days in medium-sized to large institutions comprising of 400 detainees or more. Visits to places such as police stations or immigration airport facilities, sometimes carried out at night, take much less time.

The delegation visits cells and looks closely at the conditions in which detainees are held, observes the attitude of the staff toward the detainees and examines the records relating to the custody, e.g. notification of custody, access to lawyers and medical doctors, information on rights of the detained persons, complaint procedure, etc. It also looks at the material detention conditions. The State may require that the delegation be accompanied by a senior official during its visits, which is usually requested for places that are of a high security priority for reasons linked to national defence. However, the CPT never accepts that an accompanying person is present during interviews with persons deprived of their liberty. To carry out its tasks effectively, the delegation asks to be provided with a list of all the detainees held at each establishment at the time of their visit. This right is not subject to any formal requirements such as authorisation by the competent authorities. In order to be able to assess the average turnover rate of inmates and the average period of detention, delegations systematically demand access to the custody register which holds information about the number of transfers to other places of detention. The CPT considers that the transfer of detainees just before a delegation's visit, leaving normally busy places of detention empty, is unacceptable with regard to the state's obligation to co-operate with the CPT (Article 3 ECPT). Removing persons whom the authorities do not wish the delegation to meet, or denying access to such persons, amounts to a flagrant violation of the obligation to co-operate with the CPT.

If necessary, one or more of the detainees will be examined by a doctor. The delegation has the right of access to detainees' medical files. If it is alleged that a detainee is too intoxicated to be interviewed, the delegation may confirm that on its own. In the case of detainees who are a security risk, the delegation listens to the advice of the staff as to the need for security

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<sup>20</sup> Ursula Kriebaum, *ibid.*, 2002, pp. 26.

measures, but the final word on what security measures should be taken for the purposes of an interview rests with the delegation. For example, the delegation may or may not accept the police's view that a detainee must wear handcuffs during an interview. If any of the detainees are under interrogation during a visit by the delegation, it will usually not interrupt the interrogation. However, if there is reason to suspect that ill-treatment is taking place during the interrogation or that the interrogation is used as an excuse to keep the delegation from speaking to one or more particular detainees, the delegation has the right to interrupt the interrogation in order to interview the detainee.<sup>21</sup>

Article 8 par. 3 of the Convention establishes the CPT's right to hold *interviews in private* with detainees and alike. Interviews enable the CPT to gather allegations of torture or ill-treatment, and also to hear detainees' views on the conditions of detention. Interviews take place in private, out of earshot and, if possible, out of sight of the authorities. During the interviews delegation members take notes but it has been decided to refrain from using tape-recorders or taking photographs. Interviews constitute one of the basic elements of the visits. They enable the delegation to gather allegations of torture or ill-treatment. The detainees are free to accept such interviews, but the delegation may, in the event of a refusal, satisfy itself that this is in fact the free decision of the detainee concerned.

During the visit, only CPT staff – as opposed to ad hoc experts contracted by the CPT - have the authority to pursue contacts with the national authorities. They are also responsible for the general conduct of the visit. The expert's role is to bolster or supplement the delegation with special knowledge or experience in the fields such as the treatment of detainees, prison regimes or the treatment of young offenders. The experts act on the instructions and under the authority of the CPT. When expressly authorised to do so by the head of the delegation, experts may interview detainees on their own. Contrary to the expectations of the drafters of the Convention, the CPT has from the outset relied heavily on the assistance of *ad hoc* experts. Rather than providing occasional supplementary assistance, *ad hoc* experts have accompanied delegations on practically every mission.<sup>22</sup>

During the course of its visit the delegation also holds discussions with the staff working in the institutions it visits in order to seek out what kind of information the staff receives. Delegations, usually, also want to know the staff's view on the procedures in place and the physical and working conditions, and whether there is anything which ought to be improved. Additionally, delegations also want to learn about the rights granted in theory and in reality. A duty for officials to enter into contact with the delegation may be implied from the state's obligation to co-operate (Article 3 ECPT). The delegations may also communicate freely with any other person whom they believe can supply relevant information, e.g. family members, medical doctors, lawyers, NGO representatives, journalists, etc., but there is no obligation for such persons to communicate with the delegation. As in the case of detainees, the content of interviews remain confidential and are not reproduced in the CPT report.

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<sup>21</sup> Ursula Kriebaum, *ibid*, p. 29.

<sup>22</sup> Malcolm D. Evans/ Rod Morgan, *ibid.*, p. 337.



## Reporting on visits

At the end of the visit, the head of the delegation will normally meet again with the national authorities. This meeting is used by the CPT as an opportunity to present a concluding statement summarising the delegation's findings and conclusions. Such final discussions provide an opportunity for the authorities to clear up any misunderstandings and the possibility to take immediate remedial action for situations where an urgent improvement is necessary. The oral statement is usually confirmed in writing and the CPT requests the authorities to submit a report on the immediate observations within a specified timeframe, normally within three months. The CPT has announced that in the future the discussions which the delegation has had with senior officials will, in appropriate cases, be supplemented by high-level talks with the national authorities.<sup>23</sup>

Shortly after the visit, the CPT publishes a press release announcing that the visit has taken place but does not provide any information regarding the findings. Only on one occasion, after the visit to Turkey in April 2001, has the CPT's press release also provided substantive comments on recent developments as reported by the delegation.<sup>24</sup>

On completion of the visit the findings of the delegation are submitted as soon as possible to the Secretariat which prepares a draft report of the visit. The draft report provides information on relevant facts and, as appropriate makes recommendations for strengthening the protection against torture and ill-treatment. The draft report is sent to the delegation for approval and then to the CPT. After the CPT's approval the report is transmitted to the government in question, usually about six months after the visit. Reports on ad hoc visits are sometimes transmitted within much shorter periods. The CPT's practice is to ask the recipient state to submit an interim reply usually within six months of receiving the CPT's report. The reply is expected to provide details of how the authorities intend to implement the CPT's recommendations. The reply should be followed by a final recipient state report usually within a further six months-period. This report should provide a full account of all actions taken, and to be taken, to implement the recommendations.

Pursuant to Article 11 par. 2 of the Convention, the CPT shall *publish its report*, together with any comments by the state party concerned, whenever requested by that state to do so. Despite the fact that at the time of drafting the Convention it was widely anticipated that governments would be reluctant to authorise publication of the reports, in practice publication has now become the rule rather than the exception. As of December 2001, 74 of the 111 visit reports drawn up had been published. However, the lengthy procedures of reporting are subject to criticism. Many countries routinely take eighteen months to authorise publication and, in general, it takes one year between visits and publication of the report. It follows that some reports are more historical than contemporary documents by the time they see the light of day.<sup>25</sup> If states publish only those passages of a report which are considered positive, the CPT may decide to publish the entire report without the consent of the state concerned. The CPT may act in similar fashion if a state makes a public statement summarising the report or commenting on its contents.

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<sup>23</sup> CPT, 13<sup>th</sup> General Report on the CPT's activities, par. 13.

<sup>24</sup> Ursula Kriebaum, *ibid.*, p. 31.

<sup>25</sup> Malcolm D. Evans/ Rod Morgan, *ibid.*, pp. 341.

The CPT is currently far from satisfied with the ongoing post-visit dialogue with governments.<sup>26</sup> Unfortunately, a weak dialogue and an increasing gap between periodic visits to a given country, now between four and five years, could in the long run undermine the effectiveness of the Convention.<sup>27</sup>

If a State Party fails to co-operate or refuses to improve the situation in light of the recommendations made, the CPT, in accordance with Article 10 par. 2 of the Convention, may, after granting the opportunity to the state concerned to make its views known, decide by a two-third majority to issue a *public statement*. Such a response is conceivable in the case of intentional, repetitive violations of the duty to co-operate or to improve the criticised conditions. Hence, the public statement is only a *last resort*. This is the principal “*sanction*” that the CPT officially has at its disposal and is a mark of censure which permits the CPT to at least partially lift the veil of confidentiality which otherwise surrounds its findings.<sup>28</sup> The CPT has invoked this provision on three occasions only, twice regarding Turkey in December 1992 and in December 1996, and once in respect to the Russian Federation regarding the Chechen Republic in July 2001. The main goal of the public statement is not to make known the facts found during the visits but to prevent abuse of the Convention. As regards the content of public statements, considerable discretion is left to the CPT.

### **NGO participation**

NGOs may help the CPT essentially in two ways: by providing information to the CPT and by informing those concerned about the role and functioning of the CPT.

Accurate information is the key to the success of the CPT’s work, and national and international NGOs have an important role to play in providing information on situations in which detainees are at risk. The CPT’s Secretariat collects, on an ongoing basis, all information relevant to the CPT’s mandate. On the basis of the information received from a variety of sources, it prepares a dossier for each country which is then used by the CPT to plan its visit. Hence, NGOs may contribute to the CPT’s preparation of both periodic and ad hoc visits by sending relevant information to the Secretariat. Information about the visits of the coming year are available on the CPT’s website.<sup>29</sup>

Whereas ad hoc visits will not be promulgated, NGOs that would like to influence the course of a periodic visit should transmit relevant information to the Secretariat as soon as they receive it. The Secretariat acknowledges receipt of all communications which are specially prepared for and sent to the CPT. They are brought to the attention of the CPT at its meeting in plenary session. However, for reasons of confidentiality it is not possible for the CPT to inform the authors of communications whether and to what extent the information has been used. Accordingly, the CPT has quite accurately described its relations with information providers very much as a “*one-way process*”.

It is clear, however, that the CPT’s relations are not entirely as one-way as the official picture may suggest. There are certain NGOs which have established contacts with members of the

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<sup>26</sup> CPT, 5<sup>th</sup> General Report on the CPT’s activities, par. 10.

<sup>27</sup> Ursula Kriebaum, *ibid.*, pp. 12 and 34.

<sup>28</sup> Rod Morgan/ Malcolm Evans, *ibid.*, p. 31.

<sup>29</sup> [www.cpt.coe.int](http://www.cpt.coe.int)

CPT Secretariat to whom they intermittently supply information that may be useful to the CPT. This information exchange is based on trust, and information-providers are generally requested to exercise confidentiality about the details of the exchange.<sup>30</sup> When visiting a given country the CPT delegation also regularly approaches national NGOs during the course of the visit to learn about their views of the country situation.<sup>31</sup>

## II. Council of Europe Commissioner for Human Rights

The idea of instituting the office of the Council of Europe Commissioner for Human Rights was first approved at the summit of Heads of State and Government held in Strasbourg in October 1997. Resolution (99) 50, setting out the Commissioner's mandate, was adopted on 7 May 1999 in Budapest. The Commissioner is elected by the Parliamentary Assembly for a non-renewable term of office of six years. The mandate focuses on three main areas, to promote education and awareness of human rights in the member states, to identify possible shortcomings in the law and practice of member states with regard to compliance with human rights, and to help promote the effective observance and full enjoyment of human rights as embodied in the various Council of Europe instruments.

Article 1 of Resolution (99) 50 underscores that the Commissioner is a *non-judicial institution*, who shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the ECHR or under other human rights instruments of the Council of Europe. Accordingly, the Commissioner does not take up individual complaints. It is clear from the mandate that the Commissioner must avoid duplicating the functions of the Council of Europe's supervisory bodies. Accordingly, the Commissioner has developed a "monitoring" role albeit in a distinctly pro-active manner. It remains to be seen how an appropriate degree of "synergy" can be achieved in the future between the work of the CPT and that of any future "monitoring" Commissioner.<sup>32</sup>

The Commissioner makes official visits to member states in order to identify the most serious problems concerning effective observance of human rights. Most of the Commissioner's "*visit reports*" are accompanied by recommendations. In some cases, the urgency of the situation requires recommendations aimed at improvements in the very short term. In others, the complexity of the issues raised, and the economic, political and social conditions on the ground, mean that recommendations can only call for legal or political action in the medium or long term.<sup>33</sup> The Commissioner has also repeatedly dealt with crisis situations. These have required, and sometimes still require, his active and repeated presence on site, as well as continual follow-up. For example, the Commissioner has made several visits to the *Chechen Republic* following which he has made several recommendations aiming, on the one hand, to put an end to the criminal actions of Chechen fighters and of Russian federal forces, and, on the other, to change the climate of impunity in which these atrocities were committed.

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<sup>30</sup> Malcolm D. Evans/ Rod Morgan, *ibid.*, pp. 180 - 181.

<sup>31</sup> Malcolm D. Evans/ Rod Morgan, *ibid* p. 187.

<sup>32</sup> Mark Kelly, "Perspectives from the CPT", 21 *HRLJ* 301 at. 305 (2000).

<sup>33</sup> The Commissioner for Human Rights, 3<sup>rd</sup> Annual Report, p. 5.

### III. Organisation of Security and Co-operation in Europe (OSCE)

#### The Human Dimension of the OSCE

Human rights issues have played an important and varied role in the *Helsinki process* throughout its existence. The *1975 Helsinki Final Act*, which laid the foundation for the *Conference on Security and Co-operation (CSCE)*, carried an unprecedented human rights provision: this was the first time in an international inter-state agreement that the principle of human rights was elevated to the status of a fundamental principle regulating inter-state relations.

Since 1975, individuals throughout Eastern Europe and the Soviet Union have used the Helsinki Final Act to buttress their call for respect for human rights. Without this grassroots response to the Helsinki process, it is considered unlikely that even the spirited government involvement in, and commitment to, the CSCE that was observed would have led to the relatively peaceful revolutions of 1989.<sup>34</sup> In 1994, the *Budapest Summit Declaration*, restructured the CSCE and named it *Organisation for Security and Co-operation in Europe (OSCE)*, in order to give the security structure a new political impetus, embracing states from Vancouver to Vladivostok.<sup>35</sup>

Human rights belong to the “*Human Dimension of the OSCE*”. This notion was officially introduced at a meeting held in Vienna in 1986. The human dimension is defined to cover “all human rights and fundamental freedoms, human contacts and other issues of a related humanitarian character.” By comparison with other international human rights instruments it has to be stressed that the OSCE’s human dimension catalogue concerns also *democracy*, *democratic institutions* and the *rule of law*. Thus, OSCE’s commitments to human rights can be regarded as including issues not covered by the traditional notion of human rights. By incorporating precise commitments dealing directly with the constitutional system of states and the relationship between governmental agencies within the state, the OSCE catalogue is not limited solely to addressing the relation between the state and individuals, which is the traditional underlying pattern of human rights, but also extends to the structure of government, to the interaction between governmental institutions and to the political system of the state. Whereas human rights issues are normally considered to be of a purely *humanitarian, non-political character*, the human rights perspective in the OSCE context are perceived to be of a strictly *political character*.<sup>36</sup> This has advantages and disadvantages. One of the main advantages of the political character of the human dimension commitments is its flexibility and dynamism in comparison to the more rigid nature of legal obligations. This means, *inter alia*, that OSCE is suitable for quickly finding solutions to new problems. However, the disadvantage of the political character of the human dimension commitments is that commitments are less stable and sometimes less specific than legally binding norms.

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<sup>34</sup> Erika B. Schlager, “The procedural framework of the CSCE”, 12 *HRLJ* 221 at 223 (1991).

<sup>35</sup> Budapest Document of 6 December 1994, in: 15 *HRLJ* 449 (1994).

<sup>36</sup> Merja Penkikäinen, *ibid*, at 87.

Also, OCSE negotiations usually take place in the political climate of the day which heavily influences the outcome.<sup>37</sup>

### **The OSCE's Programme on Prevention of Torture**

At the 1989 Third Follow-up Meeting in Vienna the prohibition of torture was affirmed within the OSCE. It was restated at the Paris Summit Meeting in 1990 and subsequently reaffirmed and refined at the Copenhagen Meeting in 1990. Meetings have been set up since 1993 to address the implementation of the OSCE human dimension during which problems in the field of torture are regularly raised by governmental delegations as well as by NGOs under the heading "*Prevention of Torture*". This reflects the fact that torture and ill-treatment are still widespread in a number of countries in the OSCE region. At the 1997 Human Dimension Implementation Review Meeting torture was identified by both State delegations and NGOs as an area in which Participating States could work harder to fulfil their commitments.<sup>38</sup>

Following proposals made at this meeting, an *Advisory Panel for the Prevention of Torture* was established by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in 1998. The panel is made up of five anti-torture specialists. The task of the Panel is to provide advice on how the ODIHR can best develop programmes and activities to combat torture in OSCE participating states without duplicating ongoing efforts by other organisations. The Panel serves as an institutionalized "think tank" for the ODIHR. It assumes the function of an internal control mechanism, helping to ensure that the ODIHR's overall approach is soundly conceived, that the project proposals have benefited from expert input and that its resources are directed at appropriate priorities. The Panel also helps to keep anti-torture activities high on the agenda of the OSCE.

The Panel has recommended that the ODIHR provide specialized training to OSCE mission personnel in torture prevention and awareness. Such training is deemed to enhance the OSCE's capacity to assist participating states in combating torture. In response to this recommendation, the ODIHR contracted European experts to prepare a *Handbook on Preventing Torture*,<sup>39</sup> that includes information about the practice of torture and ill-treatment, existing international and national actions to combat torture including the role and methods used by NGOs, techniques for monitoring, investigating and reporting ill-treatment, assistance for victims and issues relating to public awareness and anti-torture campaigns.

The main focus of the ODIHR's anti-torture programme is the raising of public awareness, reviewing of national legislation, training of law enforcement officials, i.e. the promoting, encouraging and measuring compliance with internationally recognised human rights standards. In respect of national legislation, the ODIHR's anti-torture programme assists participating states in bringing their domestic systems into compliance with their international obligations, particularly the UN Convention against Torture. In addition, the ODIHR has worked with prison administrations in the OSCE area, to establish sustainable training

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<sup>37</sup> Ariel Bloed, "Monitoring the CSCE Human Dimension" in *Human Rights in Europe*, Ariel Bloed et al (ed.), 1993, p. 45 at. 52

<sup>38</sup> OSCE Human Dimension Implementation Meeting, *Combating Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: The Role of the OSCE*, Background Paper 6, Oct. 1998, p. 1.

<sup>39</sup> ODIHR, *Preventing Torture: A Handbook for OSCE field staff*; see also Jeremy McBride, *Pre-Trial Detention in the OSCE Area*, ODIHR Publications: Background Paper 1992

structures and developed new tactics in the fight against torture. Furthermore, in order to help prevent the abuse of detainees, it has facilitated access of civil society to penitentiary systems.<sup>40</sup>

The OSCE occasionally follows up and intervenes in individual cases of alleged torture or ill-treatment. However, it deals more frequently with individual cases that can be regarded as part of a *general pattern* of non-compliance with the OSCE commitments. Since 1994, representatives of participating states have conducted a regular dialogue on the human dimension within the Permanent Council. The OSCE Chairman-in-Office (CiO) informs the Council of serious cases of alleged torture or ill-treatment on the basis of information received by missions, the ODIHR or participating states. The serving CiO together with the previous and succeeding Chairpersons, forming the Troika, can also make *discrete interventions* in individual cases and situations during their bilateral meetings with officials from Participating States.<sup>41</sup> The fact that an individual case is already considered by another international body may not be invoked as a reason for not considering it in the OSCE (Copenhagen, Par. 16.7).

The Handbook on Preventing Torture for field staff set out some basic guidelines on how to *investigate* incidents of alleged torture or ill-treatment. The first step is that the field mission establishes whether the alleged act falls within its mandate to carry out an investigation. Once this has been established, the field mission actively seeks to obtain information that has not yet been provided, assess the validity of claims, and determine, if possible, what steps can be taken to address the problem. However, distinctions between the monitoring and investigating functions are not easy to define. Questions of terminology should however not deter the field mission from recognising that its responsibilities extend beyond the passive role of receiving information and may include the need to actively investigate allegations. Generally, an investigation should be conducted only by a large mission with an explicit human rights mandate, but smaller missions could also consider undertaking a mission if circumstances merit it.

In the event of an allegation of torture or ill-treatment the mission should consider whether the parties directly affected by an investigation should be *notified* in advance that an investigation will take place. If this is the case, the public authorities should be informed of the terms of reference of the investigation, which officials are to be interviewed and which institutions are to be visited. The field mission is required to collect as much evidence as possible by means of questionnaires and, are advised to use available methodologies, for example the CPT guidelines for visits to prisons.

However, specific allegations are difficult to verify. Thus, it is more realistic to use allegations and any other evidence as a basis for questioning the authorities about their policies and practices. This should be done without revealing the identities of those who have made allegations. Missions should, where appropriate seek the advice of lawyers specialising in international human rights law or medical experts familiar with the examination of torture victims. Furthermore, the field mission should ask an experienced torture investigator to review its findings, conclusion and recommendation. Such investigators can be found within the OSCE or in another acceptable international institutions.<sup>42</sup>

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<sup>40</sup> OSCE, Annual Report 2001 on OSCE Activities of 26 November 2001, p. 85..

<sup>41</sup> OSCE Human Dimension Implementation Meeting, *Combating Torture, ibid*, pp. 7-8.

<sup>42</sup> ODIHR, *Preventing Torture. A Handbook for OSCE field staff*, pp. 43-44.

The OSCE commitments are *practical tools*. Although, the Handbook on Preventing Torture contains lengthy descriptions of international and regional legal frameworks for torture and ill-treatment, neither of these concepts have in fact been defined in legal terms in the OSCE framework. Nevertheless, it should be remembered that in everyday life the words “torture” and “ill-treatment” are sometimes used as synonyms and often refer to mere criminal acts non-imputable to the state.

In this context, it is of fundamental importance that the principle of respect of human rights supersedes the principle of *non-intervention*. Under this principle, OSCE States have explicitly declared that the commitments undertaken in the field of human rights – thus *inter alia* those relating to torture and ill-treatment - are matters of direct and legitimate concern to all participating states. This kind of “internationalisation”, or “opening-up”, of the OSCE human dimension is a remarkable achievement for an international inter-state organisation.<sup>43</sup>

*Conditions of detention* are still a matter of grave concern in many OSCE participating states. Tens of thousands of detainees are dying each year in detention because of appalling detention conditions, in particular lack of hygiene, food and medical care. A particularly acute problem in detention centres is widespread infectious disease like tuberculosis and AIDS. The problem of overcrowding stems partly from laws and practices allowing for *long pre-trial detention*.

Furthermore, each year in several OSCE states, *police brutality* – mostly in the form of beatings – lead to death.

Finally, impunity is a major concern of OSCE participating states. The ODIHR is aware that in some OSCE countries allegations of torture have not been properly investigated and that confessions, apparently obtained under duress, have been used in criminal proceedings. Nevertheless, all OSCE States publicly recognise that the *prohibition of torture* is *absolute*. The *Copenhagen document* clearly underlines “*that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*” (Par. 16.3). In spite of the clarity of this commitment, some OSCE governments invoke security concerns to justify widespread and serious ill-treatment while others deny even obvious cases of ill-treatment, thereby granting impunity for perpetrators. In the OSCE region, widespread torture still occurs in the context of current conflicts.<sup>44</sup>

The Handbook on Preventing Torture makes clear that accurate, unbiased reporting is an essential component of sustained, professional work for the prevention of torture. Reports should be free from exaggeration, innuendo or any other form of distortion. The quality of reports rests primarily on the validity of the information they contain and the integrity of the process used to gather it. The reports, write the authors of the handbook, should not pretend to be legal judgments and thus do not have to be definitive about allegations; neither do they have to assign criminal liability nor identify perpetrators or victims. A convincing report is one that demonstrates that there is a consistent and credible pattern of allegations, many of which are supported by medical or other evidence. The *role of the report* is to *motivate* both

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<sup>43</sup> Merja Penkikäinen, *ibid*, at 89.

<sup>44</sup> OSCE Human Dimension Implementation Meeting, *Combating Torture, ibid*, pp. 16-17.

the government concerned and the OSCE institutions to *work in partnership* to remedy any deficiencies that expose detainees to abuse.

OSCE institutions do not publish reports on torture or ill-treatment. To do so would undermine the principle of partnership. But, of course, this practice contradicts the need to bring to light what is practiced in secrecy. To handle this difficulty, the handbook advises field officers to submit their reports to more senior officials within the mission. This *chain of reporting* continues from the field missions to the CiO. Field missions should report credible allegations of torture also to the Secretariat in Vienna and to the ODIHR.

OSCE reporting is an *internal* form of communication between participating states and OSCE institutions. Reports are not a tool used to inform the public in OSCE States about torture and ill-treatment. This practice is reflected in OSCE's Annual Reports. For example, the 2001 Annual Report, consists of a report of the activities of OSCE missions and a report in general terms of ill-treatment of detainees in member states. The report provides country-specific information only for Chechnya (numbers and cases of kidnapping and killings).<sup>45</sup>

### **NGO participation**

Although, in recent years the OSCE's relationship with NGOs has received increasing attention, NGOs have neither the power to activate any of the supervisory procedures within the OSCE nor have they been granted access to meetings of OSCE's political bodies. Supervisory tasks of the OSCE political bodies in the field of the human dimension are fulfilled almost exclusively at the intergovernmental level. The involvement of independent bodies is almost fully absent. The OSCE remains primarily a diplomatic and political institution to which NGOs have no formal access. This, however, apparently contradicts the 1994 Budapest Decisions taken by the OSCE in 1994. At that time, the OSCE welcomed the contribution of NGOs to the Human Dimension commitments and affirmed in their statements that NGOs had contributed ideas and raised issues of concern also for participating states..

At the working level the ODIHR maintains contacts with NGO networks, and also informs NGOs about OSCE meetings relevant to the human dimension and open to NGO participation. The Human Dimension Implementation Meetings and Seminars offer an opportunity for NGOs to contribute to the work of the OSCE. At these meetings NGOs are invited to participate in discussions with government representatives about incidents of torture and ill-treatment. However, these meetings and seminars do not produce negotiated documents. Their main results –including informal recommendations - have been reported in discussion-summaries. These are forwarded to the OSCE states.<sup>46</sup>

The ODIHR also uses information supplied by NGOs in preparing reports on states' compliance with the human dimension standards.

Furthermore, the ODIHR contributes to the building of civic societies by helping to establish NGOs in countries where an NGO culture does not exist or is weak. For example, the OSCE Office in Baku and the OSCE Centre in Almaty have conducted a series of round tables with

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<sup>45</sup> OSCE, Annual Report 2001 on OSCE Activities of 26 November 2001, p. 48.

<sup>46</sup> Merja Penkikäinen, *ibid*, at 94-95



NGOs focusing on issues of registration of NGOs, prison conditions, and government policy towards NGOs.<sup>47</sup>

## IV. European Union (EU)

### The European Union's Human Rights Mandate

The Treaty of Rome, which in 1957 created the European Communities (EC), paid no particular regard to human rights. The Treaty is focused on *economic unity* and, incorporates few human rights principles. However, the EC has been evolving from a purely economic community towards a political community.

This trend is reflected in the appearance of a number of shared political, legal and human values which in turn has resulted in EC's growing involvement in human rights matters.<sup>48</sup> In the 1970s the Parliament stressed the need for the Community to acquire a human rights dimension. At the same time the European Court of Justice (ECJ) started to take into account the ECHR into its case-law. Hence, despite the economic-oriented emphasis of the EC, a broad set of human rights principles were elaborated within the Community. In turn, the Court incorporated fundamental rights into the Community legal order as *general principles of Community law*.

Standards for the protection of human rights that are provided by Community law apply only to Community legislation and to national measures that either implement Community legislation or are otherwise situated within the framework of the Community law. The Community law standards basically apply to Community acts. They do not affect all national measures but concern only a certain number of them, those that come within the scope of Community law.<sup>49</sup> Hence, there is the need to provide an adequate remedy to physical or legal persons when one of their human rights is infringed by EU institutions.

In December 2001, in Nice, the European Council, the European Parliament, the Council of the European Union and the European Communities adopted the *Charter of Fundamental Rights of the European Union* (the Charter).<sup>50</sup> This Charter is now an integral part of the Treaty of the Constitution for Europe. The Charter ensures *inter alia* everyone respect for his or her physical and mental integrity (Article 3 par. 1) and prohibits - with identical wording as contained in Article 3 of the ECHR - torture and ill-treatment (Article 4).

Initially those concerned with human rights had high expectations following the adoption of the Charter. However, the result has been disappointing, possibly because the question of its legal status was left open. Today the Charter possesses no legal value in itself<sup>51</sup> Nevertheless, the Commission has stated that it will implement the Charter and considers itself bound by it.,

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<sup>47</sup> OSCE, Annual Report 2001 on OSCE Activities of 26 November 2001, pp. 55 and 69.

<sup>48</sup> Peter Drzemczewski, "The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights", 22 *HRLJ* 14 at 15 (2001).

<sup>49</sup> Giorgio Gaja, "New Instruments and Institutions?" in *The EU and Human Rights*, Philip Alston (ed.), 1999, p. 781 at 795.

<sup>50</sup> Full text with Explanatory Report 21 *HRLJ* 473 (2000).

<sup>51</sup> Peter Drzemczewski, *ibid.*, at 21 and 27.

In addition decisions of the Court, subsequent to the adoption of the Charter, do not make clear whether the application of the Charter adds anything to the human rights protection already offered by the Court.<sup>52</sup>

### **The Union's activities against Torture and Ill-Treatment**

Respect for human rights features among the key objectives of the *EU's common foreign and security policy (CFSP)* and on 9 April 2001 the Council adopted the *Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment*. The purpose of these guidelines is to provide the EU with an *operational tool* to be used in contacts with *third countries* as well as in multilateral human rights fora. They are intended to assist EU's representatives in influencing *third countries* to effectively prevent torture and ill-treatment and to ensure that the unconditional prohibition of torture is enforced.

These guidelines set very ambitious goals for the EU's combat against torture. However, they should be read in combination with the *Guidelines on EU policy towards third countries on the death penalty* of 29 June 1998. These instruments serve the same objectives and reinforce each other.

The *operational part of the guidelines* suggest ways and means for the Heads of EU Missions to work effectively towards the prevention of torture and ill-treatment inter alia through reporting and miscellaneous local initiatives.. It is recommended that the periodic reporting by EU Heads of Mission include an analysis of the occurrence of torture and ill-treatment, their prevention as well as an evaluation of the effect and impact of the EU actions in this field. The Heads of Missions should also consider the possibility of *sending embassy representatives as observers to trials* when there is reason to believe that defendants have been subjected to torture or ill-treatment. Furthermore, when appropriate the EU should take official contact with third countries, and/or issue *public statements*, urging them to effectively counteract torture and ill-treatment. In well-documented *individual cases* of torture and ill-treatment the EU will urge, by a confidential or a public demarche, the authorities in the country concerned to ensure physical safety, prevent abuses, provide information and apply relevant safeguards. However, actions on individual cases should be determined on a case-by-case basis and may form part of a general demarche.

According to the guidelines the EU should urge third countries:

- to prohibit torture and ill-treatment in law, including in criminal law;
- to condemn all forms of torture;
- to take effective legislative, administrative, judicial and other measures to prevent torture;
- to prevent the use, production and trade of *equipment* which is designed to inflict torture or ill-treatment;
- to adhere to international norms and procedures by acceding to the relevant instruments in the widest possible manner including compliance with the requests for interim measures of protection of supervisory bodies, and,
- to respect the principle of non-refoulement.

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<sup>52</sup> *Mielle Bulterman, 20 NQHR 213 (2002).*

Furthermore, the EU will urge third countries to adopt and implement safeguards and procedures relating to *places of detention*. Such measures should inter alia, ensure that detainees:

- are brought before a judicial authority without delay;
- have access to lawyers and medical care without delay, and
- are held in officially recognised places.

The guidelines also call on countries to establish domestic legal guarantees that:

- statements obtained through torture or ill-treatment not be invoked as evidence in any proceedings;
- all forms of corporal punishment are abolished;
- no exceptional circumstances whatsoever, including a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or ill-treatment; and that,
- no order from a superior officer or a public authority may be invoked as a justification of torture or ill-treatment.

Finally, the guidelines urge third countries to combat impunity, to accede to the Statute of the *International Criminal Court*, to allow domestic procedures for complaints and reports of torture and ill-treatment, to provide reparation and rehabilitation for victims, to allow domestic visiting mechanisms, to provide effective training of law enforcement officials, to support the work of medical professionals and to ensure that proper autopsies may be conducted.

In 1994 the EU started to fund projects in the field of *prevention and rehabilitation of torture victims* under the *European Initiative for Democracy and Human Rights (EIDHR)*. So far, projects have been funded to the tune of 24 million Euro aimed at improving conditions of places of detention, at supporting relevant international and regional mechanisms, as well as public education and awareness raising campaigns. In addition, the EU has helped to create networks of rehabilitation centres and to fund a wide-range of activities within these centres including training of staff and medical, social and legal assistance to torture victims. Also the EU has funded documents aimed at raising public awareness of the public of the issues related to torture. The EU has also provided substantial support for *rehabilitation centres for torture victims*.

### **NGO Participation**

In the EU Declaration against Torture of 25 June 2002 it is emphasised that NGOs deserve particular attention for their efforts and that NGO action is required to find ways and means to combat torture. Hence, EU Heads of Missions are under duty to apply a pro-active approach with regard to NGOs, in particular to local NGOs, and to encourage them to deliver as far as possible information on alleged torture in individual cases as well as information about the general practice concerned and to invite them to participate in the follow-up proceedings.

NGOs, except those working in the area of development, have no official status within the Community. Nevertheless, the Commission has funded some NGO activities and has established an informal mechanism for consultation with NGOs. NGOs can attend public meetings of the Parliament and many of its members welcome informed comment on the issues before them. Naturally, NGOs may contact, when appropriate, EU Heads of missions to inform the office on individual cases of alleged torture or ill-treatment, prison conditions at variance with the EU guidelines on torture, etc.

**EUROPEAN COURT OF HUMAN RIGHTS**

**AKKUM and OTHERS v. TURKEY**

(Application No. 21849/93)

**APPLICANT'S CLAIMS FOR JUST SATISFACTION**

**(ARTICLE 41 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS  
AMENDED BY PROTOCOL 11)**

**AND RELATED MATTERS**

## AKKUM and OTHERS v. TURKEY

(Application No. 21849/93)

### Procedure

1. The Applicants submitted final pleadings on the merits to the Commission on 18 May 1998. The respondent Government submitted their final pleadings by letter dated 27 February 1998. The Commission did not have the time to adopt an Article 31 Report in the case before it ceased to function, on 1 November 1999.
2. The Applicants assume that the file before the second chamber of the Court contains all the pleadings to date and the verbatim record of the fact-finding hearings in March 1997.
3. The Applicants do not know whether the Court has received a summary of the evidence given before the Delegates of the Commission and/or an indication of the opinion of the Commission as to the violations of the Convention alleged by the Applicants. The Applicants assume that, if any such summary or indication has been provided to the Court, it has been provided to neither the Applicant nor the respondent Government.
4. In these circumstances, it is not possible for the Applicants to submit a memorial taking into account the findings of the Commission. Any such document would be merely a reiteration of the Applicants' final pleadings to the Commission.
5. The Applicants maintain all the claims in their final pleadings to the Commission and reject the claims of the Government in their final pleadings insofar as they contradict their own.

7. This document will set out the assumptions of fact and law on which the claim of just satisfaction is based and will then set out those claims.

### Summary

7. The Applicants Zulfu Akkum and Huseyin Akan are from Kursunlu village, Dicle district, Diyarbakir province. Rabia Karakoc is from Kayas hamlet, Kirkpinar village, Dicle district. They have been assisted in bringing their applications by the KHRP, an UK-based NGO. The Applicants assert that security forces, during an operation on the Kursunlu plain on 10 November 1992, killed their relatives Mehmet Akkum, Mehmet Akan and Dervis Karakoc.
8. On 10 November 1992, there were four goat herders in all assigned to look after the goats: Mehmet Akkum, Mehmet Akan, the brother of Huseyin Akan, and two women, Hacire Ceylan and Hediye Akodun. The goatherds reached the plain, and Mehmet Akan and Mehmet Akkum, took their herds up onto the mountainsides surrounding the plains so that the herds would be kept separate from those of the two shepherdesses. Hediye and Hacire stayed with their herds on the plain. They were not long on the plain before it became clear that there was a military operation going on. As Mehmet Akkum and Mehmet Akan were on the mountainside, they came across the path of the soldiers first. The two men were surrounded by soldiers who had been hidden on the mountain side. Hediye and Hacire returned to the village and said that they had heard Mehmet Akan calling out as he was hit by soldiers. Mehmet Akan and Mehmet Akkum were last seen alive on the mountains, which were full of soldiers.
9. Two soldiers stopped Hacire. They told her and Hediye to forget about their animals and to get out of the plain and to go home. Hediye began to leave, but Hacire insisted that she wanted to get her goats before she returned to the village. Her protests to the soldiers earned her a beating from the soldiers with

their rifle butts, who told her to forget her animals and to go home. Eventually she gave in and turned around to follow Hediye in the direction back to the village.

10. As the two women were crossing the length of the plain to return home, they came across a party of seven - a man on a horse, with two children, and four women walking behind. The party consisted of Dervis Karakoc who was on the horse with his two children Ersan and Dilan, Dervis' mother, the applicant, Rabia Karakoc, his wife Gullu Guzel-Karakoc, his sister Hayrire Karaman and Zelhia Karakoc, a relative by marriage on his father's side. (See *inter alia*, 8, 9, 20, 23, 34, 37, 57, 83/1) Dervis passed by Hacire and Hediye on the horse but Hacire and Hediye stopped the women, one of whom they knew to be Rabia Karakoc (23/1, 81/1). They told Rabia that she should not continue her journey any further, that there were soldiers everywhere and that Dervis might be arrested by the soldiers. The soldiers who had told Hacire to go home, approached Dervis. They told him to dismount from his horse and to show his identity card. Dervis dismounted and handed one of the children each to his wife and to his mother (9/1). He tried to hand over the horse, but the soldiers prevented him from doing so (25/1, 81/1). The soldiers looked at Dervis' identity card and replaced it in his pocket (24/1, 82/1). The soldiers then took hold of him from either side and led him towards the mountainside. The women were left watching. The soldiers hit Dervis with their rifle butt on his shoulder (10/1, 13/1). There was then a single pistol shot and almost immediately afterwards firing began to take place from all the area around the plain (85/1, 94/1). Rabia saw a flame hitting her son (13/1, 27/1, 44-46/1). There was dust everywhere as bullets caused the dust from the plain to rise. The women, terrified, ran to take shelter and returned to their village. They had not been able to approach the body of Dervis, before the continuous firing began.
11. Rabia spoke to the first applicant's wife, but Zulfu himself had gone to Dicle to make inquiries about his own son Mehmet Akkum (15/1, 27/1, 47/1).



Huseyin Akan had gone with him to inquire about the fate of his brother Mehmet. They wanted to know what had become of them after the soldiers had surrounded them on the hills by the plains. They met with Council leader Mehmet Guranioglu, leader of the Council who went with them to Dicle Central Gendarme station. A lieutenant Colonel said that the soldiers had not yet returned. They stayed in Dicle that night. The following morning they went to the Dicle Public Prosecutor. When they rang the village at around 12 pm there was still no word about the fate of the men. However, when they rang again at about 2.30 pm they heard that the bodies of Mehmet Akan and Dervis Karakoc had been found. They told the Public Prosecutor, Zulfu Akkum, asked the public prosecutor to send a car to the village to collect the bodies. Zulfu returned to the village to collect the bodies.

12. The villagers had found the body of Dervis where he had been killed and the body of Mehmet Akan on the mountain side. The corpse of Dervis horse was also on the plain. There were several dead animals around and spent cartridges. Rabia took some of the cartridges (11/1, 49/1, 62/1, 96/1)
13. Zulfu Akkum did not learn about the fate of his son until 16 November when he went to Elazig security headquarters. On 14 November he had been told by the gendarme captain that two bodies had been found in Elazig. Three of his relatives went to Elazig to try to discover further information. On 15 November they could get no news, but on the 16 November 6 family members went to Elazig Security. The soldiers showed Zulfu photographs of two people. One of those was his son, Mehmet. His body was severely wounded and his ears had been cut off. The skin on his upper left arm had been cut away.

#### **Assumptions regarding the conclusions of fact .**

14. The claim as to just satisfaction proceeds on assumption that the following questions of fact have been established beyond reasonable doubt:

- There was no warning by the Government troops that there was going to be fighting as evidenced by the fact that both the shepherds and shepherdesses set out to graze the herd as usual;
- Mehmet Akkum and Mehmet Akan were with their herd of animals at the time firing started;
- there was an operation on the plain and mountain side, *Sancak I* in which there were a great number of soldiers involved;
- Dervis Karakoc, on horseback was in a party which included his mother, wife, his sister and a relative by marriage on his father's side. They were crossing the plain;
- there was a large operation, *Sancak I* (on the plain and in the mountains, both the south-facing slopes which led to the plain and the north-facing slopes;
- there had previously been a significant PKK base in the area (Gov. pleadings p.3 "le fait que cette région constituait un point d'implantation important du PKK avec un camp de 300-400 personnes"). The object of the operation was to prevent the base being re-established (Gov. pleadings p.3 "Même si auparavant il avait été démantelé, il s'avérait important d'empêcher la réimplantation du PKK.");
- Mehmet Akkum and Mehmet Akan were last seen surrounded on the mountainside by soldiers;
- Dervis Karakoc was summarily executed in front of his family by soldiers;
- during the operation no members of the PKK were wounded, killed or captured. There was no evidence of any PKK presence during the operation;
- during the operation not-a single Gendarme officer was wounded or killed.
- the only injuries inflicted during the entire duration of the large operation were to the applicants' relatives who were killed and to the large number of livestock of Kursunlu village which were also killed;
- Huseyin Yilmaz was commander of the Elazig provincial gendarmerie headquarters and Elazig Security commander in November 1992 confirmed

that the Kovancilar and Alacakaya command division were on duty in the areas where the bodies of Mehmet Akan and Dervis Karakoc were found. (93, 94/2);

- Mr. Yilmaz stated that Aricak division was responsible for the area where the body of Mehmet Akkum was found (94/2);
- Mr. Ozdemir was a commando unit commander in Aricak. He was part of the unit which took part in the operation on 10 November 1992. His unit was involved in the operation on the north side of the Kursunlu range. It was troops from Kovancilar and Alacakaya who were on the southern side of the Kursunlu plain. The Government nonetheless seems to place great reliance on his evidence; (*ibid*, p. 4)
- Mr. Ozdemir stated that there was 4 - 5 kilometres between where the shelters were found and where the body was found (185/3). Other units had found the body (188/3), but his soldiers Ramazan Dal and Tuncer Arpaci were ordered to collect the body;
- Mr. Arpaci, commander in central gendarme in Aricak, confirmed that the body of Mehmet Akkum was not near the PKK shelter (9/4) as alleged by the Government. He also confirmed that there was no weapon near the body. (15/4). He stated that the body was *assumed* to be that of a terrorist as it was found on the plain following a clash (16/4). He did not know who had found it, (29/4) but said that Mr. Ozdemir would know (31/4);
- Murat Koc a NCO at Amacik Comando Division stated he found the shelter (38/4). He indicated that the shelter was found at 00 - 59 co-ordinates;
- Mr. Yilmaz however gave different co-ordinates for the shelter;
- Mr. Koc did not know if the contents of the record he had signed for 10 November were true as he had not witnessed many of the things contained therein and took no steps to verify their accuracy (39 - 40/4);
- Ramazan Dal, a NCO at Arancik Comando Division had been ordered to take the body of Mehmet Akkum to Cevrecik village (57/4). He remembered the missing ears (57/4) but did not want to comment on whether it was a terrorist or not (59/4). He confirmed that the body was

along way away from where the shelter was located, he estimated 4 - 5 kilometres (61/4, 63/4). The body was in the area of operation, but not caught in the clash area (65/4);

- there are inconsistencies between the incident report and the military report both dated 11 November 1992. For instance, the shelter alleged to belong to the PKK was found at co-ordinates 00 - 59, according to the incident report. This was also the mark indicated by the Murat Koc when he was asked to locate where he found the shelter. The co-ordinates given on a report filed with the Ministry of the Interior indicate that the shelter was found at 97 - 59, closer to the No. 3 mark on the map, which recorded where the body of Mehmet Akkum was found. Furthermore, the 15-day post operation report was never submitted by the Government;
- the autopsy reports show that both Mehmet were killed with bullet wounds which could not have been inflicted at long range because there were burn marks. Where bullets leave a burn mark then the shot would be fired from about 10 cm (152/2). According to the body examination performed on Mehmet Akkum, signed by Dr. Aydin, on the left thigh there was one 10 cm. Long bullet wound with burned edges implying that the shot was at close range;
- Mehmet Akkum, Mehmet Akan, and Dervis Karakoc were unarmed as confirmed by the oral evidence of the soldiers during the hearings in Strasbourg;
- no attempt was made to take statements from witnesses;
- the Application was referred to the Court on <sup>30 August</sup> ~~4 May~~ 1993. On 19 August 1994 proceedings were instituted against the seven gendarme soldiers who had signed the incident report, rather than against soldiers that were involved in the killings. For example Tuncer Arpacı was prosecuted even though he was not anywhere near Kursunlu Mountain where the killings took place;
- the proceedings were fundamentally flawed. For example, Mr. Koc, a defendant, did not attend the trial. This demonstrates that the proceedings

were not taken seriously. Furthermore, there was no proper prior investigation capable of identifying the real perpetrators;

- the Government has provided no explanation as to how the men died, given no evidence of PKK presence, no evidence of cross-fire, or any other evidence which might exculpate the Government;
- there is no evidence supporting the conclusion of prosecutor Nihat Turan that Mehmet Akkum was a terrorist killed in a clash (conclusion of the prosecutor Nihat Turan No. 26046 on 12 November 1992, in the autopsy report and in his decision of 14 May 1993);
- it is clear that all dead males in southeast Turkey are assumed to be terrorists (15-16/4)
- the Government asserts in their pleadings on the merits (p.3) that the photos supplied by the Applicants are not those of the actual victims. In a letter dated 10 April 1988, the Applicants told the Commission that they had learnt who had taken the photographs, but those responsible did not wish to be identified. The Applicants asked the Commission who, in these circumstances, to proceed with disclosing the particulars concerning the photographs. The Applicants have not received clarification on this point.

## Assumptions regarding the findings of law

### 1. Exhaustion of domestic remedies

15. At page 1 of the Government's final observations, the Government suggest that the applicants have failed to exhaust domestic remedies, not having been joined as a civil party to the proceedings before the Elazig military court.
16. The applicants submit that that was not an effective remedy since, first, they did not know of those proceedings and, second, in view of the fundamentally flawed nature of the proceedings, they could not constitute an effective remedy.
17. The record of the first hearing, dated 21 December 1995, suggests that the court had sought to contact the applicant, Zulfu Akkum, and the lawyer Sedat Aslantas. The latter was, at the time, in prison. The former was not aware of any attempt to contact him. This calls into question the seriousness and genuineness of any such attempt. This will be considered further below.
18. It is also submitted that the proceedings were so fundamentally flawed as to be incapable of constituting an effective means of identifying those responsible for the deaths of the applicants' relatives (see further below). In these circumstances, it is submitted that there was no obligation for the applicants to be a civil party to the proceedings. Furthermore, that opportunity was denied to them, since they did not know of the proceedings.

### 2. Article 2

#### a. Killings

19. Article 2 of the Convention provides an exhaustive list of the circumstances in which the State can resort to potentially lethal force (*McCann & others v. UK*). The test of absolute necessity is stricter than the test of "necessary in a democratic society", referred to in Articles 8-11 of the Convention (*ibid*, *Ilhan v. Turkey*).

**i. Dervis Karakoc**

20. It has been established beyond reasonable doubt that Dervis Karakoc was shot dead at point blank range by the security forces of the respondent Government. It is noteworthy, that the forces who were said to have been on the Kursunlu plain where Dervis Karakoc was killed were from Kovancilar gendarmerie. At no stage at the investigation or before the Commission did the Turkish authorities investigate who the soldiers present near the Kursunlu plain were.

21. There is no evidence that he was running away. There is eye-witness evidence that he was talking to the soldiers. Dervis Karakoc was therefore killed in breach of Article 2.

**ii Mehmet Akkum and Mehmet Akan**

22. It has also been established beyond reasonable doubt that Mehmet Akkum and Mehmet Akan were last seen alive on a mountain with many soldiers. They were not armed and this is confirmed by the evidence of the soldiers. There is eye-witness evidence, corroborated by the soldiers who gave evidence, that a large number of soldiers were present on the mountainside. There is no evidence that there were any PKK on the mountainside and no evidence of crossfire. The accounts of the soldiers as to what occurred on the mountainside are conflicting and, more importantly, the Government have failed to produce the report prepared 15 days after the operation, which report the Commission asked them to produce. The evidence of burn marks in the autopsy reports necessarily means that the men were shot at very close range. This represents very credible evidence that Akkum and Akan were killed at very close range by members of the security forces.

23. It is peculiarly in the hands of the Government to explain what happened to the victims. The Court has found that where the Government is unwilling to produce documents "capable of corroborating or refuting these allegations," and refuses to do so "without satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (former Article 28 § 1 (a)), but may also give rise to the drawing of

inferences as to the well-foundedness of the allegations." (Timurtas v. Turkey para. 66)

24. A similar position is taken by the Inter-American Court of Human Rights and the Human Rights Committee.

"In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. The State controls the means to verify acts occurring within its territory." (Paniagua Morales, at para. 71; see also Velasquez Rodriguez at paras. 134-138 and Godínez Cruz, at paras. 140-144 and applicants' final pleadings on the merits, pp.25-6, para. 2.5)

25. In these circumstances, the Government are required to provide a plausible explanation as to how Akkum and Akan were killed and to provide documentary evidence in their possession, failing which inferences can be drawn as to the well-foundedness of the allegations.

26. In its final observations (p.4, iii) the Government assert that there is no evidence to show that the three deaths resulted from the actions of the security forces. The Government have, however, adduced no evidence as to the presence of any other forces in the area. The same pleadings make it clear that the PKK *used* to be in the area, which means that they were not there at the time of the operation, the object of which was to *prevent* their return. Nor have the Government provided any evidence on the basis of which the resort to lethal force might be justified. It should be noted that the fatal injury to Akkum was caused to his front. He cannot, therefore, have been running away. Furthermore, the autopsy report refers to burn marks on the left thigh, indicating that he was shot at very close range. There is no evidence that Mehmet Akkum was a terrorist (see further applicants' final pleadings on the merits, p.29, para. 2.12)



27. It is submitted that it is clear beyond reasonable doubt that Akkum, Akan and Karakoc were killed in violation of Article 2.

**b. right to life shall be *protected by law***

**i. planning and conduct of military operations**

28. In *McCann & others v UK*, the Court confirmed that the responsibility to protect the right to life covers aspects of the control and conduct of a pre-planned operation (see also *Ergi v. Turkey*). The applicants submit that in this case, the Respondent State manifestly failed to make any attempt to plan, conduct or control the operation so that risk to civilian lives or property would be minimised. This is evidenced by the fact that notwithstanding the large scale nature of the operation, the only persons to have been injured or killed in the operation were three innocent civilians.

29. In particular, the Government made no attempt to warn the civilian population of the fact that this large-scale operation was going to take place. On the contrary if they had then neither the Karakoc family nor the shepherds would have wandered into the path of the operation. The Government try to suggest, again without any supporting evidence, that the soldiers would have given a warning had the villagers been in the area. However the commander himself, Huseyin Yilmaz, confirmed that no warning was given to local villagers. They were assumed to know themselves. But the villagers stated that had they known they would not have gone out. It is clear from the undisputed fact that the Karakoc family and the shepherds did go out and that the shepherds left their animals to graze. It is therefore also clear that the villagers were not expecting an operation.

30. Moreover the operation was conducted in such a manner that there were no records kept of troop movement or what orders were issued in many cases. As set out above, the reports of the operation differ significantly, in particular there are significant failures to include essential forces on the different records. The

applicants submit that the evidence of the lack of records, control or command or accountability over such an operation, which has been witnessed also in the context of other cases, shows an utter disregard for the lack of life when conducting military operations.

**ii. necessary legislative and regulatory framework**

31. States have a positive obligation to protect the right to life by law. This requires first an appropriate legal framework for its protection and, second, the issuing of rules and instructions to the security forces which give effect to the legal obligation of the State (*Osman v. UK*).

32. The repeated evidence of killings in violation of Article 2 in south-east Turkey carried out by the security forces and which are not followed by internal military or ordinary <sup>criminal</sup> proceedings, except occasionally when a case has been referred to the Government as in this case, obliges one to conclude that either the law does not afford adequate protection of the right to life or else that the regulations, directions, rules of engagement and training provided to the armed forces do not adequately protect the right to life (see generally, applicant's pleadings on just satisfaction in the case of *Haran*, currently before the first chamber of the Court).

**c. the lack of an effective investigation**

33. Another arm of the positive obligation to protect the right to life is that there must be "the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny." (*McCann v UK*; see also cases of *Mehmet Kaya*, *Yasa*, *Ergi* and *Tanrikulu*).

34. An effective investigation, is one which consists, *inter alia*, of a thorough, impartial and careful examination of the circumstances surrounding a killing. If the protection of the right to life is to be afforded meaning in practice, then an effective investigation and the initiation of legal proceedings to determine whether or not a

deprivation of life was lawful and where it is deemed to be unlawful punished, is essential. These requirements apply in areas where there are widespread killings (Mehmet Kaya).

35. The investigation in this case, far from being effective, was so defective, that the applicants submit that it is a perversion of justice. The inadequacies can be divided into two aspects: First the initial investigation and secondly the so-called prosecution of seven members of the gendarmerie. The inadequacy of the investigation include, but are not limited to, the following:

- Inadequate examination of the bodies and failure to carry out a proper autopsy of the bodies (applicants' final pleadings on the merits, pp.33-37, paras. 4.4-4.17)
- Failure to carry out any examination of the scene (ibid, p.37, para. 5.1)
- Failure of the prosecutor to conduct any forensic examination of the scene or of the deceased (ibid, p.38, paras. 6.1-6.3)
- Failure of the prosecutor to instigate any material investigation into *how* any of the three deceased persons were killed (ibid, p.38, para. 7.1). For example elementary failures include:
  - Failure of the prosecutor to take statements from the applicants or witnesses
  - Failure of the prosecutor to take any statements from the Gendarme
  - Failure of the prosecutor to identify the soldiers who would have been present on Kursunlu plain
- - Failure of the prosecutor to identify the soldiers who are alleged to have found the body of the Mehmet Akkum
- Attitude of the prosecutor in particular having regard to his false assumption that Mehmet Akkum was a terrorist
- The fact that there would appear to have been an attempted cover - up of the killing of Mehmet Akkum (ibid, p.29, para.2.12)

The failings of the investigation in this case reveal examples of virtually all of the fourteen different types of failings identified by the Commission in its Article 31 report in the case of Nasir Ihan (para.244).

*the criminal proceedings against the seven gendarmes*

36. An investigation into the deaths of Mehmet Akkum and Dervis Karakoc was commenced only after the application was communicated to the Commission, and then the trial which took place in this case is a most graphic example of how remedies in South East Turkey, not only do not function, but that worse than doing nothing, the system is used to cover up the truth. The gendarmes identified as defendant were identified simply because they had signed a report, and on no other basis. They were not identified because any investigation was made as to exactly which troops had been in the area of the deceased. Had any inquiry whatsoever been made, it would have become clear that the responsible gendarmes on the Kursunlu plain were from Kovancilar. Moreover the Government has still not provided the name of the soldier who is claimed first to have found the body of Mehmet Akkum. This omission in the Government's version is glaring. It gives rise to the inference that the soldiers who killed him, radioed to the men under Mr. Ozdemir to say that 'a terrorist' was found dead, and Tuncer Arpaci and Ramazan Dal were sent to collect the body.

37. The manner in which the trial of the gendarmes was conducted was also fundamentally flawed. The gendarmes were never once brought to Court. Their statements were taken by rogatory judges. These statements taken from the gendarmes, the defendants in a murder trial, are not only wholly inconsistent with the government's account, but before the Commission, Tuncer Arpaci said that the statements were all wrong. The fact that the Court had before it diametrically opposed evidence from the defense did not seem to cause any reason for concern. It did not prevent the prosecution from requesting an acquittal, nor the Court from granting one.

38. The applicants submit that the trial in effect was a show trial, staged as a response to the application of the applicants to the Commission. The application was

communicated to the Government on 30 August 1993. The proceedings before the Elazig criminal court (the first proceedings) did not start until 20 October 1994. The Government assert that the necessary judicial investigation was carried out independently of any request or complaint by the applicants (Government's final observations, p.3). The proceedings, however, were first started over a year after the referral of the case to the Government. The proceedings had not yet started at the time of the admissibility hearing before the Commission.

39. The trial was so evidently crucially flawed and pro forma from the commencement, that it only added insult to the injury which the families had suffered. The applicants submit that the Turkish authorities have not only failed to provide an effective remedy, under Article 2, but that they have subverted the justice system so as to provide immunity to their security forces for the murder of three innocent civilians. This raises clear issues under Article 18.

40. The record of the hearing on 21 December 1995 before the Military Court of Elazig (the second proceedings) states that the Court had attempted to obtain the address of Sedat Aslantas, the lawyer of two of the applicants. From 5 December 1994 until 20 November 1995, Sedat Aslantas was in jail, following his conviction under Article 8.1 of Anti-Terror Law 3713. It seems surprising that this information would not be available to the Court, not least because Mr. Aslantas's complaint of a violation of the Convention with regard to his trial and conviction was referred to the Government on 19 January 1995. It is not known why the Court failed to contact Zulfu Akkum. The applicant is not aware of any attempt to contact him. That may call into question the genuineness of the alleged attempt to contact him.

41. The applicants also recall the evidence that there was an attempt to cover up the killing of Mehmet Akkum as the killing of a terrorist. This attempted cover up goes to the core of the Government's failure to protect the right to life. The investigation, not only in general terms was inadequate, but was based on an untrue assertion - that the deceased was a terrorist, and then set out to corroborate this untrue assertion by trying to locate the body near an alleged PKK shelter and dress the body in clothes which could be described by the authorities as 'typical terrorist'

clothing (see also Mehmet Kaya v. Turkey, Commission Report, paras. 56, 129, 135 & 157).

42. In addition, members of the gendarmerie and the armed forces are supposed to be subject to the Military Criminal Code (Ilhan, para. 40). This includes the responsibility of commanders to enforce the rules. While the Government claims that there was a proper investigation and trial of suspects, this assertion is dubious at best. As stated in the oral evidence in the hearings conducted by the Commission, numerous witnesses were not called. In fact, at least one of the defendants did not even attend the trial. Amazingly neither Huseyin nor Mursit Yilmaz knew that soldiers under their command during the operation had been subject to court-martial for the killings, and Mr. Ozdemir only learned of it three days before giving evidence before the Commission. The evidence given by the three soldiers, Mr. Tuncer Arpaci, Mr. Murat Koc and Mr. Ramazan Dal, who were some of the defendants in the Court case was in many ways the most extraordinary.

43. In this case the key soldiers in command positions, and those responsible for investigating alleged crimes not only did not investigate, but were never informed that soldiers under their command were subject to court-martial and never summoned to give evidence at their trial.

44. It is submitted that, in the state of emergency areas, the right to life is not *protected by law*, where a death is allegedly the result of the conduct of the security forces. It is also submitted that the authorities failed to conduct an effective investigation into the deaths of the relatives of the three applicants, in violation of Article 2.

d. *practice of failure adequately to protect the right to life*

45. The evidence referred to above in cases involving suspicious killings in south-east Turkey, the evidence of the Commission's experience during fact-finding hearings as to the routine inadequacy of both the system of investigation and their conduct in practice, set out in the Commission Article 31 Report in the case of Ilhan and the evidence submitted to the Court in previous cases by the applicants' legal

representatives of the findings of IGOs and NGOs, all make it absolutely clear that the failure adequately to protect the right to life occurs routinely in the state of emergency areas.

46. Cases have been submitted with regard to the situation in south-east Turkey since 1993. No effective changes have been made to the law or the practice with regard to the effective impunity of members of the security forces for unlawful killings in that area and the conduct of investigations. On the contrary, the Government continues to assert that domestic remedies are effective, thereby revealing an extraordinary complacency in the face of the findings of the Commission and Court.

47. The repetition of acts and their tolerance by the authorities is evidence of a practice of violation of the Convention. An individual applicant can raise the issue of practice (*Donnelly v. UK*). The issue was recently declared admissible in an inter-state case which concerned the torture of an individual (*Denmark v. Turkey*). It is submitted that the issue of practice needs to be addressed on the merits and that the evidence referred to above clearly establishes that there is a practice of effective impunity for unlawful killings by members of the security forces in areas under the state of emergency law and a practice of inadequate and ineffective investigations of all unlawful killings in those areas, whether allegedly carried out by the security forces or not.

### 3. Article 3

48. The complaint of a violation of Article 3 is made only in relation to Zulfu Akkum (see original application). The ears of the applicant's son were removed *post mortem*. This was clearly not the result of shrapnel (Applicants' final pleadings on the merits, p. 34, para. 4.6). Even in time of war, the dead must not be despoiled or mutilated (Geneva Convention I of 1949, article 15, applicable in international conflicts and common article 3 to the four Geneva Conventions of 1949, applicable in non-international conflicts. Violations of common article 3 are crimes of universal

permissive jurisdiction; *Tadic*, appeal on jurisdiction, ICTY; see also Rome Statute of the International Criminal Court).

49. It is not necessary in this case to determine whether inhuman treatment can be inflicted on a dead person. In this case, it is submitted that the mutilation of Mehmet Akkum was inhuman treatment in relation to his father, the applicant. The mutilation of a body is offensive to a muslim. Zulfu Akkum had to bury an incomplete and mutilated body. In addition to his personal feelings as to what had been done to his son, equally predictably the mutilation caused grave offence of Mr. Akkum's religious principles and represented inhuman treatment.

50. It is submitted that Zulfu Akkum was subjected to inhuman treatment, in violation of Article 3.

#### 4. Article 13

51. The notion of an effective remedy, in the case of a killing, entails, in addition to the payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (*Tekin, Ilhan*). This is broader than the procedural requirements of Article 2 (*Mehmet Kaya, Yasa and Tanrikulu*).

52. In this case the failure of the authorities to investigate the killings of the applicants' relatives, was compounded by the conducting a trial which was so flawed in its inception as well as its procedure that it could never have been intended that it would provide justice for the applicants. On the contrary, the trial was so wholly flawed and obviously so, that it gives rise to an issue of bad faith. It represents the deliberate denial of justice to the applicants in the most perverse manner - by using the system of justice to corroborate an unlawful killing, and to obscure the truth of the most serious violation of human rights. The applicants submit that their rights under Article 13 have been entirely denied to them.



53. It is submitted that, in this case, there is a violation of Article 13 in relation to the applicants and their dead relatives.

#### **Practice of violation of article 13**

54. It is submitted that there is a practice of denial of an effective remedy in south-east Turkey (see paras. 45-47 above). In addition to the evidence referred to above, the applicants also refer the Court to the evidence regarding the inadequacy of national remedies both in the case of unlawful killings and also in the case of other serious violations of the Convention (e.g. torture, "disappearances", intentional destruction of homes etc). The applicants would point to the judgment of the Court in the cases of **Aksoy, Akdivar & others, Aydin, Mentesh, Tekin, Mehmet Kaya, Kurt, Sencuk and Asker, Yasa, Ergi, Cakici, Tanrikulu, Mahmut Kaya, Kilic, Ertak, Timurtas, Salman and Ilhan**. The applicants would also point to the Commission Article 31 reports in the cases of **Ayder & others, Akdeniz & others, Sarli, Tas, Gul and Sabutekin**. In addition, the applicants also rely on the evidence contained in IGO and NGO reports previously submitted to the Court in other cases.

55. The applicants submit that there is overwhelming evidence of a practice of denial of an effective domestic remedy. Again, the Government have done nothing to address the problem in the past seven years. Again, this is an issue which, it is submitted, the Court needs to address on the merits.

#### **5. Article 14**

56. In particular the applicants maintain that as villagers of Kurdish origin their relatives enjoyed their guarantee to the right to life to a lesser extent than a person of non Kurdish origin. The applicants submit that the failure of the security forces to distinguish between villagers and members of the PKK or terrorist groups, is a sign that Kurdish villagers are all treated as terrorists and legitimate targets. It is not the case that the high level of killings of Kurds is a result only of the fighting between the PKK and the Government in the south eastern provinces, so that violations of the right to life happen more frequently in that geographical region, but that the

State has taken no steps to differentiate between the PKK and the civilian Kurdish population. This failure to distinguish is a mode of discrimination, and is based solely on the victims attributes as Kurdish peasants. This attitude is well illustrated by the fact that the soldiers considered the wearing of salvar trousers, the traditional Kurdish trousers, as typical clothes of a terrorist. This is so accepted by the authorities in the South East that Mehmet Akkum's city trousers were in fact swapped and replaced with salvar trousers to add authenticity to the security force's claim that he was a terrorist shot dead. This discrimination cannot be justified on any objective criteria. The killing of the applicants' relatives in this case is but one example, and in particular the attitude of the prosecutor and the security forces to the killing of Mehmet Akkum, demonstrates how Kurdish villagers when killed are written off as terrorists or in effect as 'collateral damage' to the security forces' operations.

#### 6. Violation of Article 1 Protocol 1

57. The applicants maintain that the soldiers, as well as killing their relatives were responsible for the killing of their livestock, and in particular that the soldiers were responsible for the killing of the horse and dog belonging to Dervis Karakoc. It is not called into question that the livestock of the villagers and Dervis' Karakoc's horse and dog were killed. Photographs were submitted showing *inter alia* the corpses of both the dog and horse of Dervis Karakoc. The killing of the livestock of the village was also recorded in the reports signed by the security forces.
58. The applicants submit that on the evidence the security forces are responsible for the killing of their animals. The horse and dog of Dervis Karakoc were killed in the vicinity of where Dervis Karakoc himself was killed. The applicants submit that it is clear that those who killed Dervis, must also have killed the animals. It is therefore submitted that it can only be the security forces who killed the animals. Any other conclusion, would require an assumption that there were other agents present who could possibly bear responsibility for the killing of the animals. There is however a complete absence of any other agents capable of having carried out the killings. The only armed persons seen near the plain were soldiers. It is clear that Kovancilar security forces were responsible for the Kirsunlu plain, and would have been

present there. There is no evidence of a clash having taken place on the plain, and it was confirmed in testimony that it would be illogical for cross fire to have occurred on the plain. The security forces were the only ones present on the plain. Moreover it is not credible that other agents arrived on the plain later, after the soldiers had left and killed the animals. The animals were killed in the vicinity of Dervis Karakoc. They therefore must have been killed immediately or very soon after Dervis Karakoc was killed, or they would have run away from the scene due to the gun fire. The only agents therefore who could have killed the animals of Dervis Karakoc were the security forces who killed him.

59. Likewise the livestock were all killed in the operation conducted by the security forces. At least half of the animals being grazed were under the control of, and in the possession of Mehmet Akan and Mehmet Akkum. The livestock would have been in the area surrounding the shepherds on the mountainside, and therefore in the range of the security forces. The livestock were all killed by 11 November 1992 as the reports indicate, and as the villagers from Kursunlu village discovered when in the morning of 12 November 1992 they found the strewn bodies of their livestock on the way to Kursunlu. The persons patrolling the area where the livestock were killed were security forces. Again there is an absence of evidence of the presence of any other agent capable of killing the livestock. The security forces were present. It is therefore clear that the only agents who could have killed the livestock were the security forces.

60. The Government ask, in their final observations (p.1), against whom or what the repeated firing can have been directed if there were only soldiers in the vicinity. Photographs were submitted by the applicants to the Commission which showed the plain littered with the corpses of sheep and other animals.

#### 7. Article 18

61. The applicants submit that there are two aspects to this case which seriously call into question the good faith of the authorities in this case. The first is the attempt formally to record the killing of Mehmet Akkum as the killing of a terrorist. The efforts of the authorities in this regard show bad faith in that

- No evidence was required to support the security forces assertions. The killing was automatically listed as a terrorist killed,
- The prosecution commenced an investigation into Mehmet Akkum for being a terrorist although they had no evidence whatsoever,
- The security forces tried to establish, against the facts, that Mehmet Akkum was found near the alleged PKK shelter in order to create the impression that he was a terrorist,
- Mehmet Akkum's city trousers were removed from him and replaced with Salvar trousers so that the security forces could claim that this was a 'typical terrorist'.

62. For the authorities, the security forces and the prosecuting authorities, to go to such lengths in collaboration, must call into question the good faith of the respondent State which is responsible for the actions of the both the security forces and the investigating and prosecuting authorities.

63. The second aspect which raises issues under Article 18 is the action of the prosecuting authorities in initiating a trial, following the communication of this application, so flawed that it could only be done for the purpose of allegedly vindicating the security forces and trying to corroborate the two false assertions, one that the security forces bore no responsibility and two that the killings had been the subject of an effective remedy.

64. The applicants submit that the Respondent Government, upon receipt of this application and in order to prevent the applicants' application being investigated by the Commission by invoking Article 26, commenced a pro forma trial. This was commenced to invoke the domestic remedies rule, and it would also enable the authorities to claim the organs in Strasbourg had no jurisdiction to overturn the findings of their domestic tribunal. The respondent Government nearly succeeded. The consideration of this case was in fact delayed due to the Government's announcement on the day of the admissibility hearings of this case, that a trial would commence against seven gendarmes. The applicants submit that the commencement of a trial so obviously devoid of any merit, in order to invoke Article 26, and to

seek to undermine a claim under Article 13, is the conduct of action, aimed at undermining the rights in the Convention. The conduct of such action is a *prima facie* exercise of bad faith and an abuse of power, in violation of Article 18 of the Convention.

65. The applicant's claim for just satisfaction is based on this analysis of the facts and law.

#### IV. JUST SATISFACTION

66. Article 41 of the Convention, as amended by Protocol 11, provides,  
"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."
67. Article 50 of the Convention before it was amended provided, in relevant part,  
"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from [the] Convention, and if the internal law of the said party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."
68. In this case, so long as the respondent Government continues to deny that the authorities killed the Applicants' relatives, there is no prospect of the Applicants securing redress under internal law. The circumstances are therefore appropriate for the award of just satisfaction by the Court (*Ringeisen Case*, Eur. Court H.R., Series A No.15, p.9)
69. The Applicants have established that their relatives are the victims of individual violations and of a practice of such violations. The existence of a practice makes a violation "more serious" (*Ireland v. UK*, Report, Series B, vol 23-1 (1976-1978) pp.395-6). A more serious violation is an aggravated violation.
70. The Applicants have been in receipt of Commission legal aid.

71. The Applicants therefore ask for just satisfaction in relation to:

- pecuniary damages
- non-pecuniary or moral damage
- legal costs and expenses

**1. pecuniary damages**

72. Where pecuniary damages were suffered by an Applicant who is now dead, these may still be claimed and awarded (*Aksoy v. Turkey*). These include damages for loss of earnings (*Cakici v. Turkey*). The Applicants are, or have assumed responsibility for the heirs of the deceased.

73. In its judgment in the case of *Ertak v. Turkey*, 9 May 2000, the Court made an award for loss of earnings on an equitable basis, without giving reasons. The Applicant had provided a precise figure for his son's annual earnings and that sum had been capitalised in the way expressly approved by the Court in the case of *Cakici*.

74. In two subsequent cases, *Salman* and *Ilhan*, the Court awarded pecuniary damages for loss of earnings on the basis of earnings figures submitted by the applicant. In *Ilhan*, the Court stated,

“The Government have not queried the amount claimed by the applicant, beyond submitting that such sums should not be unreasonable.” (para. 109)

In other words, such a general claim by the Government is not a sufficient basis for reducing the applicant's claim, where it is otherwise reasonable.

75. In this case, figures are being sought for the earnings of Mehmet Akkum, Mehemt Akan, and Dervis Karakoc. The figures will then be capitalised in the

way expressly approved by the Court in *Cakici* and confirmed in *Salman and Ilhan*.

76. It is submitted that, where an Applicant submits a precise sum by way of annual earnings, that figure should be the basis of the calculation of pecuniary damages. It is not appropriate to make an award on an equitable basis. Where the respondent Government simply asserts that the sum claimed is inflated, that is not an appropriate basis for reducing the sum claimed, particularly in cases where, if the facts are as alleged by the Applicant, there is no doubt that there has been a violation of the Convention (e.g. unacknowledged detention; serious ill-treatment; killing).

77. The Applicants<sup>d</sup> claim the following pecuniary damages: -

*loss of earnings*

78. The Applicants claim loss of earnings for Mehmet Akkum, Mehmet Akan, and Dervis Karakoc, which will be held for the benefit of the victims heirs. The Applicants claim their likely loss of earnings from their age at the time of their killing to the time when they could have been expected to stop working (65.1 years according to source SPO, quoted in 'The economic, political and social structure of Turkey', prepared by Baydar-Aydingun, Celimli, Eruygur and Turk for The Antalya Conference: the Keystone of Europe, November 1998). The calculation of the appropriate capital sum for each victim is to be found in the Schedule of Pecuniary and Non-Pecuniary damages.

*Property destruction*

79. The Applicants claim compensation for the willful destruction of their livestock (Mehmet Akkum and Mehmet Akan) and horse (Dervis Karakoc).

80. The Applicants request that the sum payable for pecuniary damages should be specified in sterling, to be converted into Turkish lira on the date of payment. In the event of late payment, the applicants requests that



the statutory rate of interest applicable in the United Kingdom at the adoption of the Court's judgment should be applicable.

## 2. Non-pecuniary or moral damage

81. It is in the nature of non-pecuniary or moral damage that the sum to be awarded must be determined on an equitable basis. The Court's case-law consistently uses that criterion for the assessment of moral damage. In order for an equitable assessment to be made, it is necessary to take into account the following considerations:

- the severity of the violations;
- the number of violations;
- some parity with other awards of compensation made by the European Court of Human Rights in relation to the particular jurisdiction in question;
- some parity between different High Contracting Parties, taking into account the cost of living and the standard of living in different jurisdictions.
- the need for an inducement to observe legal standards in addition to the obligation to compensate, in order to give effective expression to the function of the Court in upholding the public order of Europe (see *Loizidou v. Turkey*, applicant's memorial with regard to Article 50, p.23). Since, in this case, the respondent Government has been found responsible for failing to protect the right to life of the Applicants relatives, in other words a very serious human rights violation, some deterrent element in the award of compensation would appear to be appropriate.

82. In this case, the authorities of the respondent State have been found responsible for the following violations:

- <sup>killings in</sup> a violation of Article 2 in relation to three victims;

- a failure to protect the right to life by law, in violation of Article 2;
- inadequate investigation into the killing of the Applicants' relatives, in violation of Article 2;
- a violation of Article 3 in relation to Zulfu Akkum owing to the mutilation of the body of his son;
- a failure to provide an adequate and effective domestic remedy in relation to both the applicants and their dead relatives, in violation of Article 13;
- a practice of inadequate investigation and failure to provide an effective domestic remedy;
- failure to protect the right to life on a discriminatory basis, in violation of Article 14 in conjunction with Article 2;
- a violation of Article 1 Protocol 1 in relation to the killing of the victims' animals;
- the violation by the respondent Government of Article 18.

83. In the light of awards made in comparable cases, notably *Aksoy* (torture), *Kurt* (Article 5 for the victim and Article 3 for the applicant), *Cakici* (violations of Articles 2, 3 and 5 in relation to the victim) and *Timurtas* (violations of Articles 2 and 5 in relation to the victim) the Applicants claim:

- £40,000 per victim, in relation to all the violations suffered by the dead men, which the Applicants would hold for the benefit of their heirs;
- £10,000 for Zulfu Akkum, in relation to the violation of Articles 3 and 13;
- £2,500 for Huseyin Akan and Rabia Karakoc in relation to the violation of Article 13.

84. The Applicants request that the sums payable for moral damage should be specified in sterling, to be converted into Turkish lira on

the date of payment. In the event of late payment, the Applicants request that the statutory rate of interest applicable in the United Kingdom at the adoption of the Court's judgment should be applicable.

### 3. Legal costs and expenses

#### a. introduction

85. In order to be awarded costs and expenses,

“... the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Commission and later by the Court and to obtain redress therefor.”

(*Niderost-Huber v. Switzerland*, 25 E.H.R.R. 709 at 720, para.40).

Once that is established,

“It must be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum.” (*ibid*, citing *Phillis v. Greece (No.1)* 13 E.H.R.R. 741)

86. It should be emphasised that the issue of payment of costs and expenses only becomes relevant when the respondent Government has been found to have violated the Convention. Given the nature of the human rights violations at issue in this case, it is not as though there was any doubt that, if the facts claimed by the Applicants were established, they would be found to constitute a violation of the Convention. The only question was the precise legal character of the violation. In these circumstances, the remedy is in the hands of the Government. If it objects to paying legal costs and expenses, it should not have permitted the flagrant violation of the Convention. On condition that the costs claimed were actually incurred and necessarily incurred and are reasonable as to quantum, and that a detailed schedule of claim is submitted, it is inappropriate for less than the sum claimed to be awarded. The Court has, in the case of *Loizidou*, been prepared to award costs of more than £160,000.00, even though the Commission objected to the amount claimed.

87. The costs claimed in this case all relate to proceedings before the Commission and Court to establish the violation of the Convention with regard to the Applicants' relatives and to obtain redress for those violations.

## b. general principles

88. The Court's recognition that an Applicant may be entitled to legal costs and expenses is a recognition that proceedings before the Commission and Court are legal proceedings. In the case of *Cakici*, the Applicant submitted a memorial specifically on Article 41 of the Convention as amended by Protocol 11. The memorial and relevant appendices contained a statistical analysis of awards of legal costs and expenses over a five year period by the former Court and an analysis of the various reasons given for awarding less than the sum claimed. The Applicant in this case relies on that memorial and, in particular, on paras. 17 -46 of the memorial.

89. It is submitted that

- a. the award of legal fees and expenses is a matter of actual costs and should generally not be a matter of the exercise of discretion, at least where the Applicant has submitted a detailed schedule of costs;
- b. the Court should not award less than the sum claimed by way of legal fees and expenses without giving reasons.

90. In the case of *Cakici*, the Court awarded less than the sum claimed. It indicated the reasons why the Government said that the sum should be reduced (para. 132) but did not give its own reasons for reducing the sum. The Court simply said that it determined the figure to be awarded "on an equitable basis" (para. 133). It is submitted that it is particularly inappropriate to reduce the sums claimed by way of expenses (e.g. telephone calls, photocopying). Such costs are either actually incurred and necessarily incurred or they are not. Where the overall award is made on a discretionary basis, the actual costs claimed still have to be paid. That means that the entire burden of the shortfall between the costs and expenses claimed and those awarded falls on the legal fees. So for example, in the case of *Cakici*, of the £30,860.37 claimed for fees and costs, £4, 560.37 was for the non-fee element. (The figure of £30,860.37 is the sum claimed, not included the expenses for attendance at the hearing.

The cost element of attending the hearing was covered by the grant of Court legal aid.) From the award of £20,000 must be deducted approximately £705 paid by way of legal aid. Of the net figure of £19,295, £4,560.37 must be paid in expenses.

91. *The Applicants, whilst submitting that detailed bills of costs should not be reduced without reasons being given, would further submit that it is particularly inappropriate to reduce non-fee elements, as these represent actual expenses incurred and it is not possible to pay for them on an equitable basis or pro rata in proportion to the award made.*

Elements relating to this specific case

*i. legal fees*

92. The fee level claimed for the lawyers from the UK is the appropriate rate for lawyers not in full-time practice and without the same overheads of those in full-time practice. The rate claimed is lower than the legal aid rate for county court work in England. The rate is that awarded by the Court in the case of *Aydin*.
93. The number of hours claimed is attributable to the inadequate domestic investigation, which made it necessary for the Commission to hold fact-finding hearings. That, in turn, made necessary the submission of pleadings on the merits, based on an analysis of the transcript of the hearings and the documents submitted during the course of the case.
94. Whilst several lawyers have been involved in the case, they have undertaken different work (e.g. taking of statements, contact with applicants and witnesses and preparation of pleadings).

*ii. use of foreign lawyers*

95. The Applicants have the right to appoint legal representatives from outside their own jurisdiction (*Kurt v. Turkey*, *Yasa v. Turkey supra*). In the case of *Kurt v. Turkey*, the Court recognised that it was particularly appropriate for an Applicant to have recourse to specialists in international human rights law where the legal analysis of the violation(s) in question was complex (Judgment of the Court, May 25, 1998, para. 179). That is also applicable in this case.
96. Certain consequences flow from the involvement of foreign lawyers. The fee levels in their own jurisdiction may be significantly different from those in the respondent State. In *Tolstoy Miloslavsky v. UK*, judgment of 13 July 1995, the Delegate of the Commission invited the Court to consider adoption of a

uniform approach to legal fees, irrespective of legal standards. The Court stated that,

"... given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees under Article 50 of the Convention does not seem appropriate." (para.77)

*iii. interpretation and translation*

97. Applicants have the right to use foreign lawyers. The need for interpretation and translation is in part a result of the exercise of that choice. It should be noted that, the official languages of the Commission and Court being English or French, it would in any event have been necessary for the Applicants to have certain documents translated. The actual cost of translation and interpretation in this case is also attributable to the need to have fact-finding hearings and the need to have translated documents which were made available for the first time during the Convention proceedings.

*iv. costs of KHRP*

98. The Kurdish Human Rights Project is a non-governmental organisation based in London. It is a charity under UK law. In relation to this case, KHRP undertook the following functions. The statements of the Applicants were sent from Turkey to KHRP. They translated the documents and then sent them to Essex. Contact with the Applicants, except during the fact-finding hearings, was effected through KHRP. Consultation between the UK-based legal representatives and those in SE Turkey in response to the Government Observations and as to the witnesses to be requested to be heard by the Commission was carried out through KHRP. The NGO provided the translation of other documents in Turkish. These costs were actually incurred and necessarily incurred. They involved international telephone calls and faxes and the cost of translation. These costs are essential for the conduct of the case. If the work had not been done by KHRP, it would have had to be undertaken by others.



*v. telephone, postage and faxes*

99. The costs as listed were actually incurred and necessarily incurred and are reasonable as to quantum.

*vi. travel costs, per diem and fee for the hearing before the Court*

100. Should there be a hearing before the Court, the figures will be submitted on the date of the hearing. (The travel costs and per diem for the hearings in Ankara are *not* being claimed as they were covered by the grant of legal aid by the Commission. This means that the Court should deduct the sums already received by grant of legal aid for fees *only*.)

101. The Applicants request the Court to stipulate that the legal costs and fees should be paid in sterling into their bank account in the United Kingdom, the details of which are provided at the end of the Schedule of legal costs and fees. (This was done in *Timurtas v. Turkey*, judgment of 13 June 2000, para. 131 and *dispositif* para. 10; *Salman*, judgment of 27 June 2000, para. 143 and *dispositif* para. 8 and *Ilhan*, judgment of 27 June 2000, para. 116 and *dispositif* para. 6.)

102. *The Applicants' claims for legal fees and expenses (minus legal aid awarded for fees, plus fees and expenses for any oral hearing before the Court) is set out in the Schedule of Fees and Costs. The Applicants request the Court to determine that their legal fees and expenses should be paid to them in £ sterling, into their UK bank account, the details of which are provided at the end of the schedule. In the event of late payment, the Applicants request the Court to order that interest will be payable at the statutory rate applicable in the United Kingdom at the time of the adoption of the Court's judgment.*

## Summary

103. The Applicants request the Court to find the following violations of the Convention in this case:
- killing of the Applicants' relatives in violation of Article 2;
  - a failure to protect by law the right to life of the Applicants' relatives, in violation of Article 2;
  - an inadequate investigation into the killing of the Applicants' relatives, in violation of Article 2;
  - a failure to provide an adequate and effective domestic remedy in relation to both the applicant and the missing men, in violation of Article 13;
  - a practice of inadequate investigation and failure to provide an effective domestic remedy;
  - failure to protect the right to life on a discriminatory basis, in violation of Article 14 in conjunction with Article 2;
  - a violation of Article 1 Protocol 1 in relation to the killing of the victims' animals;
  - a violation of Article 18.
104. The Applicants request the Court to make the following awards by way of just satisfaction:
- pecuniary damages for loss of income in relation to Mehmet Akkum, Mehmet Akan, and Dervis Karakoc, which the Applicants would hold on behalf of the victims' heirs;
  - pecuniary damages for the loss of property which the Applicants would hold on behalf of the victims' heirs;
  - non-pecuniary or moral damages of £40,000 for each victim (Mehmet Akkum, Mehmet Akan, and Dervis Karakoc), to be held by the Applicants on behalf of their heirs;
  - non-pecuniary or moral damages of £10,000 for Zulfu Akkum, for the violation of Articles 3 and 13;

- non-pecuniary or moral damages of £2,500 for Huseyin Akaan and Rabia Karakoc, for the violation of Article 3;
- legal fees and costs.

Attached

Schedule of Pecuniary and Non-pecuniary Damages

Schedule of legal fees and costs

Françoise Hampson

Reyhan Yalcindag

Cihan Aydin

Philip Leach

3 July 2000

**Schedule of Pecuniary and Non-Pecuniary Damages**

**AKKUM and OTHERS v Turkey**  
**App. No. 21894/93**

## Mehmet AKAN

**1. Pecuniary Damage:**

1.a) Loss of income of Mehmet Akan: Mehmet Akan was a shepherd [These figures will be submitted as soon as possible. The Applicant has moved again, making it more difficult for his legal representatives in Southeast Turkey to obtain the necessary information]

**2. Non-Pecuniary or Moral Damage:**

2.a) On behalf of Mehmet Akan to be held for his heirs :  
Killing, failure to protect the right to life by law, inadequate investigation and no domestic remedy £ 40,000.00

2.b) On behalf of the applicant:  
Inadequate investigation and no domestic remedy £ 2,500.00

£ 42,500.00

Total Non-Pecuniary Damage at Date of Judgement:

£ 42,500.00

Total Pecuniary and Non-Pecuniary Damages Claimed at Date of Judgement: + pecuniary

[To be converted into TL at the rate applicable on the date of payment]

to be  
submitted  
later

Dervis KARAKOC

**1. Pecuniary Damage:**

1.a) Loss of income of Dervis Karakoc: *[These figures will be submitted as soon as possible. The Applicant has moved again, making it more difficult for his legal representatives in Southeast Turkey to obtain the necessary information]*

**2. Non-Pecuniary or Moral Damage:**

2.a) On behalf of Dervis Karakoc to be held for his widow and children :  
Killing, failure to protect the right to life by law, inadequate investigation  
and no domestic remedy £ 40,000.00

2.b) On behalf of the applicant:  
Inadequate investigation and no domestic remedy £ 2,500.00

Total Non-Pecuniary Damage at Date of Judgement: £ 42,500.00

Total Pecuniary and Non-Pecuniary Damages Claimed at Date of Judgement: £ 42,500.00  
[To be converted into TL at the rate applicable on the date of payment] + pecuniary  
to be  
submitted  
later

Schedule of Professional Fees and Costs  
**AKKUM, AKAN, & KARAKOC v Turkey, 21894/93**

**Payable to:**

Sterling Bank Account of Akkum and others  
 Barclays Bank,  
 University of Essex,  
 Wivenhoe Park,  
 Colchester, CO4 3SQ,  
 United Kingdom

**1. Fees and costs incurred by the UK lawyers:****1.a. Professional Fees**

To all professional fees for:

Preparation and submission of the original Application of 18 May 1993 (20 hours); examination of and reply on 13 April 1994 to Government's observations (5 hours); hearings in Strasbourg of 18 October 1994, and in Ankara of 10-13 March 1997 (38 hours); comments submitted on 20 December 1995 (1 hour); comments submitted on 22 January 1996 (1 hour); examination and reply of 15 October 1997 to friendly settlement offers of 28 July 1997 (1 hour); examination and reply of 10 April 1998 to friendly settlement offers of 12 December 1997 (1 hour); final pleadings of 18 May 1998 to the Commission (40 hours); examination and reply of 5 June 1998 to friendly settlement offer of 29 April 1998 (1 hour), just satisfaction claims and preparation of appendix (29 hours), as well as all other necessary correspondence and work carried out in connection with the case (8 hours);

Ms. Francoise Hampson	31 hours @ £100 per hour	£ 3,100.00
Mr. Kevin Boyle	38 hours @ £100 per hour	£ 3,800.00
Ms. Aisling Reidy	81 hours @ £50 per hour	£ 4,050.00
Mr. D. Christopher Decker	28 hours @ £50 per hour	£ 1,400.00
Mr. D. Christopher Decker	8 hours @ £15 per hour (administrative time)	£ 120.00
<b>Total</b>		<b>£12,470.00</b>

**Legal Aid Received:** On 10 November 1994 a grant of legal aid was made in the amount of FRF 5,595. An additional grant of legal aid was made on 14 February 1997 in the amount of FRF 2,000 for the 5 days of hearings concerning both this case and Bilgin v. Turkey 23819/94. Please note that the Akkum case took roughly three and one half days, therefore  $3\frac{1}{2} \times \text{FRF } 2,000 = \text{FRF } 7,000$ . Both Prof. Boyle and Ms. Reidy received this amount therefore FRF 14,000 are being allocated in relation to this case. The other FRF 6,000 are being allocated to the Bilgin case. Consequently, FRF 19,595 has been granted in relation to this case.

**GBP 12,070.00 – FRF 19,595 = Total Fee Claimed**

## 1.b. Administrative Costs

### Photocopying:

To photocopying the application, the appendices, all pleadings before the Commission and Court, and all commission correspondence and correspondence between lawyers and all materials relating to the application and keeping a second copy of the file for security reasons.

Estimated number of pages:

620 pages @ 5p a copy	£	31.00
415 pages @ 6p a copy	£	24.90

### Telephone and Fax:

To telephone and fax costs for communication between lawyers in UK and Applicant in Turkey and between UK and the Commission and Court	£	48.00
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### Postage:

To postage costs for communication between lawyers and between lawyers and the Commission and the Court	£	17.50
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**Total:** £ 121.40

**Total fees and costs incurred by UK lawyers:** £ 12,591.40

## 2. Supplementary costs of Court hearing if held

Fees for preparation (10 hours) and attendance at hearing (3 hours):

- UK lawyer:	13 hours @ £100 per hour
- Turkish lawyer:	13 hours @ £30 per hour

Subsistence allowance, per diem FF 968 per lawyer (legal aid rate):

- UK lawyer:	2 days @ FF 968 per day
- Turkish lawyer:	4 days @ FF 968 per day

Cost of return travel Colchester - Strasbourg

Cost of return travel Diyarbakir - Strasbourg

**FULL COST  
DETAILS TO  
BE PROVIDED  
IN  
ADDITIONAL  
SCHEDULE ON  
DAY OF  
HEARING IF  
HELD**

### SUMMARY:

Fees of UK Lawyers	£ 12,470.00
Costs of UK Lawyers	£ 121.40

**Total:** £ 12,591.40

**TOTAL CLAIMED: (£ 12,191.40 – FRF 19,595) + FEES AND COSTS OF THE COURT HEARING**

Any additional Legal Aid granted was in relation to expenses associated with attendance of the hearing. This is not a fee element and should not be subtracted from any award of legal costs to the Applicant. Moreover, the Applicant has no additional expenses to claim in relation to the hearing in this case.



All legal costs are to be paid in sterling (GBP) directly to the applicant's sterling bank account in the UK, details of which are as follows:

Account Name: ECHR Litigation Support Unit Re Akkum and others

Account No: 40843393 Sort Code: 20-22-67

Address: Barclays Bank,

University of Essex

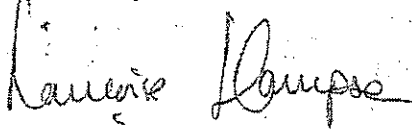
Wivenhoe Park

Colchester, Essex

CO4 3SQ

United Kingdom.

Date: 3 July 2000



Françoise Hampson  
Legal Representative

IN THE EUROPEAN COURT OF HUMAN RIGHTS

No. 27306/95

FIRST SECTION

BETWEEN:

HAYRIYE KISMIR

Applicant

-and-

THE REPUBLIC OF TURKEY

Respondent

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**Further Observations of the Applicant**

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1. This case concerns the torture and killing of the applicant's son Aydin Kismir by police officers at the Diyarbakir Police Academy between 6 and 11 or 12 October 1994. The applicant alleges violations of Articles 2, 3, 6, 13 and 14 of the Convention. The application was unanimously declared admissible by the Court on 14 December 1999.
2. By the letter of 10 January 2000 the applicant has been asked by the Court to submit any additional evidence or observations. In accordance with the Court's letter of 16 March 2000, these further observations are submitted by 2 May 2000.
3. The applicant notes that the Government has been asked by the Court to submit a full copy of the investigation file and the photographs taken during the autopsy. The applicant notes that various reports or statements have been referred to in the Government's observations which have not been disclosed to the applicant. These include the following:
  - (i) Custody records of the applicant's son and the six other people detained with him;
  - (ii) Report of Doctor Kinyas Ozturk (dated 6.10.94);
  - (iii) Report of Doctor Ozdag (date unknown);
  - (iv) Report of hystopathological laboratory (12.12.94);
  - (v) Statement of Baris Kalkan to state Security Court (13.10.94);
  - (vi) Statement of Ramazan Kutlu (13.10.94).
4. The applicant proposes to submit further observations in reply once both the investigation file (which should include the documents referred to above) and the autopsy photographs have been disclosed. For the avoidance of doubt the applicant maintains each and every submission already made on her behalf in this application to date.
5. The applicant submits (as Appendix 11) a further report of Dr Christopher Milroy, Reader in Forensic Pathology at the University of Sheffield and practising Forensic

Pathologist accredited by the Home Office. Dr. Milroy originally provided a report in relation to this case on 3 April 1996, which was submitted as Appendix 10 with the Applicant's observations of 3 April 1996 ("the first report"). The first report was written at a time when the autopsy report had not been disclosed to the applicant. In the first report, Dr. Milroy stated that "Asphyxial deaths may occur leaving no specific external injuries." He also stated that "the conclusion that mechanical asphyxia was not the cause of death cannot be sustained, and must be seriously considered as a cause of death. In the absence of natural disease, in a man who has injuries which raise the spectre of torture, death due to the actions of the custodians must be a strong possibility."

6. Following the Government's disclosure of the autopsy report and the subsequent toxicological and histopathological reports, Dr. Milroy was asked to provide a further report in the light of those documents ("the second report"; Appendix 11). In his second report, Dr. Milroy's conclusions can be summarised as follows:

- (i) Aydin Kismir was taken into custody in a fit and healthy state;
- (ii) Aydin Kismir died in custody;
- (iii) The presence of diffuse bleeding under the skin on Aydin Kismir's back strongly suggests that blows have been delivered to the back;
- (iv) The presence of colour changes on the sole of the left foot raises the possibility that the soles of the feet have been beaten;
- (v) There was a failure to record organ weights (the heart and lungs);
- (vi) There was no significant natural disease present at autopsy to account for death;
- (vii) The conclusions drawn from the original autopsy investigations do not support natural death;
- (viii) The post mortem findings, with lung oedema and congestion, some brain oedema and stress ulcers and the absence of any obvious natural cause of death, raises strong concerns that death has been caused by a mechanical asphyxiation;
- (ix) Mechanical asphyxiation due to positional asphyxia must be strongly considered and the findings support such a diagnosis;

- (x) There is a description of a 6cm occipital laceration having been sustained by Aydin Kismir;
- (xi) The occipital laceration is a substantial injury which is not recorded in the autopsy report, but which must have been present at autopsy five days later as a healing injury;
- (xii) This raises questions about the thoroughness of the first autopsy.

7. The applicant submits that oral evidence should be taken by the Court in this case. The applicant's case is that her son was tortured and killed in police custody. There are witnesses who both saw and heard Aydin Kismir being tortured in custody by the police. There is also eye-witness evidence of the circumstances of Aydin Kismir's arrest. The Government, however, deny that Aydin Kismir was in any way ill-treated and have submitted that he died of natural causes. In these circumstances, the applicant submits that the Court should hear the witnesses in order to resolve the fundamental dispute between the parties.

8. If the Court were minded to hold a fact-finding hearing, the applicant submits that the following witnesses should be called:

(i) Hayriye Kismir                      Applicant. Reported her son's arrest to the Human Rights Association and complained to the State Prosecutor on 7 October 1994. When her sons Irfan and Turan returned home after being released they told her that Aydin had been badly tortured. Subsequently sought copies of her son's autopsy report from the Diyarbakir State Security Court Chief Prosecutor.

(ii) Turan Kismir                        Applicant's son. He was taken into police custody on 6 October 1994 and was questioned about Aydin. In custody he saw Aydin handcuffed, blindfolded, wet and naked and

being threatened by 7 police officers standing over him. He also heard Aydin screaming. Turan himself was tortured.

- (iii) Yilmaz Kalkan Baris Kalkan's brother. Heard police threaten to kill Aydin on arrest and in police car. Witnessed Aydin being beaten on arrest. Taken into custody with Aydin. He saw Aydin unable to walk and being dragged along the ground. He heard Aydin screaming and police officers threatening him. Yilmaz was also beaten in custody and was forced to sign a 7 page statement without knowing what it contained.
- (iv) Baris Kalkan Friend of Aydin Kismir. Taken into custody with Aydin on 6 October 1994. He witnessed Aydin being beaten in custody.
- (v) Saniye Kismir Applicant's daughter. Questioned by police on 6 October 1994 about Aydin.
- (vi) Mehmet Kismir Applicant's husband. Returned home on morning of 6 October 1994 and signed a sheet of paper.
- (vii) Emine Kalkan Mother of Baris Kalkan. Present when Aydin and Baris were arrested on 6 October 1994.
- (viii) Ahmet Kismir Applicant's brother-in-law. He was told by the police that Aydin's body was in the morgue.
- (ix) Dr Chris Milory Forensic Pathologist. Has provided the Court with expert reports in 1996 and 2000.

(x) 7 Diyarbakir police officers from Diyarbakir security Directorate who went to Aydin Kismir's house on 6 October 1994.

(xi) Head of Diyarbakir Police Academy and the officer(s) responsible for detainees at the Police Academy as at 6-12 October 1994.

(xii) All police officers who were on duty at the Diyarbakir Police Academy from 6-12 October 1994.

(xiii) DGM Chief State Prosecutor who confirmed on 10 October 1994 that Aydin Kismir had been taken into custody.

(xiv) Ahmet Basaran DGM prosecutor who signed Aydin Kismir's burial certificate.

(xv) Dr Kinyas Ozturk Produced medical report on Aydin Kismir on 6 October 1994.

(xvi) Dr Ozdag Produced medical report on Aydin Kismir.

(xvii) Lokman Egilmez Forensic Doctor who signed autopsy report of 12 October 1994.

(xviii) Ramazan Kutlu Detainee on 6 October 1994 who provided statement on 13 October 1994.

9. The applicant would be pleased to provide the Court with any further information required at this stage. The applicant would propose to submit further observations following receipt of the investigation file and the autopsy photographs, and in the light of the Court's decision as to whether oral evidence will be taken. Those further

submissions will include submissions on both the facts and the merits of the case,  
together with submissions in relation to Article 41.

Philip Leach  
Cihan Aydin  
Reyhan Yalcindag

Applicant's representatives



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Appendix 11 – Expert Report of Dr Christopher Milroy

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# THE UNIVERSITY OF SHEFFIELD

## Department of Forensic Pathology

The Medico - Legal Centre  
Watery Street  
Sheffield S3 7ES  
Tel: (0114) 273 8721  
Fax: (0114) 279 8942

**Re: Aydin Kismer**

Application No. 27306/95

I, Christopher Mark MILROY, am a fully registered general medical practitioner with the General Medical Council of the United Kingdom of Great Britain and Northern Ireland.

My qualifications are:

Bachelor of Medicine, Bachelor of Surgery, University of Liverpool 1983.

Doctor of Medicine by thesis in Forensic Pathology, University of Liverpool 1994.

Member of the Royal College of Pathologists (Histopathology 1990).

Fellow of the Royal College of Pathologists 1998.

Diploma in Medical Jurisprudence (Pathology) 1991.

I was appointed Senior Lecturer in Forensic Pathology at the University of Sheffield in 1991. I was promoted to the position of Reader in Forensic Pathology in 1999. I was appointed as Consultant Pathologist to the Home Office in 1992 and remain as a practising full time Forensic Pathologist accredited by the Home Office.

My first house officer year (internship) was in Liverpool in 1983 and 1984. In 1984 I commenced training as a pathologist in Liverpool with further training in Bristol and at University College, London, becoming a member of the Royal College of Pathologists in 1990. I moved to Sheffield in 1990 as a Lecturer in Forensic Pathology passing the Diploma in Medical Jurisprudence in 1991. I also hold the position of Honorary Consultant Forensic Pathologist at the Central Sheffield University Hospitals Trust. Acting Head of Department from April 1999 to April 2000.

The Department of Forensic Pathology of the University of Sheffield is one of the largest departments of forensic pathology in the United Kingdom. It provides a suspicious death service for the police force areas in the Midlands and North of England, covering a population of approximately 5.5 million people. Full staff consists of 5 consultant staff. The Department currently conducts 400 suspicious death investigations, approximately 100 of which are classified as homicides. In addition, the Department undertakes a considerable number of investigations on behalf of the defence, including reviews of cases of homicide. We examine all deaths in police custody and in prison in our regions. I regularly appear in criminal trials on behalf of both the prosecution and defence in England. In addition to my duties in Sheffield,

I sit on the Policy Advisory Board in Forensic Pathology of the Home Office, the Medical Ethics Committee of the British Medical Association and the Medical Academics Staff Committee of the British Medical Association. I am a member of numerous learned societies in forensic and clinical pathology and regularly attend national and international meetings. I have published over 50 papers in clinical pathology and forensic medicine and have contributed a number of chapters to standard textbooks of forensic medicine.

As well as work in the United Kingdom I have been consulted on a number of international cases, including work in Australia and South Africa. I have provided opinions for Amnesty International and acted as a pathologist to the International Criminal Tribunal for the Former Yugoslavia (ICTY) investigating alleged war crimes in Bosnia.

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#### Turkish Post Mortem Examination Reports

I have read the post mortem examination report on Aydin Kismer and subsequent toxicological and histopathological examination. The report I have seen describes the autopsy pathologist as Dr Lorman Egilmez the Diyarbakir Legal Medicine Director. The report describes the deceased as being 1.75 m tall and weighing 70-75 kgs. Rigor mortis is described and post mortem hypostasis, though not its position. The report also describes the same colour on the sole of the left foot.

The following injuries are described in the reports:

1. A 2 cm sutured wound on the top of the head.
2. A 1 cm wound over the right eyebrow.
3. Purple bruising around the right eye.
4. Purple bruising on the outer surface of the right hand between the thumb and the wrist.
5. A scabbed wound, 2 x 2 cm, over the coccyx.
6. Purple bruising on the outside of the right arm, 2 x 2 cm.
7. A graze 2 x 2 cm on the right big toe.

Other external findings noted were a slight deformation on the right side of the chest. The nailbeds, lips and ears were described as being cyanosed. There was widespread bleeding under the skin on his back. The external genitalia were normal. The epidermis was described as being easily separated from the dermis.



On internal examination there was bruising and haematoma under the sutured injury. The skull was intact. There was no bleeding on the outside or inside of the brain membranes. The brain was described as being slightly oedematous. Sectioning of the brain was normal. The bones of the skull base were unfractured.

The mouth, throat and neck structures were described as being normal. The chest deformation was noted to be structural and not due to trauma. There were several bleeding spots on the lung surfaces. The lungs were extensively oedematous and congested. The heart was described as being normal on external examination. Sectioning revealed a slightly thick, narrow, mitral valve.

In the abdomen there were stress ulcers seen in the stomach associated with a little bleeding. The other organs in the abdomen were normal.

Samples were submitted for histology and toxicology.

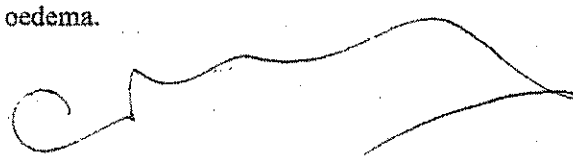
Doctors at the first examination concluded that death was due to asphyxiation.

No organ weights were recorded. No description of the presence or absence of petechiae is made, despite the diagnosis of asphyxiation.

Samples that were sent to the Istanbul Legal Medicine Department. The report was dated 12.10.94.

Toxicological examination did not identify any poisons.

According to the report of 26<sup>th</sup> December 1994, no toxic substances were identified. Histopathological investigation revealed the presence of autolysis. Nothing seen in the brain or cerebellum. Opinion was to be sought of a special council. This council which appears to consist of a series of specialists in a number of different areas of medicine, concluded that death was due to respiratory failure related to lung oedema. They commented that on external examination and autopsy, apart from the wounds on the top of part of the head and the right big toe, there were no other symptoms of an assault or traumatic change. They commented that although there was evidence of asphyxiation there was no change noticed in the neck area under the skin and there was no evidence of any compression of the chest or abdomen to indicate that death was as the result of mechanical asphyxiation. There was oedema of the lungs and brain, ulcers in the stomach with bleeding from the ulcers indicating general anoxia and asphyxiation findings related to extreme lung oedema.



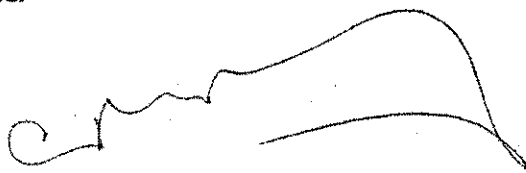
### ADMISSIBILITY DECISION

In the admissibility report of the Commission (Application no. 27306/95), the report describes Aydin Kismer as having sustained a wound to the right eye and another to the right foot toe, sustained falling down stairs whilst being arrested. Later that day Kismer was again taken to hospital where a 6 cm laceration to the occiput was identified. This injury was bleeding. He did not require hospitalisation.

### Opinion

1. This man died in custody. There was no evidence that he was anything other than fit and healthy when he was taken into custody.
2. The only natural disease identified at autopsy was a slight thickening and narrowing of the mitral valve. This was presumably due to a previous episode of rheumatic heart fever. There is no description of any enlargement of the heart or heart failure as a consequence of these changes in the mitral valve. No weight of the heart is recorded. There was lung oedema, but this is a non-specific finding seen in many deaths, both natural and unnatural. There is nothing within the autopsy report prepared to indicate any natural disease to account for lung oedema. No lung weights were recorded.

There was evidence of injury to the body with a cut over the right eye and a cut on the top of the head. The cut over the right eye could be caused by falling. It could also be caused by an impact to that area. Cuts on the top of the head are not a typical site of injury caused in a fall, although this cannot be entirely excluded. This could also be caused by a blow to that area. The 6 cm laceration described by Dr Zafer Ozdag is not described in any of the autopsy reports though a 6 cm wound should have been noticed, or a scar resulting from such a wound. It seems unlikely that a 2 cm wound seen at autopsy would be mistaken for a 6 cm wound. They are described in different positions as described by Dr Ozdag. A 6 cm wound is a large wound to be caused by a fall. This wound appears to have occurred whilst in custody, and not in the fall during the arrest. There was bruising over the outside of the right arm and the right hand which could be caused by firm gripping. A scabbed lesion at the base of the coccyx (bottom of the back) could be caused by a fall, as could a graze over a toe, assuming the person had no shoes on when the injury was inflicted.

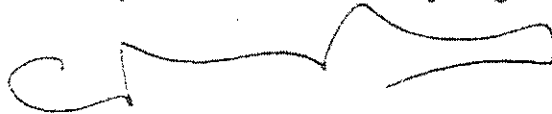


There is one area of the original autopsy report which does not appear to have been commented on and that is the presence of diffuse bleeding under the skin on his back. Assuming this is not just hypostasis and diffuse bleeding is not a description of hypostasis I would use or expect, this is disturbing and strongly suggests that blows have been delivered to the back. Such blows may not be associated with obvious external skin damage. Post mortem techniques have been developed to identify such damage and are recorded in the medico-legal literature (reference 1). Dissection should also include the removal of the skin from the face to detect any blows delivered to the head which may not be immediately apparent on external examination and incision of other areas where blows may have been delivered but not obvious on external examination of the skin, such as the soles of the feet. The presence of colour changes as described in the external report on the sole of the left foot, raises the possibility that the soles of the feet have been beaten. To exclude this deep dissection of the foot area would be required.

The post mortem findings in this case with lung oedema and congestion, some brain oedema and stress ulcers and the absence of any obvious natural cause of death, raises strong concerns that death has been caused by a mechanical asphyxiation. In positional asphyxia, pinning of the body and restraining may prevent proper breathing. This could for example, be caused by the person being laid on the floor and somebody compressing his back. Bleeding into the back would support this scenario.

Reay and colleagues have drawn attention to positional asphyxia in a number of papers. In one paper they state that the diagnosis of positional asphyxia should be considered when a) circumstances surrounding death indicate a body position that could interfere with respiration, b) historical information indicates difficulty in breathing or unusual physical respiratory signs such as cyanosis, gurgling, gasping or any other physical manifestations that could be interpreted as evidence of respiratory distress, c) there is absence of significant or catastrophic, anatomic pathologic changes at autopsy that would conclusively account for death, including such catastrophic events as intracerebral haemorrhage or ruptured myocardial infarct and d) clearly toxic or fatal levels of drugs or chemicals that are ordinarily incompatible with life (including carbon-monoxide, signs of lethal levels of therapeutic and abused drugs) are absent from body fluids. In my opinion factors a, b, c and d are present or cannot be excluded in this case and mechanical asphyxiation due to positional asphyxia must be strongly considered and the findings support such a diagnosis. (Reference 2 and 3).

Death solely attributable to superficial soft tissue injuries have also been described where people have been beaten without any obvious trauma to the major organs.



Careful dissection of the soft tissues is therefore important if this diagnosis is to be excluded. (References 4 and 5).

### Conclusions

In conclusion this person was taken into custody in a fit and healthy state. There was no significant natural disease present at autopsy to account for death. The conclusions drawn from the original autopsy investigations do not support natural disease. There is a description of an injury having been sustained by Aydin Kismer, which is not recorded in the autopsy report, namely the occipital laceration. This is a substantial injury which must have been present at autopsy five days later, as a healing injury. This raises questions about how thorough the first autopsy was.

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## Medicolegal Investigation of Death in Custody: A Postmortem Procedure for Detection of Blunt Force Injuries

Jehuda Hiss, M.D., and Tzipi Kahana, M.A., M.Sc.

Death in custody frequently raises suspicion of ill-treatment on the part of the custodians. The meticulous postmortem search for evidence of injury is the paramount consideration in objective investigation. Detection and evaluation of hidden subcutaneous hemorrhages facilitates reconstruction of antemortem circumstances. We describe a new postmortem technique for accurate examination of the subcutaneous tissues utilizing a simple X-shaped incision of the back and limbs and reflecting the skin. This technique leaves no noticeable disfigurement.

**Key Words:** Death in custody—Contusions—X-shaped postmortem incision.

The medicolegal investigation of death in custody requires precise and detailed examination. In such cases, ill-treatment or the application of undue force is often suspected; thus a meticulous autopsy is indispensable to the inquiry.

When the circumstances surrounding a fatal incident are unclear, the mandate of the medicolegal system requires that an investigation be made to determine whether an act on the part of the custodians or other inmates may have led to or contributed to the death (1).

Because of the uprising against the Israeli occupation of the West Bank and the Gaza Strip in 1987 (2), the death of any Palestinian detained by the Israelis generates local and worldwide accusations of torture and abuse by the military and civilian authorities responsible for the detention (3).

At the L. Greenberg Institute of Forensic Medicine, where all forensic necropsies of cases from both Israel and the occupied territories are performed, an additional step has been added to the standard postmortem procedure. This modification aids in the detection and evaluation of possible contusions that are not apparent to the naked eye.

Although hidden subcutaneous hemorrhages are usually neither the cause of nor even a contributory factor in death (4), they may be indicative of the circumstances surrounding the fatal event (e.g., possible handcuffing, signs of pressure on back and limbs, petechiae around almost invisible needle marks, electrocution-induced hyperemia [5], and other mechanical injuries). Their detection, therefore, allows us to reach a correct determination for the manner of death.

The plasticity and elasticity of the dermis enables a blunt force to injure underlying organs without damaging the skin (6), so that the absence of external trauma does not preclude the presence of deeper injury. This masking is exacerbated in young victims, in individuals of dark complexion, and in the presence of protective clothing (7-9).

From the L. Greenberg Institute of Forensic Medicine, Tel Aviv, Israel.

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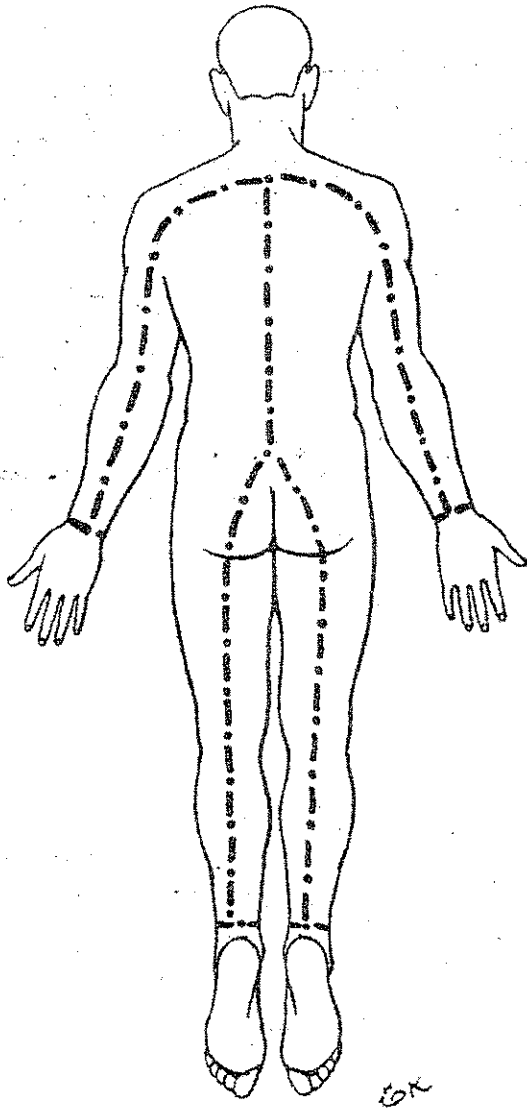


FIG. 1. Elongated X-shape incision of the back and limbs (note circumferential incisions on wrists and ankles).

Our customary postmortem external examination includes thorough inspection of clothing; careful removal of garments, gags, ligatures, and bindings (10); total body (or not less than the limbs) radiographs; close-up still photographs and continuous video recording. Following these steps, we reflect all the skin of the head, trunk, and limbs to expose the underlying subcutaneous tissue and skeletal muscles because documentation of contusions is of paramount importance in reconstructing the circumstances of a custodial death.

Removal of the skin is accomplished by incising

an elongated X-shaped cut (Fig. 1) on the dorsal surface of the body. This is in addition to the customary Y-shaped incision on the body's anterior surface and a coronal incision on the cranium (11). The X-shaped incision enables the simple and direct examination of the subcutaneous tissue without leaving any noticeably disfiguring marks on the body (Fig. 2).

#### MATERIALS AND METHODS

After removal of the brain using the standard coronal incision and lifting the calvarium (12), we recommend that the body be placed face down and the back incised in the midline. This constitutes the midpart of the elongated X-shaped cut, extending from the protuberance of the 7th cervical vertebra downward to the buttocks. The upper branches of the X are formed by continuing the incision above the shoulders through the posterior aspect of the upper limbs. The lower branches bifurcate from the midline along the posterior surface of the leg all the way down to the ankles (see Fig. 1).

The tissue from the back and shoulders should be dissected as far laterally as possible to enable good exposure beneath. To reflect the skin from the limbs, additional circular incisions are cut around the ankles and wrists and the skin is peeled sideways and upward. Once the subcutaneous tissue of the posterior aspect of the back and the whole circumference of the limbs have been thoroughly examined and documented, the skin is replaced and the incisions sutured prior to rolling the body onto its back.

The customary Y-shaped incision is then performed and the skin of the anterior surface of the trunk is retracted.

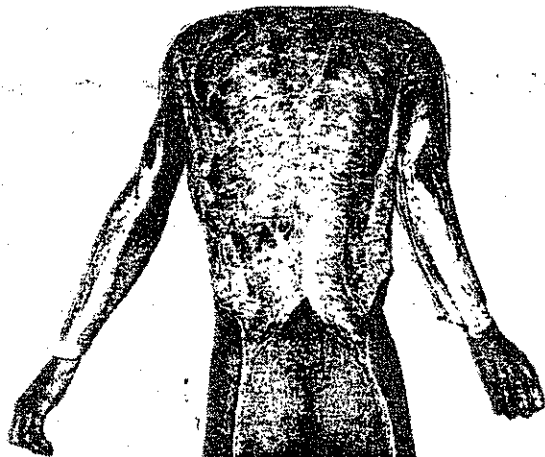


FIG. 2. Skin reflected from the back and upper limbs with exposure of the underlying muscles.

TABLE 1. Rectified manner of death after identification of hidden subcutaneous trauma

Case	Preliminary manner of death	Cause of death	Hidden injuries	Probable mechanism of hidden injuries	Rectified manner of death
1	Natural	Atherosclerotic heart disease	Bilateral hemorrhage of masseters and temporal muscles	Forceful grip of face (no CPR performed)	Undetermined
2	Accidental (fall)	Hemorrhage from lacerated intestine	Pattern bruising of abdominal muscles	Direct blunt trauma	Homicide
3	Accidental (fall)	Lacerated Berry aneurysm	Scattered hemorrhages of sternomastoid and trapezius muscles	Blows to back and neck	Homicide
4	Accidental	Traumatic asphyxia	Subcutaneous contusions of feet and hands	Restrain of limbs	Undetermined
5	Suicide	Asphyxia by hanging	Bruises of wrists and ankle muscles	Hands cuffing and feet bounding	Undetermined

## ILLUSTRATIVE CASES

In five cases listed in Table 1, reflection of the skin from the neck, trunk, and extremities enabled us to determine the correct manner of death which otherwise would have not been apparent.

In cases 2 and 3 alleged accidental deaths in custody due to unintentional falls from heights turned out to be homicides after hidden subcutaneous hemorrhages not compatible with fortuitous drops were detected in the neck, back, and shin. Further investigation into the cases revealed that both prisoners succumbed to injuries inflicted by other inmates.

In cases 1, 4, and 5 subcutaneous findings following skin reflection compelled us to revise the preliminary manner of death to "undetermined," thus inducing further investigation into their demise.

## CONCLUSIONS

The investigation of occult or ambiguous conclusions is accomplished by carefully reflecting all the skin from the body except on hands and feet, which are radiographed in full extension, using low exposure settings to detect subcutaneous hemorrhages. Vertical incisions through the skin into deeper planes implemented by forensic experts (9) fail to reveal traumatic changes located opposite to the dissection lines.

Bloody discoloration of the muscles in the lumbar area should not be confused with contusions; these discolorations are produced by the settling of the blood in the dependent area when the body has been positioned on its back for more than 12 h. Histological samples should be collected from every suspicious looking mark to substantiate antemortem injuries.

The search for potential injuries by means of ultraviolet illumination (13) should not preclude di-

rect examination and documentation with regard to the subcutaneous tissue.

The recommended additional incision is unobtrusive and does not mutilate the body. We advocate the implementation of this policy of reflecting the skin from the back and limbs by using the additional X-shaped incision in the postmortem examination of all deaths in custody or of any case in which reconstruction of the circumstances is the first imperative of a full and thorough investigation (14).

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## Positional Asphyxia During Law Enforcement Transport

Donald T. Reay, M.D., Corinne L. Fligner, M.D.,  
Allan D. Stilwell, M.D., and Judy Arnold

Three cases of positional asphyxia are described that occurred while victims were in a prone position in rear compartments of police patrol cars. These deaths are attributed to positional asphyxia. Autopsy findings and specific scene and circumstantial correlations of the investigation are discussed with emphasis placed on the limitations of interpretation of the anatomic changes at autopsy.

**Key Words:** Asphyxia—Hog-tied restraint—Positional asphyxia—Death in custody.

We have previously reported our concerns about the deleterious physiologic effects of a restraint maneuver that employs a "hog-tied" prone position (1). This method is commonly employed by law enforcement to incapacitate a suspect and occasionally is used during transport. We have had occasion to study three deaths where this method of restraint was employed by law enforcement while transporting suspects. Autopsy findings in these deaths did not demonstrate anatomic or toxicologic findings sufficient to explain death. Additionally, historical information indicated that the victims were thought to be alive at the time they were placed in the rear seat of police vehicles. Following several minutes of transport, the suspects became quiet and inactive. When they arrived at their destination, it was not immediately determined that each was experiencing respiratory difficulty although each remained motionless. After a few minutes, it was determined that the victims were not breathing and the alarm of a cardiac arrest was sounded. All three deaths are strikingly similar in circumstances and findings. Because of this, we reason that deaths in each instance were the result of adverse physiologic effects created by a semiprone and hog-tied position in a confined space. We report these deaths to alert law enforcement agencies to the potential consequences of this restraint during transport and to share with other death investigators the critical importance of historical information and the mechanics of events necessary to understand this type of respiratory death.

### CASE REPORTS

#### Case 1

The first victim was a 28-year-old white man who, 4 years prior to his death, had been seen for a nonclassified psychiatric illness for which psy-

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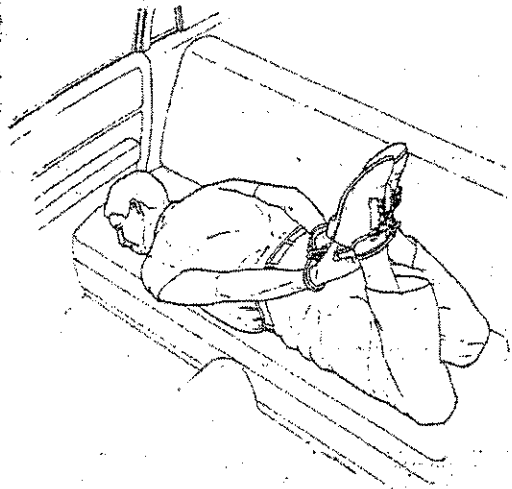


FIG. 1. A sketch of the resting position of the first victim during transport to hospital.

chotropic medications had been prescribed, leading to improvement in his behavior. One month prior to his death, he became more agitated and was again seen for psychiatric evaluation. He was diagnosed as manic depressive. All medications were stopped and he was started on lithium therapy. On the day of his death in the early morning hours, the victim became extremely agitated, and assaulted and threatened to kill his wife. His mother-in-law intervened, but was choked and escaped to a neighbor's house and called for police assistance. Two officers responded to the scene where a violent confrontation ensued. One police officer was choked. The victim was forced to release his hold only after the officer's partner struck him with a nightstick and choked him. The victim subsequently ran from his house and was cornered in the yard when he became trapped between dense bramble bushes and the front end of a law enforcement patrol car. Once cornered, he was overpowered by several police officers who placed him facedown on the ground and handcuffed him in a hog-tied fashion. Flexcuffs immobilized the ankles while handcuffs were used on the wrists. During the restraining maneuver, he continued to resist; once subdued, he became more relaxed, but was still responsive. At no time was it witnessed that a neck hold was applied during the restraining maneuver. The victim was then loaded onto the rear seat of a mid-sized patrol sedan for transport (Fig. 1).

Because of the two nightstick blows to the head that caused lacerations and bleeding, and because of multiple scratches over the body surface sus-

tained when the victim contacted the bramble bushes, a police officer was directed to rush the victim to a local hospital. A high-speed transit ensued that was estimated to have taken 5-7 min. The victim, although not monitored during this period of time, did not show noticeable activity.

Upon arrival at the emergency room, he remained prone when he was removed from the vehicle and transferred to an emergency room stretcher. Nursing personnel reported a faint, slow carotid pulse and spontaneous respirations, but the emergency room physician who saw him within a minute of arrival reported no respiration, poor facial color, and no blood pressure. Restraints were removed and the victim was placed on his back. Vital signs and cardiac telemetry demonstrated cardiopulmonary arrest with asystole. Resuscitation was initiated, which resulted in ventricular fibrillation, eventually converting to a sinus tachycardia. Administration of lidocaine and a dopamine drip resulted in maintenance of this rhythm with a blood pressure of 90-100 mm Hg. His blood lithium levels sampled during this period were determined to be subtherapeutic. The victim remained totally unresponsive during this period, with fixed and dilated pupils. Because there was concern that he might have a head injury, he was transferred to a larger medical center in a comatose, unresponsive condition and was admitted with a diagnosis of anoxic encephalopathy. Cerebral flow studies showed no perfusion and his condition rapidly deteriorated. He died 5 h after admission. The autopsy was performed 68 h after death.

The body at the time of autopsy measured 73 in. (1.85 m) in length and weighed 267 lb (121.36 kg). A noteworthy feature was the abundant abdominal panniculus. A proper assessment of the body habitus was limited because of early postmortem gas distention of soft tissues along with early skin slippage, the result of inadequate refrigeration. The surface examination of the body showed multiple bruises of the extremities and back and there were two gaping lacerations of the occipitoparietal scalp. In addition, multiple scratches were present over the surface of the extremities. All of these findings corroborated the historical information that this man had been struck with nightsticks and had become entangled in bramble bushes. Other noteworthy findings at the time of autopsy included a few petechial hemorrhages in the conjunctiva of the right upper eyelid with a single flame-shaped hemorrhage in the inner canthus of the left lower eyelid. Internal examination showed that there was no injury to the cranial cavity and brain except for subga-

leal hemorrhages attributed to impacts to the head. The brain further demonstrated some features suggestive of cerebral edema. Layered dissection of the neck was essentially free of any injury except for a small 1.3 cm area of bruising in one submandibular gland. There was mild to moderate focal coronary arteriosclerosis and a heart weight of 415 g. Moderate fatty change of the liver was likewise noted.

Toxicologic examination of antemortem blood showed the presence of 0.2 mEq/L of lithium (therapeutic level, 0.8–1.2 mEq/L). Lidocaine and caffeine were also detected, but no other drugs were demonstrated. Death was attributed to positional asphyxia.

#### Case 2

The second victim was a 28-year-old healthy white man who was house-sitting and drinking beer with his brother most of one afternoon. A small group of men arrived and tried to enter the house. A verbal confrontation took place and the group left. Later, the brothers went out to their van for a trip to the store for more beer. They noticed their van had been tampered with and began shouting at each other about the problem. Neighbors assumed they were fighting and called police.

Two police officers arrived and tried to calm the brothers and get them to go into their house. During this time, a records search found outstanding traffic warrants on the victim. The victim would not quiet down and became increasingly agitated. When faced with the option of going into the house or being arrested, he ran. A pursuit and struggle ensued. He was struck several times with nightsticks, once to the head. After the victim was partially subdued prone on the ground, a witness to the event ran out had held the victim's legs. Several officers arrived to help restrain and hog tie the victim. The witness heard the victim say during the struggle on the ground "gimme some air, gimme some air." The pursuit and struggle lasted ~7 min. There is no evidence that a neck hold was used at any time during the confrontation.

When the victim was at last restrained, and while still resisting and complaining, he was placed in a prone position in the back of a patrol car on a narrow, molded plastic, one-piece seat. The transporting officer left as soon as the victim was in the car. An officer at the scene called for an aid unit to meet them at the jail in order to treat the head injury.

While en route to the jail, the victim slipped down and became wedged between the front and back

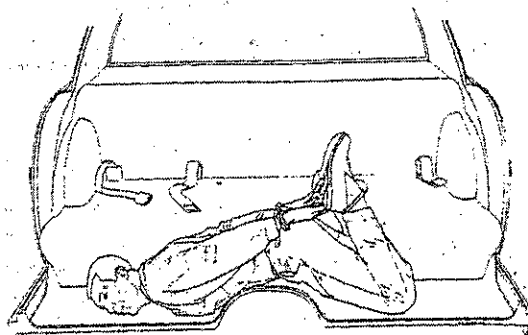


FIG. 2. A sketch of the final resting position of the second victim on the floor of the police vehicle used for transport to hospital.

seats with his left shoulder partway up the back of the front seat and his right shoulder against the bottom panel and foot well of the back seat (Fig 2). The transporting officer recalled that the victim had been "rustling" around a little bit and that his breathing had been raspy. About 3 min later, his breathing was "gurgly" and the transporting officer called a Code 3 upgrade to paramedics. Medics arrived at the jail about the same time as the officer and victim. Approximately 4 min had elapsed during the trip from the scene to the jail. The victim was unresponsive when removed from the patrol car. Despite all efforts, he never regained any vital signs. He was pronounced dead 26 min after CPR had been initiated.

At autopsy, the body measured 70 in. (1.78 m) and weighed 220 lb (99 kg). Deep neck muscle hemorrhage was present adjacent to the left carotid artery and structures of the neck. There was some vomitus in the airway. Other injuries included laceration and contusion to the right parietal scalp attributed to a nightstick blow. Other abrasions and soft tissue contusions to the body surface and extremities were also present and attributed to multiple nightstick blows. Also noted were minor circumferential abrasions and contusions to both wrists and one ankle from restraints. No petechial hemorrhages of the conjunctivae were noted. Findings in all thoracic and abdominal organs were within normal limits without significant anatomic change to account for death.

Toxicologic tests found a blood alcohol level of 0.12 g/100 ml, LSD blood level of 3.2 ng/ml, THC blood level of 4.1 ng/ml, and THC blood metabolite level of 108 ng/ml. No other drugs or chemical findings of note were present. Death was attributed to positional asphyxia.



FIG. 3. Arresting officer demonstrating approximate position of decedent in back seat of patrol car. Note that the lower portion of the body still remains on the seat. The legs have not been tied and flexed as occurred during the actual transport of the victim.

### Case 3

The third victim was a 34-year-old black man with a long psychiatric history of undifferentiated schizophrenia, who had stopped taking his medication on his own sometime prior to the described incident. On the day of his death, he began to show bizarre behavior in the home of his grandmother, including wandering about talking to himself and sticking his head in an oven and attempting to turn on the gas. The grandmother called the police. The victim apparently became quite agitated upon the arrival of the police officer and a verbal confrontation, followed shortly thereafter by a physical confrontation, took place. A backup patrol car was summoned. A scuffle took place inside the grandmother's home with one police officer admitting to several fistful blows to the decedent's chest and abdomen, but not to use of a baton or a neck hold. The victim was wrestled to the ground, whereupon his arms were placed behind his back, two sets of handcuffs were applied, and leg straps were placed around his ankles. He was taken to the waiting patrol car and placed into the back seat with his head, shoulders, and chest in the foot well behind the driver's seat and his right flank over the drive shaft compartment. His legs were in a flexed position on the rear bench seat behind the front passenger seat (Fig. 3). The arresting officer got in the back and rode with the victim to the city jail, which was ~5-7 min away. The officer stated that the victim became unresponsive, but nothing was noted to be wrong until their arrival at the receiving dock at the city jail, at which time the arresting officer said to his partner, "I think he's dead." The victim was removed from

the vehicle and emergency response personnel pronounced him dead at the scene.

Upon the arrival of the Medical Examiner (A.D.S.) at the scene, the deceased was lying on his side on the concrete floor with his hands cuffed behind his back by two sets of handcuffs. The legs were tied together at the ankles. The body was immediately removed for a postmortem examination.

At postmortem examination, the body measured 68 in. (1.73 m) in length and weighed 150 lb (67.5 kg). Insignificant injury to the head consisted of two small abrasions to the skin of the left side of the face and a small abrasion of the right side of the nose. Two minor contusions of the scalp were noted. Petechiae were noted in both eyes and on the pleural surfaces of both lungs. No abnormalities other than congestion were noted. Complete microscopic examination showed no histologic abnormalities. Results of toxicologic analysis of body fluids including vitreous fluid were within normal postmortem limits. Death was attributed to positional asphyxia.

### AUTOPSY FINDINGS AND PHYSIOLOGIC CONSIDERATIONS

The conclusions drawn from these investigations were based primarily on the reconstruction of events surrounding each death. Complete detailed autopsies showed limited findings that did not enable any anatomic cause of death to be established. In two of the victims, cutaneous injuries were compatible with impacts by nightsticks. There were scattered bruises over the bodies and lacerations of the scalp. In the first victim, considerable attention was given to the neck dissection since conjunctival petechial hemorrhages were present and there was evidence that the victim had been choked early in the confrontation. However, historical accounts of the choking episode indicate that it occurred 15-20 min before the victim was subdued. Multiple witnesses denied that choking occurred during the "take-down" and placement of restraints. Additionally, the victim had received vigorous chest compression during resuscitation. The second victim had no physical or historical evidence of cervical compression. Conjunctivae were congested, but free of petechiae. Neck compression, although considered to have been possible, could not be supported by historical accounts of witnesses. Hemorrhage in the soft tissues of the left side of the neck was probably impact injury from a nightstick. The third victim showed minimal cutaneous abrasions, but did show



conjunctival petechiae. Again no cervical injuries were present and no historical information to suggest choking was elicited. The presence of conjunctival petechiae appears to have resulted from the head placed at a lower level than the rest of the body. This would increase venous pressure in the head and promote petechiae. In all three victims, no significant natural disease process was present that could account for an independent "cardiac event."

Toxicologic analyses of the body fluids of two of the victims demonstrated subtherapeutic levels of lithium in one, while in the other there was evidence of alcohol, LSD, and THC. These findings were considered significant only in that the erratic and violent behavior of those two victims had some explanation: Subtherapeutic lithium levels in the manic-depressive illness of the first victim could account for an emergence of manic behavior. In the second victim, the presence of alcohol, LSD, and THC provides a reasonable explanation for irrational, violent, and uncontrollable behavior. In these two instances, toxicologic findings shed some light on the decedents' behavior, but do not explain their deaths.

Positional asphyxia occurs when the position of the body interferes with respiration, resulting in asphyxia. The deleterious positional effect may result either from interference with the muscular or mechanical component of respiration, from compromise of the airway, or from some combination of these. In addition, in all cases of positional asphyxia, one or more contributory factors provide an explanation for the inability of the victim to correct the deleterious and potentially lethal position, for example, alcohol/drug intoxication, concussive head injury, entrapment, restraint, or physical disability. In our view, the application of hog-tied-type restraints and subsequent positioning of the victim in a confined space are the critical factors that led to the respiratory compromise that caused these men's deaths. Hence, all three men died as a result of *positional asphyxia*. This conclusion is drawn from the totality of the investigation and depends on historical information and reconstruction of events. These deaths can only be properly evaluated with knowledge of the dynamics of the events preceding and surrounding death. In the first victim, obesity with a large abdominal panniculus interfered with respiration in the prone position in a confined space, whereas, in the other two deaths, mechanical displacement of the abdomen by the convex contour of the floor and the edge of the car seat accounted for loss of effective diaphragmatic

excursions of respiration. In each instance, the final fatal event was hypoxia.

## DISCUSSION

Respiration depends on three critical elements: the gas exchange function of the lungs, the patency of the airway, and the muscular pump or bellows that ventilates the lungs. All three are vital to life. The parenchyma of the lung, if severely diseased or damaged by injury, results in failure of the gas exchange function and hypoxemia. If the airway is obstructed at any level, a similar consequence will ensue. The same result occurs in pump or bellows failure where the lung may be healthy and the airway patent, but the mechanical muscular bellows of the chest fails. Pathologic causes of respiratory bellows failure are detailed in the medical literature, but respiratory failure attributed to adverse body positioning has not been scrutinized (2). The three deaths in this report are the result of disturbed physiology because of failure of the respiratory bellows produced by an adverse position in a confined space.

The respiratory bellows or pump depends upon the output drive of central nervous respiratory centers that control respiratory muscle activity. This neural impulse center may not be capable of responding to oxygen demand. Such failure occurs when these respiratory centers are chemically depressed as in drug intoxications, for example with barbiturates or opiates. In these instances, the central nervous system drive is attenuated or dampened and fails to respond to biochemical demands of the body. Unless life is artificially supported, death occurs rapidly. Since the higher centers of cerebration are also affected by drug intoxication, the intoxicated person may be unaware of impending death. Only careful blood-gas monitoring and artificial support of respiration can overcome the deficits in central nervous system drive to maintain respiration and life.

Failure of the bellows or the pump function of respiration can result from a mechanical abnormality of the thorax that impedes a proper bellows action. A flail chest or severe chest deformity can cause bellows failure and, ultimately, respiratory failure and death. A nonfunctioning or poorly synchronized respiratory bellows causes severe biochemical disturbances. Since such anatomic abnormalities can be readily identified, the pathophysiology leading to hypoxia, hypercapnia, and death is easily understood and generally accepted.

Bellows failure can also occur from respiratory

muscular failure. Muscles of respiration may be unable to contract and generate the motion of respiration even though the central nervous system drive is functioning and the thorax is structurally intact. Physiologic inspiratory muscle fatigue can occur (3). The exact cause of inspiratory muscle fatigue has yet to be clearly defined, but there are other recognizable clinical conditions such as myasthenia gravis and other neuromuscular disorders causing muscle dysfunction, in which respiratory muscle fatigue results in hypercapnia and its attendant biochemical consequences (4). This is rarely a cause of sudden death, since the process, although insidious, is generally clinically recognizable and treatable. There is an additional cause of bellows failure that has not been cited in the clinical or forensic literature, but is illustrated in the three deaths that form the basis of this report. Here the restrained position of the victims in a confined space creates a circumstance for bellows restriction and failure. The chest wall depends on the interaction of the diaphragm with the musculature both of the rib cage and the abdomen. Breathing takes place by displacement of either the abdomen or the rib cage (5). The total volume displaced in the abdomen by the rib cage bellows action is the total volume of change produced during inspiration in the lungs. When the muscle of the diaphragm contracts, the dome of the diaphragm displaces abdominal viscera downward. Muscles of the diaphragm, in addition to displacing abdominal contents, also act on the costal attachments to lift the rib cage in a respiratory movement. Contraction of the intercostal muscles during inspiration expands the rib cage. If inspiration depends totally on the intercostal and neck muscles of the neck, as when the phrenic nerve is severed and the diaphragm is paralyzed, the bellows action of the thorax displaces the abdomen inward so that abdominal volume is displaced upward and reduced. Any increase in the lung volume is offset by abdominal displacement due to inward volume change. Roussos and Macklem detailed these observations in their report on respiratory muscles, an excellent review of respiratory muscle physiology to which the reader is referred (6). In the normal supine person, breathing is primarily the result of diaphragm muscle activity. The excursion of the chest during respiration in a prone position is the result of diaphragm muscle traction. On the other hand, a normal person in an erect position uses both the intercostal chest muscles and the diaphragm. Consider the adverse effects of the prone position in breathing, particularly where the abdominal panniculus is so large

that it displaces the abdominal volume or when the abdominal volume is displaced by an object. The consequence is that the effective abdominal excursions produced by contraction of the diaphragm are reduced and the tidal volume of respiration is substantially reduced. If uncorrected, this leads to hypercapnia and hypoxemia.

Roussos and Macklem point out that, as the work of breathing becomes very difficult, many muscles in the arms and trunk and neck are recruited and contribute to the total oxygen utilization of breathing. The specific role of the hog-tied restraint posture and its biochemical effects on those muscles is unclear at this time, although it is obvious that any restraint that prevents a change of position could restrict breathing further by preventing those muscles from assisting in respiration.

Another, more ill-defined, factor that is likely to augment respiratory muscle fatigue is related to prior violent muscular activity. Weakness of muscles due to hypercatabolic states occurs with sepsis or when long surgical procedures cause increased energy demands (7). During the violent confrontations that ensued in these instances that we report, the expenditure of muscular energy by each victim was probably substantial. Energy that is expended by the contractile muscle machinery of the body is subtracted from the respiratory muscle needs. Muscle fatigue may induce the central nervous system to shunt energy to contracting muscles. A deficit in energy supply to respiratory muscles can influence their performance. A decrease in chemical energy supply to respiratory muscles will hasten their failure as well as the failure of other muscle groups (8). All three victims were rendered more vulnerable to respiratory muscle fatigue through deficits of energy created by violent muscle activity before they were placed in their final restrained positions.

#### OTHER CONSIDERATIONS

The diagnosis of positional asphyxia should be considered when (a) circumstances surrounding death indicate a body position that could interfere with respiration; (b) historical information indicates "difficulty in breathing" or unusual physical respiratory signs such as cyanosis, gurgling, gasping, or any other physical manifestations that could be interpreted as evidence of respiratory distress; (c) there is absence of significant or catastrophic anatomic pathologic changes at autopsy that would conclusively account for death, including such catastrophic events as intracerebral hemorrhage or ruptured myocardial infarct; and (d) clearly toxic or



fatal levels of drugs or chemicals that are ordinarily incompatible with life (including carbon monoxide, cyanide, and lethal levels of therapeutic and abused drugs) are absent from body fluids.

During the evaluation of deaths such as those reported here, sudden cardiac death without pathomorphologic changes must be considered. A relationship between stress and death is known to exist, but there is a dearth of factual data because of the unpredictability and suddenness of such deaths (9). Certainly primary sudden cardiac death without pathomorphologic changes is a well-recognized entity. However, in view of the pathophysiology of the respiratory disturbance created by respiratory restriction, it is likely that any fatal cardiac event would be precipitated by the adverse respiratory physiology produced by respiratory restriction. Since it is known that biobehavioral stresses can augment cardiac susceptibility to ventricular fibrillation (10), one might contend that these deaths were caused by a malignant ventricular arrhythmia triggered by the psychological events and is unrelated to and independent of the position of the victim. Ventricular fibrillation has been reported spontaneously and has been triggered by psychiatric interviews, by stressful emotions, and during REM sleep stages (11). However, recognizing that biobehavioral factors predispose to sudden cardiac death does not allow for the conclusion that the deaths reported here are the result of such factors. There are no pathomorphologic changes that enable differentiation between death induced by psychobehavioral factors and the pathophysiologic disturbance created by body position. Until such time as we have a means of differentiating between these two physiologic events, it is our view that the best explanation for such deaths is positional asphyxia, which is supported by circumstantial events.

Another possible cause of death that needs to be considered, especially when sudden death occurs in psychiatric patients, is the so-called neuroleptic malignant syndrome (NMS). In the late 1800s, the diagnosis of "acute exhaustive mania" was given to sudden death of psychotic patients from apparently natural but undetermined cause. This condition is poorly understood and may be related to a "cardiac event" due to psychological stress as described above. NMS is a hyperpyretic syndrome that is frequently fatal and occurs in people who are taking antipsychotic agents, which include phenothiazines, butyrophenones, thioxanthenes, and other drugs (12). A drug's potential for inducing this syndrome appears to parallel its antidopaminergic potency. Additional predisposing factors include physical exhaustion, dehydration, organic

brain disease, and the use of long-acting depot neuroleptics (13). Classic features of NMS are hyperthermia, hypotonicity of skeletal muscles, and fluctuating consciousness along with instability of the autonomic nervous system. NMS has been seen in psychiatric and medical patients given neuroleptic drugs and is not related to previous exposure to the drug or to toxic overdoses. However, NMS may also occur in the absence of the administration of neuroleptic type drugs and appears to be indistinguishable from the poorly understood "acute exhaustive mania" described prior to use of neuroleptics (14). Sudden phenothiazine-related deaths that lack the other distinguishing features seen in the typical NMS death have also been described (15). A history of neuroleptic drug use or the other clinical features of NMS in an unexpected death might suggest that this syndrome is the most likely cause of death. Because neither NMS nor positional asphyxia show definitive pathologic/toxicologic findings, positional asphyxia and neuroleptic malignant syndrome are not mutually exclusive and may coexist. Each death must be investigated not only by examining the morphologic features at autopsy and the toxicologic results, but also by evaluating the victim's medical history in conjunction with the scene and circumstances surrounding death. Without a consideration of all these factors, it is likely that some deaths due to positional asphyxia will go unrecognized.

There will be deaths, particularly those where cocaine, methamphetamine, and high levels of alcohol are present, in which it becomes tempting to assign the cause of death solely to these intoxicants, and to ignore or discount the final position in which the victim was found dead. In a previous report on cocaine deaths, Wetli and Fishbain (16) cite instances where victims were found dead in the back seat of police cars and in other unusual circumstances where there was the potential for the position of the body to adversely affect respiration. Whether any of these deaths had an unrecognized pathologic respiratory contribution because of body position is unknown. Such assessments must take into account the total death investigation and not focus on anatomic findings and toxicologic values without due consideration of the resting position of the victim.

The same dilemma occurs in deaths where significant, but not necessarily fatal, natural disease exists. Finding advanced coronary artery disease, cirrhosis, and even diabetic ketoacidosis in a person who is restrained in a position that can compromise respiration may tempt the death investigator to attribute death solely to the natural disease process and discount any contribution to death by the po-

tion of the body. Again, we do not know of a clear or direct way to settle such issues. Because the positional asphyxia diagnosis is primarily based on scene and historical information, it is not often an unequivocal diagnosis in any given death investigation. Nevertheless, our view is that positional asphyxia should be seriously considered whenever unusual positional stress has been placed on respiration. Until postmortem methods are developed to better assess physiologic disturbances, the ultimate judgment will be in the hands of the examining pathologist. Because of the complexity of the issues involved, there certainly will be a spectrum of opinions and no clear answer. The ultimate and difficult assessment as to cause of death is in the hands of the certifying physician who is left to make a judgment that incorporates the bias and prejudice inherent in each of us, but is also based on the important principle of forensic pathology which requires that each death be evaluated using all available information, especially historical and scene investigative material, rather than relying solely on anatomic-toxicologic information. □

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## The Perils of Investigating and Certifying Deaths in Police Custody

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Procedures leading to the proper investigation and certification of deaths occurring in police custody are discussed. The importance of training and experience, of interchange of information between investigator and forensic pathologist, and of common sense in the pursuit of fairness toward this end is emphasized.

**Key Words:** Death in custody—Asphyxia—Choke hold—Death certification.

This article provides additional comment on the report "Positional asphyxia during law enforcement transport," by Reay et al. (1), which concerns itself with a number of fundamental and complex issues pertaining to deaths in police custody. We present here a brief discussion of certain investigative and certification parameters from that perilous, never-never land of deaths, many of which occur by asphyxial means. We use the term "perilous" because in our specialty, there is no more slippery slope than deaths in custody. Justice must be served, and served fairly, first and foremost. Judgments made have legal ramifications and are often rendered without recourse to legitimate second opinions. Political fallout may result, regardless of the conclusions reached.

An integral aspect of forensic pathology is the correlation between the circumstances of death and the pathologic and toxicologic findings of the post-mortem examination. Deaths in police custody often demonstrate even less pathologic evidence than is the case with most violent asphyxial fatalities and, consequently, with fewer anatomic findings, circumstantial, historical, and scene investigative information becomes of the utmost importance. In addition, one must constantly guard against confusing a finding with the cause of death. None of the findings commonly associated with asphyxia are diagnostic of the condition, and findings commonly associated with asphyxia are found in other medical-legal situations, as is discussed in the article by Reay et al. Not all trauma to the neck represents asphyxial compression, and not all conjunctival/facial petechial hemorrhages represent signs of asphyxia.

In asphyxial deaths in general, and custody deaths in particular, the pathology is often less important than are the investigative circumstances. In turn, both the pathologic evidence and the circumstances must be evaluated within the framework of, to par-

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phrase Dr. Lester Adelson, "that most precious (and all too uncommon) of human attributes, common sense."

If the investigative circumstances are so important, how can we best insure their validity? First, the forensic pathologist must advise the case investigators regarding the type, specificity, and extent of information that will be required to serve as a situational template against which subsequently identified pathologic and toxicologic findings can be assessed. A step-by-step, freeze-frame, specific sequential scenario of the confrontation(s) between law enforcement and the person being detained must be developed. For obvious reasons, this should be accomplished as soon after the event as is practical, with participants sequestered for questioning. It is essential that all witnesses and participants understand the importance of developing reliable information—information that, because it emanates independently from different sources, can be shown to be reproducible and to represent what is likely to have happened. Once there has been an opportunity for scenarios to have been orchestrated, even if no orchestration has taken place, the issue is, if not lost, significantly complicated. In this regard, access to pathologic and toxicologic findings and their interpretation will have to be carefully controlled until after the circumstantial investigation is completed.

Types of questions that should be explored relative to law enforcement involvement include those regarding extent and type of neck compression (if any was employed), sequence of holds applied, position of the person being restrained, location of each participant during each phase of the event, and restraint devices used and when sequentially employed. Regarding the victim, information to be elicited should include a step-by-step reconstruction of purposeful activity, injury sustained or observed, focalization, if any, time when resistance ceased, time of onset of unconsciousness, and time of emergency medical intervention. The observations and findings of emergency medical personnel are often useful in documenting time-line benchmark observations such as vital signs, cardiac rhythm disturbances, and therapeutic procedures, which are useful in identifying and explaining artifacts of attempted resuscitation.

Certification of custody fatalities must necessarily be delayed until the investigation has been completed. The importance of exercising caution in describing a cause of death based primarily on positive pathologic and/or toxicologic findings noted at the postmortem examination (for example, cor-

onary atherosclerosis, fatty metamorphosis/cirrhosis of the liver, positive blood alcohol or cocaine levels) should be emphasized. In addition, an array of conditions—stress- or fright-related cardiac rhythm disturbances, coronary artery spasm, and acute exhaustive mania/neuroleptic malignant syndrome, for example—are associated with sudden death where no significant pathology is found. Proper certification absolutely requires a free exchange of situational data and their synthesis with circumstantial and other forensic information.

If, for one reason or another, a definitive conclusion regarding cause of death is not achievable, the case can be certified by a situational paragraph that describes the known scenario of events. This is far preferable to listing findings—aspiration of gastric contents, cerebral edema, or cardiac arrest, for example—that may have little or nothing to do with cause of death or that simply avoid the issue altogether. A situational statement might include the following: "Cardiac arrhythmia while being restrained by police, following arrest for [whatever criminal charge]. Recent use of [drug recovered]."

Classifying manner of death can be similarly problematical. However, it seems to us that the essential element here is that the certifier understand what is meant by the particular classification that has been selected. It was not until the 1980s that, because of reports of deaths resulting from neck holds employed by law enforcement officers for restraining purposes, further characterized by Reay and Eisele (2) and Reay and Holloway (3), that police agencies came to recognize the risk to the victim of neck restraint holds and to amend their training procedures accordingly. The potential lethality of this practice is accepted today in most jurisdictions. In that context, if the method or means used in the restraining process has been defined as representing deadly force, and death results during its application, the death is appropriately certified as a homicide. In fact, in many jurisdictions, all deaths at the hands of another person, regardless of circumstance, are classified in this fashion. In any event, if a custody death is classified as a homicide, intent would not necessarily be implied in that classification.

There will be other situations where law enforcement officials would have no reason to expect that death would result from their actions. The positional asphyxia deaths described in the accompanying report by Reay et al. (1) exemplify this category, where it would be reasonable to classify deaths of this type as accidental. Finally, some custody deaths may be classified as having resulted

from undetermined circumstances, not because the circumstances are unknown (although, in some cases, gaps in available information may be sufficient to prompt this classification), but because the certifier does not believe that either "homicide" or "accident" are appropriate categories, and "undetermined circumstances" is chosen by default. There are obvious risks with the latter manner of death, as well. Regardless of classification, in many jurisdictions the circumstances and forensic scientific findings of deaths of all of the above types are presented to a grand jury or coroner's inquest for independent review. What should be emphasized here is the importance of the certifier having thought through the ramifications of the selection of manner of death and being prepared to articulate the rationale for the choice that he or she has made.

Interviews with the media should be delayed until the entire investigative process has been completed, with the reasons for a delay of this sort, which may represent days or weeks, being communicated at the initial media contact. It is important that the investigative process be seen not as a conspiracy, but as being deliberative and even-handed. When information is finally released, it should be in a thoughtful and circumspect manner and clearly stated.

There is certainly a legitimate public health component to custody fatalities, both in terms of the rate of cases per jurisdiction and the identification

of risk factors that, through modified methods of restraint or transport, may reduce the incidence of subsequent deaths. Comparison of death rates between and within jurisdictions may highlight methods of restraint that are more apt to result in death and identify law enforcement officers not well suited for confrontational situations and categories of arrestees who may be at excess risk.

In conclusion, there is no need to rush to judgment. There will be ample time to discuss the case with a trusted colleague, and we would strongly encourage such interchange. The desired end is fairness, to the law enforcement officials involved and to the victim and his or her family. We certainly do not claim to be the ultimate authority of the oracle when it comes to asphyxia-related custody deaths, but we have learned over the years the value of training and experience, the risk of underestimating the importance of common sense, and the fact that there are no easy answers in such deaths. □

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## Death Due to Superficial Soft Tissue Injuries

Kevin A. Lee, M.R.C. Path., and Kenneth Opeskin, F.R.C.P.A.

A series of deaths due to multiple superficial injuries is reported. These cases represented 5% of a consecutive homicide series in the Northern Territory of Australia. All cases were characterized by extensive superficial injuries, particularly involving soft tissue, which were present over much of the body including the face, head, arms, legs, and trunk. Upper-limb fractures were present in some cases, as were fractured ribs. The internal organs and tissues were pale, but there was either little or no organ damage. No significant volume of free blood was found in any of the body cavities. In one case, fat emboli were identified in moderate numbers in the lung and kidney. Death due to multiple superficial soft tissue injuries has not previously been characterized in the literature.

**Key Words:** Injuries, blunt—Injuries, superficial—Soft tissue.

The cases from this series originated in the Northern Territory of Australia and were autopsied by the same pathologist (K.A.L.). Some of the bodies were examined at the scene, and all were subjected to full autopsy that included a full neck and face dissection, and examination of subcutaneous tissues and muscles. The procedure involved posterior incisions from shoulder tip to heel on each side as well as on the medial border of the hand, ulnar forearm, and upper arm followed by further dissection in the deep fascial plane. Histologic examination of major organs was carried out and toxicology performed in most cases.

### CASE REPORTS

#### Case 1

##### Scene

The clothed body of a 30-year-old Aboriginal woman was found on a riverbank. The body was lying on its back with limbs straight, and had been washed after death. A little bloodstaining was present in the sand.

##### External Examination

The deceased was 165 cm tall and of a medium to heavy build. A total of 70 external injuries were present, including

Six lacerations, each up to 2.5 cm long with an associated abrasion rim on the front and sides of the forehead and face.

Five lacerations, each with abrasion, on the left side of the head, extending downwards and backwards from above the ear.

A series both of simple and complex lacerations with abrasion on the right side, vertex, and back of the head. Four areas of abrasion lay in this region.

An abrasion of the prominence of the right cheek. Deep bruising on the left cheek and along the jaw line.

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An irregular series of ~44 lacerations and abrasions on the front and outer legs from knees to ankles. The largest laceration was 2.5 cm. Nine irregular abrasions on the outer elbows and the knuckles.

*Internal Examination*

No organs showed focal trauma and no free blood was in the body cavities. All internal organs were pale, there was no evidence of sexual assault, and the only skeletal trauma involved a fracture of the distal left ulna.

*Subcutaneous Examination*

Heavy subcutaneous bruising over large areas of the body extended from the skin and underlying tissues through to muscle. Anteriorly this bruising was situated in the sternal area, the right clavicle and shoulder, the epigastrium, the front of the mid-left thigh, the front of each lower thigh, and the knees and shins. Posteriorly it was situated in a dense band extending from the region of the upper shoulder blades, down the back, across the buttocks, and down the back of the thighs, calves, and ankles. Very heavy bruises were present along the ulnar border of each forearm, from the elbow to wrist. The backs of the hands and knuckles were bruised. Bruising underlay ~28% of the body surface area (BSA).

*Old Injuries*

A series of 23 separate and mainly linear scars were on her face and head.

*Histology*

Sections of liver showed only mild fatty change consistent with alcohol abuse. Occasional fat emboli were present in lung, but multiple sections of brain and other major organs were histologically normal.

*Toxicology*

The vitreous alcohol level was 0.02 g%.

*History*

The deceased was found to have had a long history of alcoholism as well as injuries received during assaults. This particular assault was described in the assailant's statement as involving fists, feet, and a length of firewood. He changed the victim's clothes and washed the body in the river after her death.

*Case 2*

*Scene*

The naked body of a 33-year-old Aboriginal woman was found in an open area. The body was

semiprone, with the legs together. There was no blood at the scene or within any of the injuries, but there had been recent heavy rain. No weapon was found. There had been no attempt at concealment.

*External Examination*

The deceased was 164 cm tall and weighed 50 kg. A total of 19 external injuries were identified, including

Four lacerations up to 7.2 cm in length in the parietal, occipital, and vertex areas.

Irregular abrasions over the temples and cheek.

Irregular abrasions and superficial lacerations around the knees and shins.

Irregular abrasions and lacerations on the outer right shoulder, around the elbow; the midforearm, and the back of the hand; with further abrasions on the back of the fingers of each hand.

*Internal Examination*

There was no gross evidence of intracranial or chest trauma. The only abdominal trauma involved the spleen (150 g), which had old adhesions of the convexity with related fresh superficial lacerations. These were surrounded by a thin film of blood. All internal organs showed moderate pallor. There was no evidence of sexual assault. The skeletal system had a number of fractures that included the mid- and distal left radius, the lower humerus, and the distal right radius and mid-ulna. There were posterolateral fractures of the lower five ribs on each side.

*Subcutaneous Examination*

Bruising was present under external scalp injuries as well as in the cheeks and temples. The front showed bruising between the breasts, in the epigastric region, and at the level of the umbilicus. Several areas of bruising were present on the front of each thigh. There were numerous irregularly rounded bruises of the upper central back, the right and left scapular areas, the left lateral hip, the buttocks, right thigh, the back of each knee, and the back of the left calf. There was extensive bruising of the forearms and hands, particularly in areas of fracture. Bruising underlay ~20% of the BSA.

*Old Injuries*

Irregular linear scars were on scalp, arm, and hip.

*Histology*

There was a minor cortical contusion of the inferior frontal lobe of the brain, and fresh hemor-

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phage of the subcapsular area of the spleen. Occasional fat emboli were present in lung, but the only other changes were myopathic changes of the myocardium, mild fatty change of the liver, and early atrophy of the brain. These changes were consistent with alcohol abuse.

#### Toxicology

The blood alcohol level was 0.207 g%.

#### History

The deceased had had multiple convictions for alcohol-related offenses. This assault was described in the assailant's statement as involving a stick. After the assault, he had cleaned up the victim and had driven her by car ~10 km, when the assault restarted, this time with a house brick and a tree branch. The total duration of the assault was given as ~1 h.

#### Case 3

##### Scene

The body was that of a 19-year-old Aboriginal woman. She was wearing light day clothing. The bra and blouse were pulled up to expose the breasts. The crime scene, examined after the autopsy, showed extensive blood spotting, but no large deposits of blood. A bloodstained claw hammer was present.

##### External Examination

The deceased was 158 cm tall and of a very light build. A total of ~36 external injuries were identified, including

A series of 16 lacerations and punctures, which were up to 6 cm long, on the head and face.

Approximately 20 small puncture wounds and abrasions on trunk and limbs, which were concentrated mainly on the back of the left upper arm and elbow, the region of the knees, and the front of the feet and ankles.

##### Internal Examination

Heavy bruising was present underlying the external scalp and facial injuries. There were no identifiable intracranial injuries, but a small depressed fracture of the medial right maxilla underlay an external injury. There was a thin film of blood in the left chest cavity, but the organs were undamaged. No trauma was identified in the abdomen, and all organs and tissues were pale. There was no evidence of sexual assault. The skeletal system had multiple fractures of the scapulae and posterolateral fractures of the left 10th and 11th ribs.

##### Subcutaneous Examination

Subcutaneous and muscle bruising was very heavy around the scapulae, and in the central back of the lower neck to the lower thoracic area. The right thigh and calf, and the left buttock, thigh, and the knee region, were extensively bruised. There was moderately extensive bruising of the back of the upper arms and elbows. Extensive bruising was present on the back of the right hand. Bruising underlay ~24% of the BSA. No bruising was present on the ulnar borders.

##### Old Injuries

A series of 24 mainly linear scars were on the scalp.

##### Histology

No evidence of trauma was identified. Moderate numbers of fat emboli were confirmed in lung and kidney with occasional emboli in brain, and the liver showed mild fatty change consistent with alcohol abuse.

##### Toxicology

The blood alcohol level was 0.02 g/100 ml.

##### History

The deceased had recently been in protective custody following threats from her husband. The assailant in this instance was her husband. He had used a claw hammer and then a mop handle and then had laid her on a bed where she stayed for the remainder of the day and that night. On the following morning, she was helped into a car and died after it had traveled only a short distance. The body was then dumped.

#### Case 4

The body, which was that of a 38-year-old Aboriginal woman, was first seen at autopsy. The victim had survived ~36 h in the bush prior to admission, and a further 6 days in hospital during which she received laparotomy and blood transfusion. The scene was not examined in this case.

##### External Examination

The deceased was 160 cm in height and weighed 82 kg. A total of 67 external injuries were present, including

Three lacerations in the parietal and frontal regions.

A series of 13 abrasions and lacerations on the face.



Abrasions of the front of the chest, including the breasts.

A pair of 2.7-cm incised wounds over the left scapula.

Irregular areas of abrasion up to 14 × 12 cm over the abdomen and loins.

Abrasions up to 8 × 5 cm on the buttocks.

Irregular abrasions on the posterolateral left hip, left thigh, left knee, both shins, and the right ankle.

Fifteen abrasions and lacerations on the left shoulder, the elbows, and the forearms.

*Internal Examination*

Bruising was present under external injuries of the face and head, but there were no signs of intracranial trauma. There were no signs of intrathoracic trauma, but a bilateral early bronchopneumonia was present. The only trauma in the abdominal cavity was repaired lacerations of the small bowel mesentery and of the inferior pole of the spleen. Approximately 200 ml of blood clot was present. Other changes included swelling, pallor, and edema of the kidneys, massive bilateral adrenal hemorrhage unrelated to external injury, and areas of fat necrosis in the pancreas. A generalized fibrinopurulent exudate of the peritoneal cavity was also present. There was no evidence of sexual assault. The skeletal system had transverse fractures of each radius and of the mid-right fibula, and there were fractures of the left 8th and 9th ribs laterally and the 9th rib posteriorly.

*Subcutaneous Examination*

The posterior surface of the body showed extensive bruising, with the heaviest and deepest areas being ~10-12 cm in diameter over each scapula. There was an ~20 × 10-cm area of deep bruising of the central back. Bruising was identified in most of the rest of the back, the buttocks, and the legs down to the ankles. Other areas of bruising were identified in the midsternal region, the right breast, the left abdomen, and the outer aspects of each upper arm and shoulder. There were 17 separate areas of moderate to heavy bruising on the ulnar borders and the back of the hands. Bruising underlay ~23% of the BSA.

*Old Injuries*

Approximately 35 scars were on the head, and many old scars were on the inner aspect of the lips.

*Histology*

An early bronchopneumonia was confirmed. There was an acute tubular necrosis with hemoglobin/

myoglobin casts, and bilateral adrenal hemorrhage and infarction. There was splenic intracapsular hemorrhage with repair, and acute pancreatitis. A number of changes consistent with alcohol abuse included moderate fatty change of the liver, moderate myopathic changes of the heart, and atrophic changes of the mammillary bodies and cerebellum. No fat emboli were identified.

*Toxicology*

This was not done because of the extended survival period. Total creatine kinase on admission was 6,700 U/L. (reference range 0-220 U/L).

*History*

The deceased had a past history of multiple admissions to hospital relating to assaults. In this assault, the victim had been attacked by two assailants who had punched her and hit her with a stick. She was later assaulted by her husband, who used an aluminium cooking pot and a spring-loaded exerciser bar. The assault was intermittent over a period of 2 days. The deceased lay in the bush for 36 h, until discovered by the police who had been informed of the incident.

*Case 5*

A 38-year-old Aboriginal woman was found disoriented in a riverbed. There was apparent bruising of the upper back and a laceration above the eye. A number of old injuries were found. She was admitted to a hospital and survived for ~14 h. Evidence became available that she had been assaulted ~18 h prior to admission. The scene was not examined.

*External Examination*

The deceased was 158 cm tall and of a very heavy build. A number of external injuries were identified, including

A series of 15 lacerations and abrasions, mainly of the scalp, and of varying ages: many showed partial healing, extensive granulation tissue, or old sutures.

A 10 × 4-cm bruise of the outer aspect of the left upper arm.

A 10-cm bruise of each breast.

A 4-cm bruise of the umbilical area.

A wide band of bruising involving most of the upper back and the right shoulder.

A large number of small irregular blistered lesions resembling scalds covering <1% of the BSA.

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#### Internal Examination

A fracture of the outer table of the skull related to a partially healed injury. There was no sign of intracranial hemorrhage and the brain appeared unremarkable apart from early atrophic changes. There were no signs of trauma in either chest or abdomen, but an early micronodular cirrhosis was present. All internal organs were pale and there was no evidence of sexual assault. The skeletal system had fresh refractures through the right clavicle and mid-ulna. There was a fresh fracture of the left midhumerus.

#### Subcutaneous Examination

A single bruise measuring  $75 \times 55$  cm on the back was particularly heavy at the base of the cervical spine, over the right scapula, over the left lower ribs, and over the sacral area. This bruising was almost confluent with an area of bruising of the buttocks, which showed areas of avulsion between skin and subcutaneous tissues. Diffuse bruising was present on the back of the left thigh to a depth of 7 cm. Bruising was confirmed in the deep tissues of each breast, in the epigastric area, to the right of the umbilicus, and over the lower abdominal wall and mons pubis. Bruising was seen on the ulnar borders and on the outer upper left arm. Bruising underlay 46% of the BSA.

#### Old Injuries

There were many dozens of old scars, the largest on the head, but others on the back, buttocks, knees, and legs. There was virtually continuous scarring of the left ulnar border. Old fractures were confirmed in each clavicle, with five old fractures of the ulnar bones and two old fractures of the radii.

#### Histology

The scalp lacerations were significantly older than the bruises. The brain showed generalized atrophic changes, the heart showed a moderate degree of myopathic change, and the liver showed fatty change and Mallory's hyaline. The stomach showed acute-on-chronic gastritis. There had been no associated hemorrhage. Occasional fat emboli were present in lung.

#### Toxicology

This was not carried out because of the extended survival time.

#### History

The victim had a longstanding history of alcohol abuse, accidents, and assaults, which had resulted in numerous admissions to hospitals. The assault

prior to her admission was described as prolonged and involving hands, feet, and lengths of wood.

#### Summary

In all of these cases, the victims were Aboriginal women, varying from 19 to 38 years of age, who were of average height and varied in build from very thin to very heavy. In cases where the scene was examined, there was an inadequate volume of blood to indicate serious external hemorrhage. In each case, a large number of external injuries were present, including abrasions, lacerations, and some incised injuries. The lacerations were most prominent over the scalp, with the other injuries widely scattered over the body. Only two victims had identifiable external bruising, this being confined to the face in one case.

On internal examination, none of the deceased had gross evidence of head or chest trauma. In three cases, there was no abdominal trauma. Two victims had minor splenic damage: one had superficial lacerations and local hemorrhage, whereas the other had 200 ml of clotted blood surrounding a repaired laceration of the inferior splenic pole and a small bowel mesentery repair.

There was no evidence of sexual assault in any case.

Skeletal trauma was present in each case. Three victims had fractured ulnas, two had fractured radii, two had fractured humeri, one had a fractured clavicle, and one had fractured scapulae. The only lower-limb fracture was a fractured fibula. Three victims had lower rib fractures, mainly on the left.

Subcutaneous bruising that was identified over large areas of each body (see, for example, Fig. 1) involved skin, fat, and muscle. Each case involved bruising of the back over much or most of its area, including the scapulae. All victims had bruised buttocks and thighs, and four had bruised knees and calves (Fig. 2). Scalp and facial bruising was present underlying external injuries. Four victims had areas of bruising of the front of the chest or abdomen, three had bruised shoulders and upper arms, three had bruising on the back of the hands, and all but one had bruising on the ulnar borders and other parts of the forearm. Bruising underlay 20-28% of the BSA in four cases and 46% of the BSA in the longest surviving case.

In four victims, the organs were pale, and the remaining victim had been transfused. No natural disease was present in any case, but alcohol-related disease was seen in all.

Old injuries were identified in each case. One victim had a small number of irregular scars of the scalp and hip; three had 23-35 scars of the face

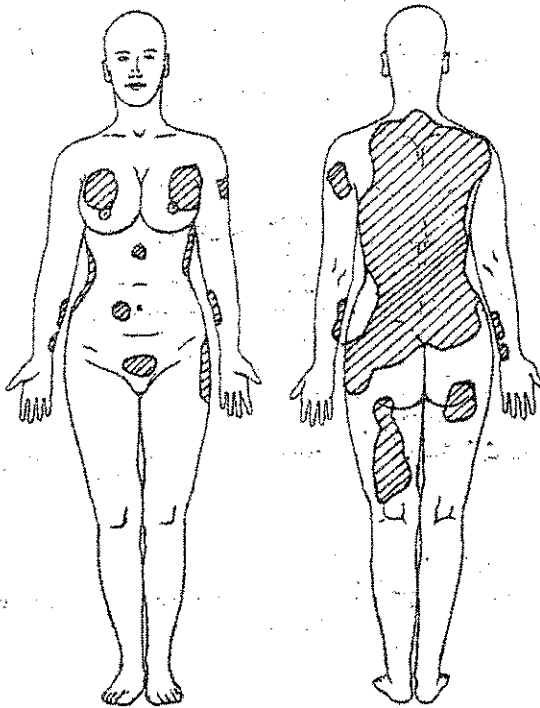


FIG. 1. Distribution of subcutaneous bruising over body.

and head with further scars of the inner aspect of the lips; and one, who had dozens of scars of the head, back, buttocks, and limbs, also had nine old upper-limb fractures.

Histologic examination confirmed the gross findings in each case. Additional findings included a small area of frontal brain contusion in one case, the identification of some fat emboli in four cases, and acute tubular necrosis in one case. Alcohol-related disease was present in each case in the form of fatty liver, myopathic changes of the heart in three cases, atrophic brain changes in three cases, and acute-on-chronic gastritis in one case. Alcohol levels were estimated in three cases with results varying between 0.207 and 0.002 g/100 ml in blood or vitreous. In the other cases, alcohol levels were not estimated because of the extended survival interval. Three of the victims had previous histories of both assault and alcohol abuse, and one each had a history of alcohol abuse or assault.

In summary, the victims in this series had a prior history of alcohol abuse and assaults, but were otherwise healthy. They had each undergone a sustained assault causing multiple injuries particularly to the scalp, back of the body and legs, arms, and hands. These injuries were almost entirely limited to skin, subcutaneous tissue, and muscle, with upper-limb fractures and organ pallor being the most

significant internal findings. The victims had generally survived for a period of many hours without or prior to treatment.

DISCUSSION

The mechanism of death is one primarily of hypovolemic shock as evidenced by the extensive blood loss into tissue and the organ pallor (1). The degree of muscle tissue trauma and extravasation led to hemoglobinuria and myoglobinuria in one case. The speed of death from hemorrhage depends on the size of the vessels involved. In this series, there was no evidence of damage to any large or medium-sized vessel. Damage to small blood vessels would be expected to be associated with a delayed death, as in these cases.

It has been suggested that chronic alcoholism or acute alcohol intoxication produces an increased liability to hypovolemic shock because of impaired peripheral vasoconstriction (2). Although alcohol is both a significant acute and chronic factor in this series, nothing in the autopsy examination suggested that the degree of bleeding was disproportionate to the level of trauma. The part played by alcohol would appear to be one of having a general association with increased levels of violence.

In only one case was there significant bruising identified prior to dissection, and minor external injuries were disproportionate to deep underlying degloving and hemorrhage in each case (Fig. 3). Much of the bruising was in deep subcutaneous tissues and muscles, where it would not be identified externally even in light-skinned individuals. The homicide autopsy often cannot be regarded as complete without direct observation of the subcutaneous tissues and muscles. This would particularly apply in cases where the victims are dark



FIG. 2. Bruising of calf muscles and overlying subcutaneous tissues.

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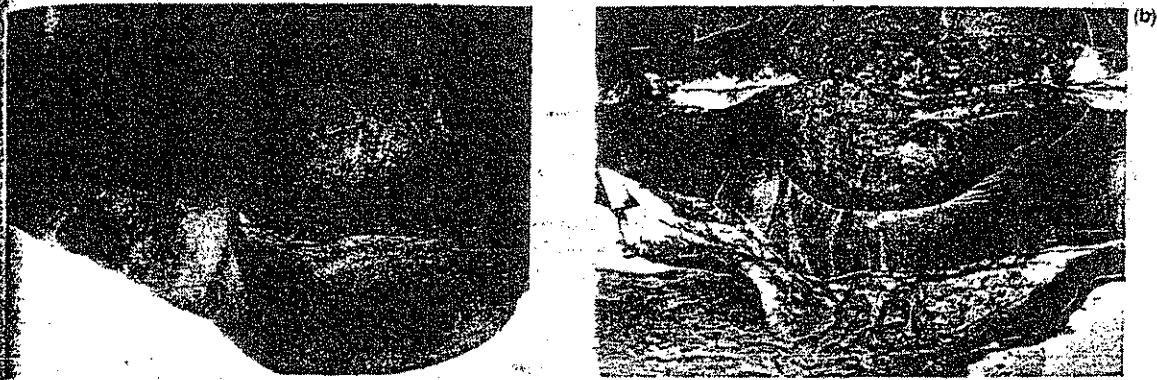


FIG. 3. Disproportion between (a) minor external injuries and (b) deep underlying degloving and hemorrhage.

skinned, as in this series from the Northern Territory of Australia.

In any case of trauma involving blunt injury, a contributing element in the death may be soft tissue damage. Fat embolism of a minor degree in three cases and of a moderate degree in another was identified. Primary fat embolism can occur as a result of trauma to any fat-containing tissue. The depth and distribution of injury in each case of this series confirmed the presence of direct trauma to subcutaneous fat.

This series constitutes ~5% of a consecutive series of homicide cases. Cases other than those described above also had victims whose superficial injuries were regarded as contributing to the fatal outcome. There is no simple way of assessing the total volume of hemorrhage into tissue, other than

by identification of pallor of organs and visualizing the extent of bruising. In this series, the area of bruising was estimated by use of the rule of nines as used in burn-area estimation. The area of bruising was generally consistent in the series, but greatly increased in that case with transfusion and the longest survival period. The disadvantage of BSA estimation is that it provides no accurate indication of the volume of tissue involved, as the depth and intensity of bruising or bleeding cannot readily be incorporated into the estimate. □

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## Superficial Soft-Tissue Injury

Alison D. Cluroe, B.Med. Sc., B.M., B.S., F.R.C.P.A.

In 1992, Lee and Opeskin published an article on the little-recognized problem of death related to multiple superficial soft-tissue injuries following an assault. These deaths resulted from an acute assault and were restricted to young aboriginal women with a history of alcoholism. Presented here is a similar case occurring in a 22-year-old Polynesian woman. However, there are some significant differences. Aside from the final acute assault, there was evidence of chronic repeated episodes of superficial soft-tissue injury that resulted in undermining of connections between large areas of different tissue planes. These injuries produced pockets and spaces lined by fibrous tissue and numerous old intramuscular and subcutaneous hematomas, some of which showed secondary infection. There was also dense soft-tissue and subcutaneous fibrosis, and myositis ossificans.

**Key Words:** Superficial soft-tissue injury, acute and chronic—Blunt trauma—Assault.

Death occurring as the result of extensive superficial soft-tissue injuries is rarely described and probably infrequently recognized; however, it is an important cause of, or contributor to, death in some homicidal assaults. Therefore, all forensic pathologists should be aware of this phenomenon.

Death due to superficial soft-tissue injury was first described in 1992 in a series of five aboriginal women from the Northern Territories of Australia (1). Presented here is a similar case that also exhibits some interesting and pertinent differences.

### CASE REPORT

The deceased was a 22-year-old Polynesian woman living with a large (unrelated) family. It was alleged that she was unexpectedly found dead at home lying on the sofa. The police and a police surgeon attended. Since they noted no suspicious circumstances, the body was removed to the local mortuary. The body was refrigerated overnight and not examined by a pathologist until it came to autopsy the following morning. At this stage, the only history available was that of previous bilateral tibial osteotomies at the age of 14 for marked bilateral genu-varum and an apparently increasing thirst over the preceding 24 h prior to death.

### Summary of Autopsy Findings

#### External Examination

External examination revealed 23 fresh injuries comprising a mixture of bruises, lacerations, and abrasions. There were also 38 old injuries in various stages of healing; they consisted mainly of lacerations and abrasions. Both the fresh and old injuries were located over the scalp, forearms, shoulders, back, buttocks, thighs (Fig. 1), and lower legs. There were also 125 old scars over the body surface, excluding surgical scars. The vulval and perineal areas were markedly edematous, but there was no evidence of any internal genital

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FIG. 1. Multiple fresh and old injuries identified on external examination.

trauma. No petechial hemorrhages were seen around the face or in the conjunctiva.

#### Internal Examination

Internal examination showed no focal internal trauma within the body cavities or within the head. A layerwise neck dissection of the anterior neck structures was performed following removal of the thoracic organs and brain. This examination revealed no injury to suggest that strangulation had been a factor in the death. The only abnormalities noted were the presence of a dilated right ventricle of the heart and the presence of moderate pulmonary edema. The left lung weighed 414 g, the right lung 535 g. Frothy edema fluid was also seen within the trachea and main bronchi. All internal organs were extremely pale. There was no free blood within any of the body cavities.

#### Subcutaneous Tissue Examination

Subcutaneous tissue examination revealed a large, fresh hematoma of the posterior compartment of the left thigh measuring ~350 ml in vol-

ume (Fig. 2). There was also extensive hemorrhage into the soft tissues of the left thigh and into the left buttock. Further extensive fresh subcutaneous and intramuscular hemorrhage was seen in the right buttock and in the posterior compartment of the right thigh (Fig. 3). Six small (<4 cm) areas of fresh hemorrhage and hematoma were noted within the soft tissues of both lower legs. Eight small areas of fresh hemorrhage were found in the soft tissues of the arms. Also noted in the region of the buttocks and thighs were many older areas of resolving hematoma formation and areas with separation of tissue planes and resulting fibrous-lined pockets (Fig. 4), extensive soft-tissue fibrous scarring (Fig. 5), and focal calcification.

#### Skeletal Examination

Skeletal examination showed an old displaced fracture of the mid-shaft of the right humerus. There was an old fracture of the right ulna with evidence of fresh refracture. There was an old fracture of the distal phalanx of the left ring finger, marked dystrophic calcification within the soft tissues of the left buttock, and evidence of myositis ossificans around both femurs.

#### Histology

The presence of fat embolism syndrome was considered. Histological assessment of frozen sections of lung tissue stained with oil red O was carried out to identify possible fat emboli. Some small microemboli were seen, but they were not numerous and fell into the category of grade II (i.e., emboli easily seen) using the scale devised by Mason (2). The presence of stress cardiomyopathy was considered, but the myocardium appeared histologically normal and showed no evidence of contraction band formation. Histological examination of the kidneys revealed the presence of brown/red granular staining casts within a few of the distal and collecting tubules, indicating the presence of mild myoglobinuria. In other respects, organ histology was unremarkable.

Histology of the soft-tissue injuries revealed a spectrum of injury ranging from dense, fibrous scar tissue to sparsely cellular granulation tissue with early fibrosis to more recent cellular and vascular granulation tissue to acute injury with areas of hemorrhage, polymorphonuclear leucocytes, and, in some areas, mononuclear cells and phagocytosis.

#### Other Tests

Postmortem toxicology was negative. All vulval, vaginal, and rectal swabs were negative for the presence of semen. A postmortem vitreous glucose



FIG. 2. Fresh hematoma in the posterior compartment of the left thigh.



was performed in view of the history of excessive thirst shortly prior to death. The vitreous glucose level was  $<0.5$  mmol/L. The presence of a large blood volume within the soft tissues, particularly of the buttocks and thighs, was in keeping with death due to multiple superficial soft-tissue injuries, causing shock due to blood loss into these tissues.

#### Additional History Available after Autopsy

Further inquiries by the police following the autopsy findings led to the discovery that the deceased had been treated as a slave within the family and was subjected to repeated episodes of chronic physical abuse by various family members. The final assault occurred ~24 h before death. The deceased woman had been beaten with a cricket bat, particularly around the area of the buttocks and thighs.

#### DISCUSSION

This case is an example of death resulting from multiple superficial soft-tissue injuries arising as a result of hypovolemic shock due to blood loss into tissues. From the history given, it would appear that the bleeding had occurred over a 24-h period following the beating before sufficient hypovolemia ensued to cause death.

In 1992, Lee and Opeskin published an article describing five cases of death in aboriginal women related to multiple superficial soft-tissue injuries (1). Many of the features reported in that article were similar to the case presented here. In that series, there was no large- or medium-vessel damage; the damage was confined to small vessels, thereby accounting for a delay in the death. There were, however, some notable differences between the five cases previously reported and the present case.

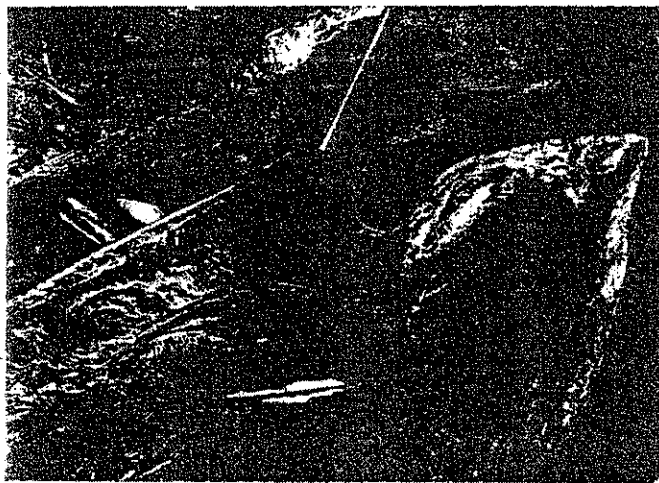


FIG. 3. Fresh subcutaneous and intramuscular hemorrhage in the posterior compartment of the right thigh and in the right buttock.

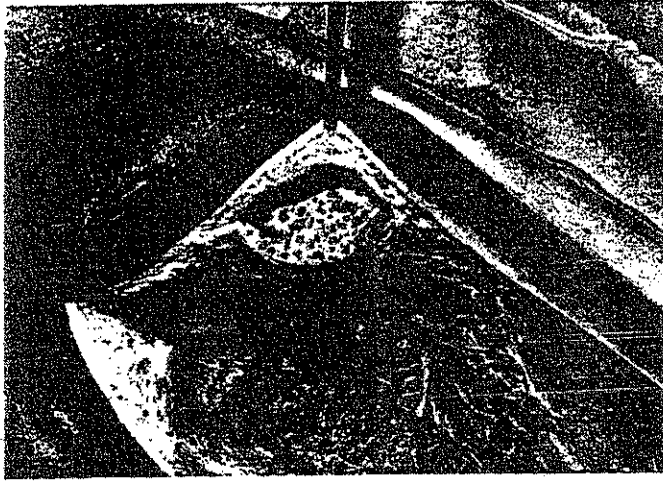


FIG. 4. Old areas of injury to the buttock and thigh region comprising resolving hematomas and separation of tissue-planes with formation of fibrous-lined pockets.

First, in the previous series, there was an indication of chronic alcoholism or acute alcohol intoxication in all of the deceased. The possibility that this was related to an increased liability to hypovolemic shock because of impaired peripheral vaso constriction was raised (3). However, Lee and Opeskin concluded that the alcohol was only contributory in the sense that it was associated with increased levels of violence, but that it did not exacerbate the degree of bleeding into soft tissues. In the present case, there was no history of chronic alcoholism or acute intoxication, thus lending support to their hypothesis.

Second, although there was diffuse hemorrhage into the skin, fat, and muscle, there were also hematomata lying between the muscle groups and other tissue planes (Fig. 2). This feature was not described by Lee and Opeskin. Histological ex-

amination of the damaged soft-tissue areas revealed large amounts of granulation tissue involving the different soft-tissue layers. It seems likely that this condition increased tissue fragility. It may also account for the presence of these quite considerable hematomata.

Third, there was widespread evidence of previous soft-tissue injuries of varying age. These lesions consisted of dense soft-tissue scarring and calcification, resolving and organizing hematomata, and empty pockets lined by fibrosis lying between tissue planes. These features were not described by Lee and Opeskin but would seem to indicate that the story of chronic abuse with frequent beatings was in fact correct and that the deceased had suffered significant but survivable beatings on previous occasions.

Finally, the deceased's skin was much lighter than that of the aboriginal women, whose subcutaneous bruising was largely obscured by the overlying skin pigmentation. However, as pointed out by Lee and Opeskin, when much of the bruising is confined to deep subcutaneous tissue and muscle, it may not be possible to identify this bruising externally even in light-skinned individuals. Certainly, in the present case, much of the deep bruising, and even some of the superficial areas of soft-tissue bruising, were not evident through the skin surface and were only revealed on deep dissection. This finding underscores the importance of subcutaneous tissue dissection in any case where the cause of death following an assault is obscure.

There was no evidence of fat embolism in our case. As in the series reported in 1992, it was difficult to estimate the area of the bruising; in partic-

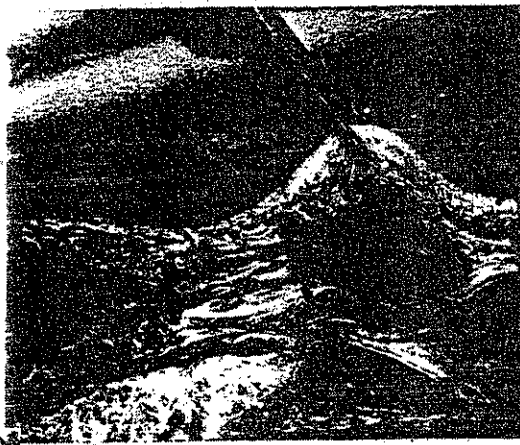


FIG. 5. Extensive soft-tissue fibrous scarring.



ular, the use of the rule of nines in this case, as used in burn area estimation, was of little value in view of the presence of localized, but large, hematomata. It seems clear, however, that the finding of marked skin and internal organ pallor, in the absence of massive external hemorrhage or internal body cavity bleeding, or where other injuries seem inadequate to explain the cause of death, should alert the vigilant pathologist to the possibility of significant superficial soft-tissue injury.

**Acknowledgment:** Many thanks to Janet Clements for typing this manuscript.

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**Observations of the Government of the Netherlands**  
**on the admissibility and merits of**  
**Application no. 50901/99**

**Franciscus Cornelis VAN DER VEN**  
**v. the Netherlands**

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## I Introduction

1. On 30 August 1999, Franciscus Cornelis van der Ven ("the applicant") submitted an application to the European Court of Human Rights ("the Court"). The application was registered on 16 September 1999.
2. The applicant submits that the regime in the maximum security institution (*Extra Beveiligde Inrichting, EBI*) in Vught, where he is detained, is in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). He maintains that the procedure by which detainees are selected for placement in the EBI violates article 6, paragraph 1, in conjunction with article 8, paragraph 1, of the Convention.
3. On 21 December 1999, the Court notified the Government of the Netherlands ("the Government") that an application had been submitted. In a letter of 19 January 2000, the Court invited the Government to comment on the admissibility and merits of the application, and requested the Government to address the following questions:

"Having regard to the findings related to the *Extra Beveiligde Inrichting* contained in the "Report to the Netherlands Government on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 27 November 1997" (CPT/inf (98) 15);

1. Is the applicant a victim of a violation of Article 3 as regards the conditions of his detention in the *Extra Beveiligde Inrichting*?
2. Is the applicant a victim of a violation of Article 8 of the Convention as regards the restrictions on the "private life" and "family life"?
- 3(a) Is Article 6 applicable to proceedings in which a transfer to a different institution for detention is requested on the grounds that the placement in the institution from where a transfer is sought was unlawful?
- (b) If so, has there been a violation of that Article in that the applicant and his counsel were denied access to information which was apparently of decisive importance for the decision to prolong the applicant's detention in the *Extra Beveiligde Inrichting*?"

4. The Government will address the following points successively:
  - the legal framework for penal institutions in the Netherlands
  - the EBI
  - the facts and circumstances of the applicant's case
  - the questions raised by the Court.

## II Legal framework

### *The Penitentiary Principles Act (Penitentiaire Beginselenwet)*

#### *Penal institutions*

5. Prior to 1 January 1999, the enforcement of custodial sentences (such as prison sentences) and custodial orders (such as pre-trial detention) was governed by the Criminal Code (*Wetboek van Strafrecht*), the Prisons Act (*Beginselenwet gevangeniswezen*) (Act of 21 December 1951, Bulletin of Acts and Decrees no. 596), and the Penitentiary Order (*Gevangenismaatregel*) (Decree of 23 May 1953, Bulletin of Acts and Decrees no. 237).
6. On 1 January 1999, the Penitentiary Principles Act (Act of 18 June 1998, Bulletin of Acts and Decrees no. 430) and a new Penitentiary Order (Decree of 23 February 1998, Bulletin of Acts and Decrees, no. 111; **Annexe I**) came into force, replacing the former Prisons Act and Penitentiary Order. The main amendments concern the right of complaint.
7. More detailed rules and regulations governing the enforcement of custodial sentences and orders are laid down in ministerial orders and circulars.
8. In accordance with section 2 of the Penitentiary Principles Act, the enforcement of a custodial sentence or order involves the transfer of the person concerned to a penal institution. Section 9 of the Act distinguishes between remand centres (*huizen van*

*bewaring*) and prisons (*gevangenissen*).

9. According to section 9, subsection 2 of the Penitentiary Principles Act, remand centres are intended *inter alia* for

any person who is subject to an order for pre-trial detention (*voorlopige hechtenis*);

any person who is required to serve a custodial sentence, the remainder of which is no more than three months;

any person who is required to serve a custodial sentence and is waiting to be placed in a prison.

Prisons are intended for persons who have received a custodial sentence (section 10 of the Penitentiary Principles Act). In certain cases, the Minister of Justice may designate an institution as both a remand centre and a prison (section 9 of the Penitentiary Principles Act).

10. Penal institutions or units are classified in five security categories (section 13 of the Penitentiary Principles Act):

minimum security

low security

normal security

high security

maximum security (*extra beveiligd*).

11. Section 5 of the Penitentiary Principles Act provides that the governor of a penal institution or unit must establish a set of rules for that institution or unit, having regard to the model and guidelines to be provided by the Minister of Justice (see **Annexe I**).

#### *Placement in a custodial institution*

12. The Minister of Justice determines the criteria to be applied when assigning detainees to a particular institution or unit (section 13, subsection 3 of the Penitentiary

Principles Act).

13. The placement or transfer of detainees is effected in accordance with section 15 of the Penitentiary Principles Act. Selection officers (*selectiefunctionarissen*) are responsible for the placement of detainees (section 15, subsection 2 of the Penitentiary Principles Act) and are competent to order transfers. Any decisions to this effect take account of instructions given by the Public Prosecution Service (*openbaar ministerie*) and by the authorities responsible for imposing the sentence or order (section 15, subsection 3 of the Penitentiary Principles Act).
14. The governor of an institution or unit determines how detainees are to be accommodated (section 16 of the Penitentiary Principles Act).

*Supervision of prisons*

15. Under section 6 of the Penitentiary Principles Act, the Central Council for the Application of Criminal Law (*Centrale Raad voor Strafrechtstoepassing*: "the CRS"), formerly known as the Central Advisory Council for Prisons, the Care of Criminal Psychopaths and Rehabilitation (*Centrale Raad van Advies van het Gevangeniswezen, de Psychopatenzorg en de Reclassering*) is responsible for supervising the enforcement of custodial sentences and orders.
16. The CRS also advises the Minister of Justice on the matters referred to above, while its appeals board is responsible for hearing appeals. The chair of the board must be a member or former member of the judiciary.
17. The members of the CRS are independent, and they are appointed by royal decree. They are experts in various fields, such as medicine, psychology or law.
18. They have unrestricted access to all penal institutions at all times, and they may talk freely with detainees. They must be given any information they request for their visits

(article 11 of the Decree regulating the Central Advisory Council for Prisons, the Care of Criminal Psychopaths and Rehabilitation of 16 May 1953).

19. In addition, every penal institution or unit has a supervisory committee whose duties include supervision of the enforcement of custodial sentences or orders in the institution or unit concerned, and the hearing of grievances and formal complaints (section 7 of the Penitentiary Principles Act and article 11 et seq. of the Penitentiary Order). The members of the supervisory committee likewise have unrestricted access to the institution at all times.

#### *Legal protection*

##### *Objections and appeals against placements or transfers and against the dismissal of an application to this effect*

20. On the basis of section 17 of the Penitentiary Principles Act, a detainee may file an objection to his placement or transfer, or against the dismissal of his request for transfer to a particular institution. The selection officer gives him an opportunity to explain his position, unless the objection was deemed inadmissible, or manifestly ill-founded or well-founded from the start. Within six weeks the officer must inform him in writing of his decision and the reasons for it. He must also advise the complainant that he can appeal against the decision, and specify the time-limit for doing so. On the basis of section 72 of the Penitentiary Principles Act, the complainant may lodge an appeal against the selection officer's decision with the CRS appeals board.

##### *Application for transfer*

21. Section 18 of the Penitentiary Principles Act allows detainees to apply to the selection officer for placement in or transfer to a particular institution or unit. Applicants are given an opportunity to explain their reasons for the request. The officer must notify the applicant of his decision within six weeks, stating his reasons. He must also



inform the detainee that he can appeal against the decision, and state the time-limit for doing so.

*Complaints and appeals against decisions by the prison governor*

22. Pursuant to section 60 of the Penitentiary Principles Act, a detainee may file a complaint against a decision concerning him taken by or on behalf of the governor of the prison or unit. He may also complain if the governor refuses or fails to hand down a decision. Such complaints are filed with the complaints committee of the institution in which the decision was taken (section 61 of the Penitentiary Principles Act). The complainant is entitled to legal counsel or the assistance of a confidential advisor (section 65 of the Penitentiary Principles Act). The committee must hand down a decision within four weeks of receiving the complaint.
23. The prison governor as well as detainees may file an appeal with the independent appeals board of the CRS against a decision of the complaints committee (section 69 of the Penitentiary Principles Act).

*Legal protection prior to the Penitentiary Principles Act*

24. Before the Penitentiary Principles Act entered into force, the appeals procedure was open only to detainees who had been convicted by a final and conclusive judgment. Detainees who had not been convicted, as in the applicant's case at the time, were unable to have their placements reviewed by the CRS appeals board.
25. However, all detainees, whether they had been convicted or not, could exercise their right to complain, in which event an independent body would review decisions taken by or on behalf of the governor to determine the reasonableness of the governor's recommendation to the selection officer that the person in question be placed in the EBI. This procedure concerned only the governor's recommendations regarding placement in the EBI, not the decision about the placement as such.

26. Before the Penitentiary Principles Act entered into force, any person in pre-trial detention was entitled, pursuant to article 78, paragraph 4 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), to file an application with the body which had ordered pre-trial detention, requesting a transfer to a different remand centre.

### III Maximum Security Institution (*Extra Beveiligde Inrichting, EBI*)

#### *History of the EBI*

27. In the 1980s, a large number of detainees absconded from prisons in the Netherlands, often with the use of force. The public responded with growing alarm, while prison staff began to fear for their own safety. A working party was consequently appointed in 1986 to make recommendations on facilities for detainees who were considered potential absconders and a potential danger to society. The working party's report of March 1987 (*Rapport Opvang Vlucht- en Gemeengevaarlijke gedetineerden*) proposed that the Dutch prison system should include special facilities for this category of detainee.
28. In 1990, as a follow-up to the report, five maximum security institutions were opened, each comprising two units and six places. The idea was that by introducing more stringent physical security measures and more staff, and by transferring inmates to a different institution every six months, these facilities could maintain a regime as similar as possible to that in ordinary custodial institutions for prisoners serving long sentences.
29. Although the number of abscondments declined on the whole, there were numerous escapes and serious attempts to escape from maximum security institutions in the Netherlands in the early 1990s. Four breakouts occurred within the space of two years, involving a total of ten detainees. In each case, firearms, knives or similar weapons

were used, and hostages were taken. In one incident in 1991, a detainee escaped from the EBI in Rotterdam with the assistance of a helicopter. In the same year, three masked men forced their way into the yard of the EBI in Arnhem. In 1992, two detainees in possession of a firearm escaped from the EBI in Sittard. Seven others escaped from Rotterdam and Sittard prisons, after hostages had been taken. These incidents demonstrate that many detainees in maximum security institutions have the financial resources to secure help from outside.

30. Following the abscondments in 1992, a commission was appointed to review prison security across the board (Hoekstra Commission, "*Rapport van de Evaluatiecommissie Beveiligingsbeleid Gevangeniswezen*", September 1992). According to the report, it was impossible to provide adequate security and services in the maximum security institutions in use at the time. The commission recommended that two completely separate and fully equipped units be established, with a regime geared specifically to the target group.
31. As the use of violence and the incidence of abscondments increased, special measures were needed in the meantime. At the beginning of 1992, a commission appointed to review prison security regimes recommended that contact between detainees in maximum security institutions and the outside world should be subject to strict surveillance. It observed that unrestricted communication with the outside world was incompatible with security requirements. As a result, the regime guidelines for maximum security institutions were amended on 25 September 1992. All telephone calls are now recorded except for privileged communications (for instance with lawyers, the national ombudsman and parliament). Detainees may receive visits from no more than one family member at a time, and a prison officer must be present throughout. All visitors are screened, and all correspondence is subject to inspection.
32. Further abscondments took place in 1993, again with outside help, and with the use of violence against prison staff. In January, a detainee in possession of a firearm escaped from the EBI in Rotterdam after taking hostages among prison staff and fellow

inmates. In March 1993, another two detainees escaped from the same prison. Once again, they were armed and took hostages. In April, six detainees held prison officers hostage with knives and similar weapons, and escaped from Sittard prison. In July, an armed maximum-security prisoner who was temporarily detained in an ordinary institution in Maastricht escaped by holding staff members hostage.

33. To put a stop to these continuing abscondments and taking of hostages, two facilities were opened in Vught in August 1993 to serve as temporary maximum security institutions pending the construction of two purpose-built prisons. A new regime introduced for these two institutions was incorporated in the regime guidelines (14 February 1995, 46021/94/DJJ) and the EBI House Rules (15 July 1993, 376190/93/DJJ). It was based on the following principles:

The taking of hostages should in principle be impossible. For this reason, only one detainee at a time may come into physical contact with prison staff, and more than one prison officer must be present; staff supervising group activities must be physically separated from detainees: they can monitor activities either from behind a transparent partition or with the use of surveillance cameras. To prevent detainees from obtaining outside help, all their communications with the outside world are subject to screening, except those with privileged contacts.

Detainees in the EBI have the same rights as their counterparts in ordinary prisons, and are subject to the same legislation. Their daily activities programme is therefore similar to that in other institutions, except that a number of security measures have been incorporated into the regime.

34. The two facilities in Vught were designed to accommodate 33 detainees rated as high-risk potential absconders, in three units for five people and three for six.

35. The regime for these temporary EBI's was evaluated in 1994. The report concluded that they indeed provided tighter security and that significant progress had been made (J.J.L.M. Verhagen and R. van Grunsven, *"De tijdelijke extra beveiligde inrichting."*

*Waarborgen voor een grotere veiligheid in relatie tot kwaliteit van de detentiesituatie*", spring 1994). However, there was some concern about the social and psychological climate for detainees and the working climate for staff.

36. A new maximum security prison with improved facilities opened in Vught in August 1997. It has four units and a total of 24 places. Though the Hoekstra Commission (1992) had recommended the construction of two such prisons, current trends were such that there was no longer any need for a second, equally large institution. However, to ensure that there would be sufficient capacity, two units of the old temporary facilities were maintained, providing accommodation for 11 detainees. For some time now, however, this extra capacity has not been needed and merely provides a safety net.

*Target group and selection procedure*

37. As noted above, Chapter IV of the Penitentiary Principles Act contains rules for assigning detainees to penal institutions. The same rules apply to placement in a maximum security prison, except that extra safeguards have been incorporated into the selection and placement procedures. Assignments to the EBI are therefore subject to an additional set of rules, as published in a circular of 22 August 1997 (ref. 64188/97/DJI) reviewing the selection and placement procedures ("*Herziening selectie- en plaatsingsprocedure extra beveiligde inrichting*").
38. A risk profile is used to identify candidates for placement in the EBI. It helps to identify potential absconders and individuals who constitute a danger to society. Only people with the highest scores are considered for placement in a maximum security institution. Placements are never automatic. Each case is examined individually.
39. The EBI in Vught is designated a remand centre and a prison for males aged 20 and over who are required to serve a sentence of more than six months. A distinction is made between:

detainees who are deemed likely to abscond from a closed institution and commit further violent crimes, and who would therefore constitute an unacceptable threat to society;

detainees whose escape would cause great anxiety amongst members of the public and who therefore constitute an unacceptable threat to society; their rating as potential absconders is secondary.

40. The main factors which determine whether a person falls into either of these categories are:

the views expressed by the Public Prosecution Service at the time of that person's arrest;

the conclusions reached by the National Criminal Intelligence Division (*Centrale Recherche Informatiedienst*: "the CRI") on the basis of all available information about him;

the nature of the offence he committed and the circumstances of the offence;

information from external sources (police, probation and after-care board, etc);

information about his present detention and any previous detentions in the Netherlands or abroad.

41. Detainees are assessed in terms of their likelihood to abscond, taking account of the following factors:

any previous escape or attempt to escape from a closed institution, especially with the use or threat of violence;

the prospect of extradition and whether the person in question objects to being extradited or the custodial sentence he would or could expect to serve in the country to which he would be extradited;

the length of the sentence he still has to serve, either in the Netherlands or elsewhere (only a term of several years is deemed an indicator);

information or tip-offs from external sources indicating that he is planning to escape with or without help from outside; the CRI's Detainee Intelligence Information Service (GRIP) checks the reliability, validity and present

relevance of any such information.

42. The main determinants as to whether a detainee constitutes a danger to society are:
- the seriousness, nature, and political or social sensitivity of the offence of which he was convicted, particularly if it constituted a serious sexual or violent crime or an offence under the Opium Act (*Opiumwet*) in the Netherlands or abroad;
  - the circumstances surrounding the charges or conviction; the likelihood of the detainee resorting to reprisals or committing further serious offences.

***Placement in the EBI***

43. In principle, placements in the EBI are made from an ordinary custodial institution. The governor of the institution submits a proposal to the selection officer (formerly known as the prison advisor, or *penitentiair consulent*), giving reasons why the person concerned should be in the EBI.
44. Before submitting the proposal, the governor requests information about the person concerned from the secretary of the EBI selection board. The secretary obtains such information from various sources including the CRI and the Public Prosecution Service and passes it on to the governor. The governor then discusses his proposal with the detainee. Finally, he completes his report by adding the detainee's comments and any objections he may have, and submits his proposal to the selection board.
45. The selection officer considers the proposal and consults with the governor. If it is the detainee's first placement from a custodial or closed institution, he is interviewed by the selection officer, who draws up his own report on the governor's proposal and submits it to the selection board secretary. The report again includes the detainee's comments. If the detainee is serving a long sentence or if a psychologist considers it necessary, it may be forwarded to the Prison Selection Centre (*Penitentiaire Selectiecentrum*), which is responsible for issuing recommendations on the

psychological aspects of the enforcement of custodial sentences and orders. The Centre is always consulted about first placements.

46. The case is subsequently discussed by the selection board, chaired by the selection officer. The board comprises a representative of the Public Prosecution Service, a psychologist and a representative of the board of governors of the Nieuwe Vosseveld Prison in Vught. The board is assisted by a number of officials, including a representative of the CRI.

#### *Extension and termination of detention in the EBI*

47. Every detainee in the EBI has his case reviewed at six-monthly intervals to determine whether the placement is still appropriate. If necessary, his placement is extended for a further six months. The prison governor prepares a written report before each review. For this purpose he consults the secretary of the selection board, who obtains information from the Public Prosecution Service and the CRI. In all other respects the procedure is the same as the placement procedure.
48. If new facts emerge, relating for instance to a criminal case or a request for extradition, or if any change occurs in a detainee's circumstances, the prison governor may submit a proposal to the selection officer between these reviews to the effect that the detainee should be removed from maximum security.

#### *Miscellaneous*

49. If a detainee in the EBI is convicted by a final and conclusive court judgment, a decision is taken as soon as possible regarding the type of prison he should be assigned to, and whether he should remain in the EBI. In principle, a detainee whose remaining sentence does not exceed 18 months is transferred to an ordinary closed institution, except possibly in the following circumstances:
- ... if there is a prospect of his being extradited;



if he is still deemed to constitute an unacceptable threat to society;  
 if he absconded or attempted to abscond in the preceding 12 months or if his conduct constituted a threat to order and safety in the institution;  
 if the CRI or the Public Prosecution Service are in possession of currently relevant information suggesting that he might still abscond.

50. Very few of the 40,000 people detained in custodial institutions in the Netherlands each year are assigned to the EBI. The average is between 25 and 30. The number at present is 18.

#### IV. Detainee Intelligence Information Service (*Gedetineerden Recherche Informatiepunt, GRIP*)

51. In 1994, the Detainee Intelligence Information Service (*Gedetineerden Recherche Informatiepunt, GRIP*) was established as a division of the CRI in order to improve cooperation between the Public Prosecution Service, the police and the Agency of Correctional Institutions (*Dienst Justitiële Inrichtingen*) of the Ministry of Justice with a view to achieving a systematic and consistent security regime for detainees who are rated as potential absconders or as constituting a danger to society. The GRIP collects all incoming information for review and processing.

52. The duties and functions of the GRIP are:

- to issue recommendations based on information which has been systematically processed and analysed concerning detainees and/or their relationships with people with whom they wish to maintain contact (by telephone or in person); the object is to safeguard security by systematically monitoring the activities of potential absconders who constitute a danger to society, so that appropriate measures can be taken if necessary;
- to investigate tip-offs and if necessary recommend measures for tightening up security; the information in question relates to abscondment, bribery, rioting, the taking of hostages, liquidations or any other criminal activity or any

activity designed to terminate the detention;  
to help assess any present or future security risks by analysing information from the police, the Public Prosecution Service and the Agency of Correctional Institutions.

53. The GRIP classifies information as follows:

- information whose source and content do not require protection and can therefore be disclosed to the persons concerned;
- information whose source and content must be protected in the interests of the informant's safety; it is therefore confidential and may not be divulged to third parties.

Although confidential information cannot be verified by the person it concerns, it is nevertheless of great importance in judging whether he is likely to abscond and whether his abscondment or assisted escape would constitute a danger to society.

54. Confidential information obtained from a criminal intelligence service may be passed on to the public prosecutor from the National Public Prosecutors' Office (*Landelijk Parket*) who is responsible for the supervision of the GRIP. The public prosecutor in question makes an objective evaluation of the information to determine its reliability without jeopardising the source. This is not the public prosecutor who is acting or acted in the criminal case for which the detainee is being held. The applicable rules are set out in the "GRIP circular" (20 July 1994, 44716/94/DJ).

55. If the public prosecutor in question considers such information to be sufficiently up to date, reliable and specific, he sends an official notification (*ambstbericht*) to the governor of the institution in which the detainee is being held, informing him that the detainee constitutes a security risk. This official notification may be used when determining whether the detainee is likely to abscond.

56. In 1999, the GRIP received 151 tip-offs or reports concerning potential incidents of abscondment. In 15 cases, the governor of the institution concerned consequently

recommended maximum security placements, which were effected in five of those cases. In the remaining ten cases, the selection officer determined that the person in question did not satisfy the criteria for a maximum security placement.

#### V The regime in the EBI

57. The Penitentiary Principles Act and the Penitentiary Order (*Penitentiare maatregel*) apply in full to detainees in the EBI, giving them the same rights and obligations as detainees in ordinary institutions. Their daily programme, for instance, is the same as that in other institutions (cf. article 3, paragraph 2 of the Penitentiary Order, which provides that their daily programme, like that in the standard regime, shall occupy 83 hours a week). The number of hours set aside for activities and visits differs (43 hours in the standard regime, 18 hours in the maximum security regime). But in practice, detainees in the EBI are offered an activity programme of 55 hours - more, in fact, than in the standard regime. However, there are differences in the way these activities are organised. A number of security measures are built into the regime, and detainees are under surveillance at all times outside their cells. These special arrangements are set out in the EBI House Rules (*Regeling model huisregels EBI*) of 12 October 1998, 715635/98/DJ, Government Gazette 1998, no. 233.

58. Subject to the provisions of the Penitentiary Principles Act, the EBI imposes a security regime aimed at preventing detainees from escaping or taking hostages among prison staff or any other persons with whom they come into contact. Situations in which hostages could be taken are consistently avoided and special security measures have been introduced for this purpose.

59. The main features of the regime are as follows:

screening of all contacts with the outside world; all correspondence and telephone calls are screened except those with privileged contacts; detainees must be separated from their visitors by a transparent partition ("closed visits"); members of their immediate families, spouses and partners may visit

once a month without being separated by a partition ("open visits"), although physical contact is restricted to a handshake on arrival and departure; telephone conversations and conversations during visits are screened, recorded, and translated if necessary; for security reasons, conversations must in principle be held in a standard European language, or Turkish or Arabic; only one detainee at a time may come into contact with staff, and at least two staff members must be present; for this purpose, special corridors have been built leading to areas where group activities take place; these areas are under camera surveillance or supervised by staff who are physically separated from inmates by a partition.

60. Other features of the regime:

detainees who leave the premises must be handcuffed, for instance when going to court or for hospital treatment; they may also be handcuffed inside the institution, in areas where they might have access to objects with which they could injure staff or take hostages, for example when visiting the barber or the clinic, or when being escorted to open visits;

cells are inspected daily; strict rules apply concerning the objects detainees may have in their possession or keep in their cells;

no more than four people at a time may take part in group activities;

detainees are not obliged to work, but they are given the opportunity to work in groups;

they may take educational courses individually and by correspondence under the supervision of a tutor;

library books can be requested by computer;

a form is provided for ordering food and beverages, and such orders are subsequently delivered;

detainees may take music and drawing lessons on an individual basis;

they can take part in sport at least twice a week; they may also use gym equipment after completing their work;

they can spend at least one hour a day outdoors; they may also use the exercise

yard at fixed times during recreation periods in their programme; they are entitled to spend at least six hours a week engaging in group recreation; they may also use the exercise yard at specified times, and the kitchen on an individual basis; in practice, efforts are made to enable detainees to take part in recreational activities every day, and thus to spend longer and more frequent periods of time outside their cells.

*Contact with staff and other inmates*

61. Detainees are physically in the presence of prison staff several times each day. They must be alone on such occasions, and at least two members of staff must be present. They can also contact staff by intercom from their cells or during activities. The staff are trained by specialised external agencies to develop and maintain personal contact with detainees.
62. To increase spontaneous contact between staff members and detainees, the governors have submitted plans to the Prison Service Department (*Directie Gevangeniswezen*) proposing modifications to the building which would enable staff to walk around the exercise yard and come into contact with detainees. A similar arrangement in the temporary EBI's proved effective in this respect.
63. Article 3 of the Penitentiary Order provides that detainees in the EBI must be offered an activity programme covering at least 18 hours a week. As stated above, however, detainees can take part in activities for an average of 55 hours a week. Group activities are organised for a maximum of four people, with the six assigned to each unit rotating. No contact is allowed between detainees in different units. Group activities are supervised with the aid of cameras or else by staff who are physically separated from the detainees.
64. The fact that activities are organised for groups of four whenever possible means that

detainees can spend more time than the statutory minimum taking part in various activities.

65. Detainees have contact with various care workers (the medical team, a psychologist, a social worker and a spiritual counsellor) (see "Maintaining a healthy psychological and social climate").

*Clothing search (frisking) and strip-search*

66. Pursuant to section 29 of the Penitentiary Principles Act, the governor may frisk or strip-search detainees on their arrival at or departure from the institution, before or after they have received a visit, or at any time he considers such action necessary in the interests of maintaining order or safety in the institution.

67. Pursuant to the EBI House Rules, detainees may be frisked in any situation which involves contact with staff to ensure that they are not in possession of objects which could be used to inflict injuries or take hostages.

68. The building has special corridors through which detainees may proceed unescorted, except in certain cases, to take part in activities. The introduction of this system has significantly reduced the number of times that detainees need to be frisked.

69. The EBI House Rules further provide that detainees may be frisked or strip-searched:
  - in areas where they would have access to dangerous objects, such as the dentist's surgery, the barber's or the clinic; the aim is to ensure that they do not come into possession of such objects;
  - after open visits; the aim is to ensure that they do not receive objects from their visitors;
  - once a week, as part of a thorough cell inspection, which involves a full inspection of all their possessions; the strip-search is necessary to ensure that nothing is concealed on their person.

*Contact with relatives and others*

70. Chapter VII of the Penitentiary Principles Act regulates the frequency and manner in which detainees can maintain contact with the outside world. Pursuant to the EBI House Rules, they may correspond with friends and relatives, telephone friends or relatives twice a week for ten minutes, and receive one visit a week for an hour. Access to the telephone once a week is the standard set by the Penitentiary Principles Act.

71. Section 38(4) in conjunction with section 36(4) of the Penitentiary Principles Act sets out the grounds on which a detainee may be barred from contact with a particular person, and provides that all contacts may be subject to surveillance. The Act states that they must be told why their visits are subject to surveillance and what form it will take: this information is accordingly set out in paragraph 3.8.2.1 of the Annexe to the EBI House Rules. Similar though less stringent rules apply in ordinary institutions. The rules may also specify where visits should take place and whether they must be held individually in separate rooms or communally in a hall. They should also state what conditions apply (e.g. whether open visits are allowed).

72. The EBI House Rules contain further provisions governing contact between detainees in the EBI and the outside world. All personal contact is subject to surveillance. The main threat to the security of an institution comes from detainees' contacts with the outside world. Although there have been no escapes involving the use of force from the new maximum security prison, the authorities receive several tip-offs to this effect every year, notwithstanding the stringent security. Detainees are constantly seeking ways to evade surveillance and communicate privately with the outside world. The authorities must be able to screen their contacts to prevent them from escaping with assistance from outside.

73. The GRIP screens every person with whom a detainee wishes to have contact, either by telephone or in person. On the basis of the its recommendations and pursuant to section 36(4) of the Penitentiary Principles Act, the governor may forbid contact with any given person.
74. Except in the case of privileged contacts, all correspondence is intercepted, telephone calls are screened and recorded, visits take place under surveillance, and conversations during visits are likewise screened and recorded, and they may be translated, if necessary. Detainees are separated from their visitors by a glass partition except in the circumstances described below.
75. Detainees may receive one open visit a month from a spouse, partner or relatives to the first degree of consanguinity. They are nevertheless separated by a counter to ensure that their conversation can be monitored. Open visits are further subject to the following restrictions:
- physical contact is limited to a handshake at the beginning and end of the visit; this also applies to children; children may not sit on the detainee's lap;
  - visitors must submit to a clothing search before the visit;
  - the detainee must submit to a strip-search and change his clothing before and after a visit.

#### *Reasons for security measures*

76. The main threat to the security of an institution comes from detainees' contacts with the outside world. Although no escapes involving the use of force have occurred in the new maximum-security prison, potentially-useful tip-offs are received several times a year concerning planned abscondments, with or without outside help, notwithstanding the stringent security. Detainees constantly seek ways of communicating with the outside world without being monitored. The authorities must be able to screen their contacts to prevent them from absconding with help from outside. Special measures must be taken when detainees need to leave the institution, for instance for a court



hearing or hospital treatment. In these circumstances, the security of the prison building is ineffective.

77. Bearing in mind that most abscondments from maximum security institutions in the past took place with outside help, that several serious attempts have been made even in maximum security prisons, and that detainees or their associates have planned escapes with the use of extreme violence, the rules governing contact with the outside world cannot be relaxed without increasing the security risk to an unacceptable degree. Strict regulations governing such contact, based on the principle that all contact with the outside world must be subject to surveillance, is a vital aspect of the institution's overall security. Allowing more physical contact during visits would jeopardise security.

78. It would then be virtually impossible to prevent dangerous objects from being brought into the institution, as even small, normally innocuous objects can be used as weapons. People have managed to unlock handcuffs with a paperclip, for example, while a pen or a toothbrush sharpened to a point is a potentially lethal weapon. Substances such as semtex, which is highly explosive even in small quantities, can easily be introduced into the institution undetected.

79. If more physical contact were allowed, for instance if detainees and their visitors were not required to maintain a distance, they would not always be visible to the supervising staff, and it would be difficult to ensure that no objects were being passed. The problem cannot be avoided by frisking visitors before a visit and strip-searching detainees afterwards, as these measures do not necessarily prevent objects from being smuggled into the visiting area. Small objects concealed in a person's clothing are not always detected. Objects can even remain hidden in a strip-search. There have been many incidents of detainees ingesting drugs and other objects (such as wrapped explosives) in order to smuggle them into the institution.

80. More physical contact would also allow detainees to exchange unscreened

communications with their visitors, for instance by whispering information that would be inaudible to the prison officers and beyond the range of recording equipment. The authorities regularly find evidence that detainees continue to seek ways of exchanging unscreened communications with the outside world. Some of their attempts to do so have yielded potentially useful information about escapes or plans to secure their release from outside.

81. Allowing detainees more physical contact with children or infants would allow children to be used to convey messages or bring objects into the visiting area. Frisking them more thoroughly as a means of preventing this problem would not be an acceptable option, as this would be considered highly unpleasant by both the child concerned and the prison staff.

#### *Psychological and social climate*

82. Detainees have the right to consult nursing staff, a doctor, a psychologist, a psychiatrist, a social worker and a spiritual counsellor. Weekly meetings are held at the institution, attended by the psychiatrist, the psychologist, the medical staff and the rehabilitation officer. They discuss the personal wellbeing of each detainee weekly or once a fortnight and give advice on the treatment of each individual.

83. In addition, the prison authorities try to achieve a favourable social and psychological climate in the institution, and encourage opportunities for contact between staff members and detainees. As mentioned above, the staff are trained by specialised external agencies to develop and maintain personal contact with detainees. They have contact with detainees several times a day.

84. Moreover, consultations are held with external specialists every two months to review matters concerning the institution in general, and the atmosphere in particular. The same matters are discussed four times a year with the Ministry of Justice.

85. In response to the report published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment on 10 September 1998, the University of Nijmegen has been reviewing the policy on care for the mental wellbeing of detainees in maximum security prisons and the way it is implemented in practice. Their report, which is due in April 2000, will include recommendations on the scope for studying the psychological impact of maximum security detention.

86. Finally, the Government would mention that Parliament has frequently discussed the maximum security prison regime since its introduction in 1990. It also dealt at length with the subject during the debate on the Penitentiary Principles Act. Parliament acknowledged that the regime is necessary to prevent detainees, many of whom are serving long custodial sentences, from absconding or using violence, and for the protection of prison staff.

## VI Facts and circumstances concerning the applicant

### *Criminal record*

87. The applicant has a criminal record dating back to 1969, when he was convicted of assault and criminal damage. Since then he has committed a series of offences ranging from misdemeanours to extremely serious crimes. His record includes several contraventions of the Firearms Act, nine convictions for violent offences, a previous conviction for rape and an offence under the Opium Act. He has been convicted 22 times in total.

88. On 27 August 1996 and 4 February 1997, the applicant was sentenced by 's-Hertogenbosch District Court (*arrondissementsrechtbank*) to respective terms of 11 and 9 years' imprisonment. He lodged an appeal with 's-Hertogenbosch Appeal Court (*gerechtshof*), which dealt with the two cases jointly. By judgment of 27 January 1998, the applicant was sentenced to life imprisonment for a series of offences under the Opium Act, attempted manslaughter (alone and with others), intentional

deprivation of liberty (with others), rape, sexual abuse of a minor, and murder. He instituted an appeal in cassation against this judgment. The Appeal Court judgment was quashed by judgment of 19 November 1999 on the grounds that one of the judges who heard the case at first instance was simultaneously employed as a public prosecutor in the same district as the public prosecutor in the case. The Supreme Court (*Hoge Raad*) referred the case to 's-Hertogenbosch District Court for a retrial.

89. On 3 February 2000, 's-Hertogenbosch District Court sentenced the applicant to life imprisonment for the following offences (see, also, the abridged judgment, **Annexe II**);

intentional contravention of the Opium Act on several counts (selling, providing and/or transporting amphetamines and substances containing heroin and cocaine);

attempted manslaughter and attempted murder (committed with others);

attempted manslaughter;

intentionally and persistently depriving a person of their freedom (committed with others);

rape;

sexual abuse (penetration) of a minor aged between 12 and 16;

murder.

On 3 February 2000, the applicant filed an appeal against this judgment with 's-Hertogenbosch Appeal Court.

#### ***The applicant's placement in the EBI***

90. The applicant was remanded in pre-trial detention on 11 September 1995. He was held in pre-trial detention in ordinary remand centres until 29 October 1997. As transpires from the decision of the CRS of 18 August 1997 (**Annexe III**), he was transferred from the remand centre in Sittard to a similar institution elsewhere, in response to a confidential letter from the police.

91. On 7 October 1997, the national public prosecutor (*landelijk officier van justitie*) notified the governor of Arnhem Zuid Remand Centre that he had been informed that the applicant was planning to escape, and that he would probably receive outside help and use violence against persons in the process. While in detention the applicant had made threats to people outside, or used intimidation or caused it to be used. This tip-off had come from the Criminal Information Service (*Criminele Inlichtingendienst*), which had checked the reliability, validity and present relevance of the information, in compliance with the procedure set out in the GRIP's circular. In view of the nature of the information, the governor of Arnhem Zuid Remand Centre was advised to take appropriate measures to ensure that the applicant remained in detention.
92. The governor placed the applicant in solitary confinement immediately after receiving the tip-off. He also transferred him to an institution in Veenhuizen pending his placement elsewhere. The prison advisor (now known as the selection officer) was notified about the tip-off (see the governor's letter of 14 October 1997). He recommended placement in the maximum security prison, and informed the selection board accordingly. The applicant was transferred to the maximum security prison on 29 October 1997.
93. The applicant lodged a complaint with the complaints committee (*beklagcommissie*) of Arnhem Zuid Remand Centre, submitting that the governor's decision of 7 October 1997, whereby he was placed in solitary confinement, was based on information that was not passed on to him. The committee declared the complaint unfounded. On 27 January 1998, the applicant lodged an appeal with the CRS appeals board, objecting to the complaints committee's decision. The appeal was declared unfounded, albeit on different grounds.
94. On 9 October 1997, the applicant again lodged a complaint with the complaints committee of Arnhem Zuid Remand Centre on the grounds that, before being placed in solitary confinement following a tip-off that he was planning to escape, he was not given an opportunity to phone anyone outside the institution or convey messages

through a fellow inmate. This complaint, too, was declared unfounded, as was his appeal against this decision of 19 February 1998 (decision of the CRS appeals board, 29 May 1998, *Annexe III*).

#### *Applications for transfer*

95. On 13 January 1998, the applicant filed an application with 's-Hertogenbosch Appeal Court, asking to be placed in a remand centre with a less stringent regime than that in the maximum security prison. The application was declared inadmissible on the same day on the grounds that it was not for the criminal courts to decide how a pre-trial detention order should be enforced. The applicant subsequently instituted interlocutory injunction proceedings against the State of the Netherlands, applying to be transferred back to an ordinary custodial institution. By judgment of 20 February 1998, the president of The Hague District Court declared the application in the injunction proceedings inadmissible (*Annexe IV*) because the application to 's-Hertogenbosch Appeal Court of 13 January 1998 had not argued that the applicant's transfer to the maximum security prison was unlawful.

96. On 26 February 1998, the applicant filed another application with 's-Hertogenbosch Appeal Court, asking to be transferred. His application was dismissed by judgment of 26 March 1998 (*Annexe IV*). He had submitted that his placement in the maximum security prison should be deemed unlawful, as the decision to this effect was based on information obtained from the Detainee Intelligence Information Service which had not been given to him and which he was therefore unable to verify. At the hearing in chambers, the procurator general had given the court confidential information in substantiation of the official notification referred to above. He had subsequently notified the applicant and his counsel to this effect, summarising the information and omitting to mention where or when it had been obtained. On the basis of the procurator general's information, the court concluded that the decision to place the applicant in a maximum security prison was reasonable, and that the applicant's detention was not unlawful. His application was accordingly dismissed.

97. On 18 December 1998, the applicant filed another application with 's-Hertogenbosch Appeal Court, again requesting a transfer, and expressly invoking articles 3, 5, 6 and 8 of the Convention. The application was dismissed by judgment of 16 March 1999. With regard to article 3 of the Convention, the court found that the maximum security prison regime does have a basis in law. Moreover, considering the letter from the Minister of Justice of 29 October 1998 and the reasons it set forth, the court concluded that the decision to subject the applicant to that regime was reasonable. In the court's opinion, the manner in which the applicant had been treated could not be characterised as inhuman or degrading treatment or punishment, as referred to in article 3 of the Convention. Nor did it constitute a violation of article 5, paragraph 1(a) of the Convention, since the applicant's detention was lawful. Article 6 of the Convention had not been violated either, given that it has no bearing on the custodial regime to which the applicant was subjected. Finally, the court found that the applicant's treatment was not in breach of article 8 of the Convention, because the restrictions in the present case have a basis in law and are necessary *inter alia* in the interests of public safety.

98. In addition to the above proceedings, the applicant appealed against the decision to extend his detention in the maximum security prison as from 1 January 1999. On the basis of information from various sources, including the prison governor, the Prison Selection Centre and the selection officer, the CRS concluded that there was a high risk of the applicant absconding and that, in view of the sensitivity of, and media interest in, the offences with which he was charged, his abscondment would cause great anxiety among members of the public. In these circumstances and considering that there was insufficient reason not to place the applicant in a maximum security prison, the CRS found that extending his detention there was consistent with the law, and that, all things considered, it was neither unreasonable nor unfair to do so. The CRS further observed that the decision had been taken with proper regard to procedure, as the applicant had been given due notice of the governor's recommendation (about extending his detention in a maximum security prison) and

the opportunity to express his views (see the decision of the CRS appeals board of 24 November 1999, *Annexe III*).

*The applicant's detention in the EBI*

99. Subject to the restrictions of the maximum security regime, the applicant enjoys whatever contact he wishes with his family. However, he has been refused permission to receive visits from two friends, a man and a woman, or to communicate with them by telephone. He filed a complaint with the complaints committee against the ban on contact with the woman. However, the committee considered the ban reasonable in view of the available information about her. As regards the ban on contact with his male friend, the applicant filed a complaint and lodged an appeal with the CRS appeals board, which found the ban not unreasonable in view of the man's long criminal record.
100. The applicant makes use of every opportunity to maintain telephone contact with the outside world, and has regular contact with his mother, daughter, sister, granddaughter, friends and lawyer.
101. The applicant last requested permission to receive an open visit in September 1999. Since then, he has had only closed visits, but he has made use of every available opportunity for this purpose. He sees his family on these occasions.
102. Between November 1999 and February 2000, the applicant had seven appointments with the institution's spiritual counsellor. He also has contact with the institution's rehabilitation officer once a fortnight on average.

**VII Questions raised by the Court**

1. *Is the applicant a victim of a violation of Article 3 as regards the conditions of his detention in the Extra Beveiligde Inrichting?*



103. The Court and the European Commission of Human Rights ("the Commission") have frequently commented on prison conditions in the light of article 3 of the Convention. The Court applies article 3 subject to the condition that ill-treatment reaches a "minimum level of severity" (Ireland v. the United Kingdom, 18 January 1978, Series A Vol. 25, p. 65, § 162: "[...] ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3").

104. There is no breach of article 3 unless a "minimum level" is attained. In other words, the disputed treatment cannot be regarded as torture or inhuman or degrading treatment.

See, for example, Costello-Roberts v. the United Kingdom, 25 March 1993, Series A Vol. 247-C, § 30: "However, [...] in order for punishment to be "degrading" and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in any punishment. Indeed, Article 3 (art. 3), by expressly prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment more generally."

105. The circumstances of any given case determine whether the treatment to which the person is exposed is sufficiently harsh within the meaning of article 3, taking account of the duration of the treatment, its physical and psychological impact, and the person's age and state of health.

See, for example, the recent case of A. Messina v. Italy, no. 25498/94, 8 June 1999: "L'appréciation de ce minimum est relative par essence; elle dépend de l'ensemble des données de la case, et notamment de la nature et du contexte du traitement ainsi que la durée, de ses effets physiques ou mentaux ainsi que, parfois, du sexe, de l'âge et de l'état de santé de la personne concernée."

106. The Government does not deny that the regime in the EBI imposes severe restrictions.

For this reason, as few people as possible are placed in such facilities, and only those whose detention in ordinary or high security facilities would be unacceptable. To protect the safety of prison staff and the public, everything possible must be done to ensure that inmates cannot escape from these institutions. With this in mind, the maximum security prison in Vught operates a regime designed to eliminate any possibility of inmates absconding with outside assistance or by taking hostages among prison staff or visitors. Their activities in general and their contact with staff and visitors are under strict surveillance. Though the applicant considers these measures excessive, the Government believes they are justified in view of the serious risks that less stringent measures would entail. The Government is very aware of its obligation to minimise any risk to prison staff. It also has a duty to do all it can to protect the public by preventing people convicted of serious crimes from returning to the community before completing their lawful sentences.

107. The Government also has a duty to ensure that detainees are not subjected to inhuman or degrading treatment, within the meaning of article 3 of the Convention. It therefore urges the competent authorities to be constantly aware of the effects of the maximum security regime on the physical and mental wellbeing of the detainees concerned.
108. The applicant submits that the maximum security regime is harmful, and draws attention to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of 10 September 1998, and the report drawn up by spiritual counsellors serving custodial institutions in July 1995.
109. The applicant also submits that conditions in the prison cause severe suffering. He maintains that the CPT observed that the maximum security regime has disturbing effects on the mental health of people who are or have been detained in such institutions, and presents this as evidence that his mental health has declined as a result of his detention.
110. The applicant sent a letter to the Court on 13 January 2000, accompanied by a copy of

the Prison Selection Centre's report of 28 October 1999. The report notes that the applicant experiences mood swings, and suffered a period of depression. His malaise has several causes, one being the fact that he misses his family.

111. The Government is of the opinion that the applicant has not been subject to inhuman or degrading treatment as referred to in article 3 of the Convention.

112. The Government is aware of the CPT's comment that the maximum security regime "could be considered to amount to inhuman treatment". The CPT uses the word "could", which, in the Government's view, does not mean that the regime actually *is* inhuman. In the Government's understanding, the CPT chose this formulation because it lacked sufficient information about the effects of maximum security detention on the mental health of individual detainees. It is impossible to say how the regime affects detainees in general. This depends on the individual's personality, character and other personal factors. For article 3 of the Convention to be applicable, a person must be able to show that he has suffered from serious physical or mental problems as a result of his detention in a particular institution (cf. Aerts v. Belgium, 30 July 1998, Reports of Judgments and Decisions 1998-VI, no. 83, § 65-66).

113. The applicant refers to a report on high security institutions ("*De humaniteit van bijzonder beveiligde inrichtingen*"), published by a group of spiritual counsellors in 1995. In response the Government would observe that the report is outdated and no longer relevant. It was based on information dating from the days of the old maximum security institutions, i.e. 1990-1993, and the initial stages of the temporary EBI. In the Government's opinion, the report contains numerous inaccuracies (see the prison governor's comments on the report, dated 21 August 1995, Annexe V). But more important still is the fact that the situation changed radically with the opening of the maximum security prison.

114. Considering the information at its disposal, the Government is of the opinion that

there is no evidence that the applicant is suffering from serious psychological problems as a result of his detention in the EBL.

115. According to the report issued by the Prison Selection Centre, the applicant's psychological disposition can be ascribed to a combination of factors, such as the stress surrounding his appeal in cassation (the Supreme Court has since given judgment), his poorly integrated personality, and limited cognitive powers. The report also points out that he suffered only one episode of depression. He is therefore not chronically depressed. Moreover, as the applicant himself remarks, he had previously suffered episodes of depression in ordinary custodial institutions.
116. Regarding the conditions of detention in the maximum security prison, the Government would further observe that there is no question whatsoever of the applicant being subjected to sensory deprivation or social isolation. The Court made the following comments in its consideration of the admissibility of the Vincenti and Messina cases:

"La Cour rappelle que l'isolement sensoriel complet combiné à un isolement social total peut détruire la personnalité et constitue une forme de traitement inhumain qui ne saurait se justifier par les exigences de la sécurité ou toute autre raison. En revanche, l'interdiction de contacts avec d'autres détenus pour des raisons de sécurité, de discipline et de protection ne constitue pas en elle-même une forme de peine ou traitement inhumains [...]. La Cour observe d'emblée que le requérant n'a pas été soumis à un isolement sensoriel ni à un isolement social absolu. En revanche, il a été soumis à un isolement social relatif, découlant de l'interdiction de voir des détenus soumis à un régime différent, de l'interdiction de recevoir des visites de personnes autres que les membres de sa famille et de l'interdiction de téléphoner. Si ses possibilités de contacts étaient aussi limitées, on ne saurait toutefois parler à ce propos d'isolement." (A. Messina v. Italy, no. 25498/94, 8 June 1999; A. Vincenti v. Italy, no: 48469/99, 1 February 2000).

117. Hence, in the Messina and Vincenti cases, the Court did not regard a situation in which detainees are prevented from seeing certain fellow inmates, or receiving visits from anyone other than relatives, or using the telephone, as constituting isolation. In

both cases the Court concluded that "le traitement dont se plaint le requérant n'atteint pas le minimum nécessaire de gravité pour tomber sous le coup de l'article 3 de la Convention". The Government would observe that none of these restrictions apply in the present case. The applicant has contact with fellow inmates, he is allowed to receive visits from relatives and friends, and he has ample opportunity to make telephone calls.

118. In the Messina and Vincenti cases, moreover, the applicants' activities were also restricted. This again does not apply in the present case. The applicant has ample opportunity to take part in a wide variety of activities (see § 57 ff.).

119. The Government further refers to the report of the Commission in the case of Kröcher and Möller v. Switzerland (16 December 1982, D&R 34 (1983), p. 24), in which the Commission raised the question as to "whether the balance between the requirements of security and basic individual rights was not disrupted to the detriment of the latter". Even though the conditions in this case involved solitary confinement, constant artificial lighting, constant surveillance by means of a closed television circuit, no access to newspapers or radio, and no opportunity to take physical exercise - and not one of these conditions applies in the present case - the Commission concluded that all the above measures were warranted in the case in question in the interests of safety both inside and outside the prison.

120. On the basis of the above, the Government concludes that conditions in the maximum security prison are neither inhuman nor degrading, and that the applicant has failed to demonstrate that his mental health has seriously suffered as a result of his detention in that prison.

2. *Is the applicant a victim of a violation of Article 8 of the Convention as regards the restrictions on the exercise of his "private life" and "family life"?*

121. The applicant submits that detainees have virtually no privacy or opportunity to maintain contact with the outside world (and therefore with members of their immediate families), particularly as compared with life in an ordinary custodial institution.
122. The Government does not dispute the fact that opportunities for the applicant to exercise his private and family life are restricted. However, it believes that these restrictions are necessary within the meaning of article 8, paragraph 2 of the Convention, which prohibits interference with a person's exercise of his right to respect for his private and family life, except such as is in accordance with the law and is necessary in a democratic society in the interests *inter alia* of public safety, the prevention of disorder and crime or for the protection of the rights and freedoms of others.
123. The Government maintains that the authorities have satisfied the requirement that any such interference must be in accordance with the law. The maximum security regime is based on the Penitentiary Principles Act (and was based on the old Prisons Act prior to 1 January 1999).
124. The Government also believes that the interference at issue is necessary in the interests of public safety, for the prevention of disorder and crime, and for the protection of the rights and freedoms of others. The Government would elucidate its views as follows.
125. In determining the applicability of article 8, paragraph 2 of the Convention, the Court proceeds from the principle that it is not its duty to substitute its own judgment for the judgment of the competent national courts. The Court's duty is to establish whether, in the specific circumstances of the case, the national courts' reasons for justifying the disputed measure are relevant and sufficient for the purposes of article 8, paragraph 2 of the Convention. In this respect, the national courts have the advantage of having direct contact with the persons concerned (see, for example, Johansen v. Norway, 7

August 1996, Reports of Judgments and Decisions 1996-III, no. 13, § 64; Bronda v. Italy, 9 June 1998, Reports of Judgments and Decisions 1998-IV, no. 77, § 59).

126. As explained above, the purpose of the maximum security regime is to eliminate any possibility of abscondment. Following the numerous escapes and attempted escapes in the early 1990s, which were perpetrated with the use of violence and caused profound suffering among prison staff and great anxiety among the public, a regime was designed which would provide watertight security. Its aim is to prevent detainees from escaping by taking hostages, but also to convince them any attempt to do so would be futile. The regime is especially geared to the two weakest links in any security chain: contact with people outside the institution who are in a position to provide the information and means that would enable detainees to escape, and contact with prison staff, who are vulnerable to attack. In concrete terms, this means that the prisoner may not hold unmonitored conversations with his visitors or have physical contact such as would enable him to receive objects that could facilitate his escape.

127. The Government considers these measures necessary to minimise security risks. The Government respects the applicant's view that being subjected to systematic controls and surveillance and to the restrictions on physical contact with his family is frustrating. However, this intrusion on his privacy is inherent in his detention and is therefore not unjustified. Unmonitored conversations and unrestricted contact between detainees and the outside world would seriously undermine security. For instance, it would be quite simple for the applicant to plan his escape with people outside the institution and thus coordinate the venture on both sides.

128. Detainees have shown themselves to be highly resourceful when it comes to obtaining objects to facilitate their escape. In the past, objects were often smuggled into prison to be used as weapons against prison staff. Seemingly innocuous articles, such as paperclips, pens or toothbrushes, can easily be used as weapons. Since walk-through metal detectors and frisking are not foolproof, physical contact between detainees and their visitors has to be limited to a handshake. In any event, closer contact would

enable detainees to evade surveillance and communicate by whispering or through gestures (see § 76 ff.).

129. Allowing more physical contact would make it necessary to subject visitors to stricter controls, which they would regard as violations of their privacy. The Government is not in favour of such measures.

130. The Government concludes that intrusions on the applicant's private and family life are warranted in the interests of the aims of the maximum security régime, i.e. to prevent the abscondment of detainees convicted of serious crimes, to protect prison staff from being taken hostage, and to protect society at large.

*3(a) Is Article 6 applicable to proceedings in which a transfer to a different institution for detention is requested on the grounds that the placement in the institution from where a transfer is sought was unlawful?*

131. Article 6, paragraph 1 of the Convention provides that everyone is entitled to a fair hearing in the determination of his civil rights or of any criminal charge against him.

132. According to the applicant, the proceedings in which the decision concerning his continued detention in the EBI was reviewed by 's-Hertogenbosch Appeal Court related to the determination of his civil rights within the meaning of article 6 of the Convention. He submits that the outcome of the case had direct implications for determining his right - a civil right within the meaning of article 6 - to respect for his private and family life and the manner in which he can exercise it.

133. In the Government's opinion, the applicant's interpretation of article 6 is incorrect. By his reasoning its scope would be vastly expanded and article 6 would apply to disputes it was never intended for. Moreover, the Government believes that the applicant's interpretation of article 6 differs from that given by the Commission and the Court. The Government would clarify this view as follows.



134. The Government contests the view that the proceedings concerning the extension of the application's detention in the EBI were decisive for his right to respect for his private and family life. The restrictions he is now subjected to as regards his exercise of that right are a direct consequence of his criminal conviction. The restrictions on his ability to lead a private and family life are inherent in, and a logical outcome of any prison sentence. Hence, in the Government's opinion, the decisive factor in determining the applicant's ability to lead a private and family life was his criminal conviction and the enforcement of his sentence, not the decision to extend his detention in the EBI. Though his contact with relatives and other visitors is subject to tighter restrictions than would be the case in other custodial institutions, in the Government's view this is a difference of degree, not of kind. Other institutions can also impose far-reaching restrictions of this type. Hence, the applicant's ability to lead a private and family life is restricted by his conviction for a criminal offence, not by the proceedings reviewing the decision to extend his detention in the EBI.

135. In the Government's opinion, the proceedings referred to above do not concern the determination of a civil right within the meaning of article 6 of the Convention, because their purpose was not to regulate relations between the applicant and his family. The purpose of the proceedings was to determine the place where a sentence was to be enforced. There are two reasons why determining this place does not amount to the determination of a civil right.

136. Firstly, it does not involve an issue which, according to Dutch legal thinking, could reasonably be regarded as a *right*. Though the national authorities give serious consideration to a detainee's preferred place of detention - which is reflected in the placement procedure set forth in the Penitentiary Principles Act - this is not to say that detainees have the right to choose where they wish to serve their sentence or to refuse the place to which they are assigned. The judicial authorities decide on placements and transfers, and they have wide-ranging discretionary powers to do so.

See ECHR, Masson & Van Zon v the Netherlands, 28 September 1995, Series A Vol. 327, § 51: "The grant to a public authority of such a measure of discretion indicates that no actual right is recognized in law."

137. The Convention likewise does not confer on detainees the right to choose where they wish to serve their sentence.

See the European Commission's decision of 20 October 1994 in the case of Hacıilevmanoglu v. Italy, no. 23241/94: "[...] la Commission rappelle tout d'abord que la Convention n'accorde pas aux détenus le droit de choisir leur lieu de détention."

138. Secondly, the proceedings cannot be described as civil law proceedings. According to the Court's established case law, the concept of "civil rights" in article 6 should be regarded as autonomous, whereby the domestic courts' qualification of a particular entitlement as not constituting a civil law entitlement should *not* be the decisive factor. Nevertheless, it must concern an entitlement or right which is "civil in character" (see, for example, ECHR, M.S. v. Sweden, 27 August 1997, Reports of Judgments and Decisions 1997-IV, no. 44, § 47). Having regard to the above, the Government is of the opinion that decisions and proceedings concerning placements in a custodial institution are patently public law issues. This is recognised in the Commission's case law. The Government refers to the Commission's decision of 1 April 1992 in the case of Hagemann v. the Netherlands, no. 19084/91, which reads as follows:

"It is true that a person's placement during imprisonment and the regime under which he serves his sentence may have certain repercussions on his private life and on the opportunities he will have of maintaining contact with his family. Nevertheless, the Commission considers that the decisions which the prison administration takes on such matters should be regarded as administrative decisions which do not determine the prisoner's civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention."

139. The Government also refers to the Commission's decision of 1 July 1992 in the case

of Roelofs v. the Netherlands, no. 19435/92, in which the Commission observed that

"[...] the applicant was at the relevant time detained. The decisions complained of did not concern the question whether he should be deprived of his liberty but merely the conditions under which his further detention should be performed. The Commission considers that the determination of the place and conditions of detention are as a rule administrative matters which cannot be considered to concern the determination of the detainee's civil rights."

140. The Court's judgments in the cases of Neumeister and Matznetter corroborate the Government's opinion that prison law proceedings do not fall within the purview of "the determination of civil rights" within the meaning of article 6. In the Neumeister case the Court found that article 6 was not applicable to an application for release on parole. In the Court's opinion, the view taken by several members of the Commission that such an application relates to civil rights within the meaning of article 6

"does not seem to be well founded. Quite apart from the excessively wide scope it gives to the concept of 'civil rights', the limits of which the Commission has sought to fix on a number of occasions, it must be observed that remedies relating to detention on remand undoubtedly belong to the realm of criminal law and that the text of the provision invoked expressly limits the requirement of a *fair hearing* to the *determination ... of any criminal charge*, to which notion the remedies in question are obviously unrelated." (Neumeister v. Austria, 7 June 1968, Series A Vol. 8, p. 43, § 23).

141. The Court confirmed this view in the case of Matznetter v. Austria (10 November 1969, Series A Vol. 10, p. 35, § 13). In the Government's opinion, since the Court finds that article 6 of the Convention is *not* applicable to proceedings which may result in the release of a detainee, it must by the same token be inapplicable to proceedings which may result in the transfer of a detainee from one custodial institution to another.

142. The Government concludes that the proceedings concerning the extension of the applicant's detention in the EBI do not fall within the scope of "the determination of civil rights" within the meaning of article 6.

143. Nor can placement in the EBI be regarded as a "criminal charge" within the meaning of article 6. In this connection, the Government would cite the Commission's judgments referred to above. In the judgment of 1 July 1992 in the case of Roelofs v. the Netherlands, no. 19435/92, the Commission observed that

"the detention regime imposed by the decisions complained of was ordered as a security measure and not as a sanction against the applicant for an offence committed by him. The applicant was not charged with any criminal or disciplinary offence, but the decisions were aimed at eliminating the risk of the applicant absconding which was considered to be serious. In these circumstances the Commission considers that the proceedings did not concern the determination of a criminal charge and that in these proceedings the applicant was not charged with a criminal offence."

144. And in the judgment of 1 April 1992 in the case of Hagemann v. the Netherlands, no. 19084/91, the Commission observed

"[...] that the decision to separate the applicant from other prisoners was not a sanction for any offence which the applicant had committed during his imprisonment. It follows that in the proceedings concerned the applicant was not charged with a criminal offence within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention."

145. The Government therefore concludes that article 6 of the Convention is not applicable to the proceedings held to review the extension of the applicant's placement in the EBI.

**3b) *If so, has there been a violation of that Article in that the applicant and his counsel were denied access to information which was apparently of decisive importance for the decision to prolong the applicant's detention in the Extra Beveiligde Inrichting?***

146. Having regard to the answer to question 3a), the Government is of the opinion that

article 6 of the Convention has not been violated.

### VIII. Conclusions

147. The Government concludes as follows.

The conditions in the EBI are neither inhuman nor degrading. Nor has it been demonstrated that the applicant's mental health has seriously suffered as a result of his detention under the maximum security regime. Article 3 of the Convention has therefore not been violated.

Interference with the applicant's private and family life is necessary to prevent the abscondment of detainees convicted of serious crimes, to protect prison staff against being taken hostage, and to protect the public at large. There is no reasonable alternative to the contested measures. Hence, article 8 of the Convention has not been violated.

The proceedings relating to the applicant's placement in the EBI are not decisive in determining civil rights. Nor do they concern the question of whether a prosecution is well founded. Article 6 of the Convention is therefore inapplicable to the present case.

**VERY URGENT!!!**  
**RULE 39**  
**APPLICATION AGAINST**  
**THE NETHERLANDS**

European Court of Human Rights  
**The Registrar - Section III**  
Council of Europe  
67075 Strasbourg CEDEX  
France

**Also by fax: +33388412730**

Amsterdam, 15 July 2005  
Our ref. 20050934.MF/MW/BF

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**Betreft: Ramzy v the Netherlands – REQUEST FOR RULE 39**  
**New case**

Dear Sir,

We, counsels for the applicant, Mr Mohammed RAMZY, introduce a new application ex Article 34 of the Convention, against the Netherlands. The applicant was born on 23 November 1982. He is an asylum seeker from Algeria who is on trial in the Netherlands on charges of Islamist terrorism. He is presently in aliens detention in Penitentiary Institution Ter Apel.

The applicant is about to be expelled to Algeria.

His asylum case was terminated in last and final instance on 6 July 2005. On 12 July 2005 he has been presented by the Dutch immigration authorities to the Algerian Embassy for travel documents. In practice this means that he will be put on an airplane to Algeria at very short notice.

The applicant files this application on grounds that there are substantive grounds to believe that there is a real risk of him being exposed to torture and/or inhuman and/or degrading treatment contrary to Article 3 of the Convention if he is expelled from the Netherlands to Algeria.

The applicant requests the Court to apply Rule 39 of its Rules of Court and to indicate to the Government of the Netherlands an interim measure not to expel him to Algeria while his application is pending before the Court.

## OVERVIEW OF PRESENT IMMIGRATION PROCEEDINGS

The applicant's asylum request was rejected by the Minister for Aliens Affairs and Integration on 25 August 2004. On 14 September 2004 the applicant was also declared an undesired alien on the grounds that he was considered to be a threat to national security and in the interest of "the Netherlands' international relations". The applicant lodged an administrative appeal (*bezwaar*) against this decision. These proceedings are still pending before the domestic courts.

On 2 November 2004 the Haarlem Regional Court issued an interim order at the request of the applicant prohibiting the minister to expel the applicant until a decision was taken on his appeal against the decision of 25 August 2004 and on the administrative appeal against the decision of 14 September 2004.

The minister lodged an extraordinary appeal (*doorbreking van het appèlverbod*) against this interim order to the Administrative Jurisdiction Division of the Council of State [AJDCS] (*Afdeling Bestuursrechtspraak van de Raad van State*). On 19 November 2004 the AJDCS annulled the Haarlem Regional Court's interim order as regards the minister's decision of 14 September 2004.

On 23 December 2004 the Haarlem Regional Court considered the applicant's appeal well-grounded (*gegrond verklaard*) and overturned the minister's impugned decision of 25 August 2004 referring the case to the minister for a new decision (see below).

The minister lodged a further appeal (*hoger beroep*) against the judgment of the Haarlem Regional Court to the AJDCS. On 6 July 2005 the AJDCS quashed the judgment of the Haarlem Regional Court. This decision is final and not subject to any appeal.

The applicant can be expelled at a very short notice. On 12 July 2005 he was taken to the Algerian embassy, assumingly for a *laissez-passer*, where he spent an hour waiting, handcuffed, while his expulsion was being negotiated by the Netherlands immigration authorities with the Algerian embassy.

## BACKGROUND OF THE CASE

The applicant made a first application for asylum in the Netherlands on 30 January 1998. This application was rejected by the State Secretary of Justice on 7 October 1998. The applicant did not appeal that decision.

On 9 September 1999 the applicant filed a second request for asylum. On 14 September 1999 the application was declared inadmissible by the State Secretary of Justice. The applicant's appeal against this decision was rejected by the Zwolle Regional Court on 6 October 1999.

## CRIMINAL CASE

On 12 June 2002, the applicant was arrested in his house in Groningen upon suspicion of belonging to a criminal organisation with the alleged aim of:

- prejudicing the State of the Netherlands by providing assistance to the enemy conducting a holy war (jihad) against among others the Netherlands;
- drug trafficking;
- using false (identity) documents;
- forging (identity) documents;
- human trafficking.

The applicant was also suspected and subsequently separately charged with having co-committed the crimes abovementioned themselves, i.e. not only within his membership of a criminal organisation.

The applicant was tried together with a group of eleven co-suspects who had all been arrested in approximately the same period of time.

The basis for the suspicion against the applicant and the other co-suspects were reports dated 22 and 24 April 2002 from the General Intelligence and Security Service (*Algemene Inlichtingen en Veiligheidsdienst*, further: AIVD) and the former Internal Security Service (*Binnenlandse Veiligheidsdienst*, further: BVD). The reports were supported, among others, by taps of telephone conversations gathered by the AIVD/BVD.

The suspects supposedly belonged to an organisation that adhered to Salafism. A number of them allegedly were part of the *Groupe Salafiste pour le Predication et le Combat* (GSPC) organisation, an Algerian extremist Islamist group. This group, suspected to be an al-Qaeda cell, allegedly recruited persons for the jihad and conducted preparatory/auxiliary activities for terrorist acts.

The suspects met regularly at the Al-Fourqaan mosque in the city of Eindhoven.

At the trial, the prosecutor finally only maintained the charges against the applicant as to the membership of a criminal organisation with the aims described above and pleaded that the applicant be acquitted for the other, separate, charges.

On 5 June 2003 the applicant was fully acquitted of all charges by the Rotterdam Regional Court, together with all others co-suspects. The court held that the reports from the AIVD/BVD, adduced by the prosecutor, could not be used as evidence since neither the applicant's defence counsel nor the court itself could verify the validity, correctness and sources of its contents. The court did consider that the telephone taps of the AIVD/BVD, whose contents the defence for the applicant had been able to verify, could be used in evidence at the trial even it was not certain whether this was obtained in accordance with domestic law. The Rotterdam Regional Court also ruled that even if the



AIVD/BVD information could have been used as evidence it would not have provided sufficient proof for a conviction. The court ordered the applicant's immediate release.

The public prosecutor lodged an appeal against the Rotterdam Regional Court's judgment. Counsel for the applicant in the criminal case addressed the prosecutor at the Hague Court of Appeal (*Advocaat-Generaal*) requesting him to ensure that the applicant is not expelled pending the criminal proceedings in view of his right to be present at trial. The *Advocaat-Generaal* responded that he saw no problem with the applicant's expulsion. He suggested that the applicant could apply for a visa once a trial date in appeal would be known. The case has not yet been tried in appeal and no date for a trial hearing has been set.

The applicant's "high-profile terrorist trial" was followed closely by mass media and the public. The trial and its outcome also received wide international press coverage (attached). In at least two publications the applicant's name was mentioned.

### **THE ASYLUM CASE**

Following the applicant's release from criminal detention he was immediately apprehended by the Foreigners Police (*Vreemdelingenpolitie*) and taken into aliens detention (*vreemdelingenbewaring*). He was, however, released on 21 July 2003 as no decision had been taken on his asylum request by the minister within six weeks. The latter is a statutory obligation in case an asylum seeker who has lodged his asylum request is placed in aliens detention.

Upon release the applicant was ordered (*aangezegd*) to leave the country. The applicant indeed tried to do so and attempted to get to Turkey. He first travelled to Germany. From Germany the applicant arrived by airplane to Turkey where he requested asylum. Turkey, however, did not consider his request on the merits and sent the applicant back to Germany. Upon return to Germany, the applicant applied for asylum there.

However, on 14 May 2004 the German authorities made a claim under the Dublin Agreement to the Netherlands authorities to take the applicant back for a (further) consideration of his asylum request, which was still pending before the Netherlands Immigration Service (*IND*). On 16 June 2004 the Netherlands authorities accepted Germany's claim. The applicant was surrendered to the Netherlands on 15 July 2004.

Prior to the applicant's forced return to the Netherlands from Germany, the AIVD, on 14 July 2004, issued a new report with respect to the applicant. It stated that he must be considered as a threat to national security, since his extremist Islamic views and opinions had remained unchanged. Upon return to the Netherlands the applicant was immediately taken again into aliens detention and has remained there ever since, despite numerous appeals to court by his counsel for his release.

## **Arguments and submissions in the asylum case**

In support of his asylum request the applicant submitted that since he was suspected and was in fact still on trial in the Netherlands for belonging to a terrorist Islamist organisation, he had or must also have come under negative attention of the Algerian authorities. To that effect he referred to the wide (inter)national press and internet coverage on his, public, trial.

The applicant was also personally referred to under his own name as a person suspected of “playing some role in the assassination of Massood, leader of the anti-Taliban Northern Alliance, and being part of a larger Dutch-based terrorist cell that recruited young Muslims to go on suicide missions against non-Muslim targets outside the Netherlands” (AP). The extensive international press coverage explicitly mentioned the suspicion of the applicant belonging to the GSPC (see further press coverage, attached).

Counsel for the applicant further contended that there is a co-operation and exchange of information in place between the Netherlands, EU and the Algerian intelligence services. This inevitably led to a justified assumption that information on the applicant – a person suspected of Islamist terrorist activities - has been indeed provided to the latter. This naturally course could not be proven by the applicant, considering that the exact contents of such exchanged information is not disclosed by the security services.

However, the likelihood of this already followed from, e.g., the AIVD year report 2003 which reports that foreign intelligence services monitor their nationals residing in or migrating to the Netherlands. Counsel for the applicant further referred to the EU Counter Terrorism Group (CTG), which was formed following the “9/11” attacks in the United States and which inter alia coordinates intelligence information, also with countries outside the EU where terrorism occurs. Counsel finally pointed to the EU Euro-Mediterranean Agreement with Algeria which Article 90 (Fight against terrorism) provides:

In accordance with the international conventions to which they are party and with their respective laws and regulations, both Parties agree to cooperate with a view to preventing and penalising acts of terrorism:

- through the implementation in its entirety of United Nations Security Council resolution 1373 and other related resolutions;
- through the exchange of information on terrorist groups and their support networks in accordance with international and national law;
- by pooling experience of means and practices for combating terrorism, including experience in the technical and training fields.

Counsel for the applicant concluded that it was impossible for the applicant to prove that the Algerian authorities knew that he was a suspected Islamist terrorism for the GSPC and would treat him as such upon return. He had however, in view of the aforementioned, sufficiently substantiated that the Algerian authorities were at least aware of the applicant’s terrorism trial in the Netherlands.

The applicant contended that his expulsion would be contrary to Article 3 of the Convention considering the practice of the Algerian authorities of torturing persons suspected of being Islamist terrorists. His counsel referred in this respect to Amnesty International's year reports on 2003/2004, US State Department Country Report on Human Rights, i.e. on Algeria and Human Rights Watch Reports.

### **The minister's decision**

The minister, in his decision of 25 August 2004, considered – in short - that the applicant had not pointed to specific, individual facts and circumstances which demonstrate that the Algerian authorities knew about the fact that he was a terrorism suspect in the Netherlands and that a trial was taking place against him. He had, in the minister's view, not substantiated that he be seen as a terrorism suspect himself upon return to Algeria.

The minister further observed that “even if the latter were the case, the applicant's situation would not be worse than other terrorism suspects. Participation in armed Islamic groupings was a common criminal law offence and was treated as such in Algeria. Even though death sentence could be imposed for terrorist crimes, this sentence had not been applied since 1993, and death sentences are usually reversed to life imprisonment in appeal. Prosecution for such acts therefore did not fall under the protection of the Geneva Convention and the punishment for such acts could not be considered disproportionately severe or discriminatory”.

Finally, the minister considered that the applicant did not run a risk being treated contrary to Article 3 of the Convention if returned to Algeria, since he had failed to show that there was an individual specific ‘negative’ attention against him on the part of the Algerian authorities, which would justify the fear for a real risk of torture.

### **The Haarlem Regional Court**

In his appeal to the Haarlem Regional Court, the applicant submitted additional arguments that he had done everything in his power which could reasonably be expected from him to substantiate the fact that the Algerian authorities must have become aware of the criminal trial and the nature of suspicions against him.

Counsel for the applicant referred among others to a letter from Amnesty International of 27 May 2003 in which Amnesty argued that it cannot be excluded that the Rotterdam terrorism trial was followed closely by the Algerian authorities in the Netherlands.

Counsel for the applicant further contended that it was, conversely, relatively easy for the Netherlands authorities to find out whether there is a search order for the applicant in Algeria. To that effect counsel submitted a process-verbal

of the Foreigners Police in a case of another Algerian, which showed that such research had indeed been successfully carried out before in another case by the Dutch authorities through their Criminal Research Service (*CRI*).

In its judgment of 23 December 2004, the Haarlem Regional Court held that in view of the public and mass media attention for the applicant's trial and considering the increasing international co-operation between intelligence services, the applicant had sufficiently substantiated (*aannemelijk gemaakt*) that the suspicion of terrorism against him had or must have become known to the Algerian authorities.

As far as Article 3 of the Convention was concerned, the Haarlem Regional Court held that although there had been improvements in the human rights situation in Algeria since the nineties, there was still a particular risk of torture at the hands of the police of persons suspected of belonging to armed Islamist extremist groups – to which the applicant is suspected to belong. In reaching this conclusion, the Haarlem Court analysed official country reports (*algemene ambtsberichten*) of the Ministry of Foreign Affairs (MFA) and the Year Report on 2004 of Amnesty International concerning Algeria.

### **The Administrative Jurisdiction Division of the Council of State**

In its judgment of 6 July 2005 the AJDCS, quashing the Haarlem Regional Court's judgment, limited its consideration to stating that the applicant had not substantiated that he personally ran the real risk of being tortured in Algeria. It considered that even if the Algerian authorities had become acquainted with the charges against the applicant in the Netherlands, it did not follow from the MFA's official reports that the applicant ran the risk he alleged. The AJDCS observed that the applicant "had merely referred to the suspicion which had arisen against him and the criminal proceedings that followed from it, speculating as to the possible consequences of his return to Algeria". The AJDCS concluded that it was not up to the minister to substantiate that the alleged risk does not exist. The AJDCS made no assessment of the other sources adduced by the applicant, and restricted its findings to the MFA official country report.

### **COMPLAINTS**

The applicant complains that there is a real risk that he will be exposed to torture or inhuman or degrading treatment contrary to Article 3 of the Convention if he is expelled from the Netherlands to Algeria. The applicant submits that his case meets the criteria set out in the Court's established case law in this specific area (*Soering v the United Kingdom*, *Hilal v the United Kingdom*, *Chahal v the United Kingdom*, *Cruz Varas v Sweden*, *Jabari v Turkey*, *Muslim v Turkey* and, most recently, *Said v. the Netherlands*)

The applicant submits first of all that he has substantiated that the Algerian authorities have, or must have, become aware of the criminal trial against him in the Netherlands upon suspicion of belonging to an extremist Islamist group

involved in jihad. This matter is in fact no longer in contention, considering the Haarlem Regional Court's acknowledgement in this respect. The AJDCS in its judgment, does not express itself explicitly on whether it considers that the Algerian authorities are aware of the applicant's trial and the nature of suspicions against him. The AJDCS does not, however, reject the Haarlem Regional Court's finding in this respect.

The applicant contends that in view of this knowledge by the Algerian authorities, he runs a real personal risk of being subjected to torture and/or other inhuman and degrading treatment when he falls in the hands of the Algerian security forces. The fact that he, an expelled asylum seeker, will be interrogated by the Algerian security forces directly upon return is also not in dispute in view of information provided thereon in the MFA official report.

The applicant observes that the Netherlands authorities, and in particular the minister and the AJDCS made an inadequate assessment of the risks involved for the applicant. In particular the AJDCS's judgment lacks a sufficient and consistent reasoning in its finding that even if the Algerian authorities are aware of the suspicions against him, he ought to have adduced even more individual circumstances to substantiate the existence of his personal risk.

The minister and the AJDCS have failed to reason by what other means the applicant could have adduced more than he has already done to point to the fact that he personally falls under the category of persons who are tortured and/or killed by the security forces. In doing so, the Netherlands have burdened the applicant with a *probatio diabolica*.

The applicant relies *mutatis mutandis* on the Court's judgment in the case *Said v the Netherlands* (1 July 2005, § 51) and submits that even though the materials and reports on treatment of terrorism suspects submitted by him do not relate to him personally - they concern information of a more general nature - it is impossible to see what more he might reasonably have been expected to submit in the way of substantiation of his fears that he - a suspect of extremist Islamist terrorism - will find himself in the same situation as other (to be) tortured terrorism suspects in Algeria. This is the more true since the Netherlands Government have the resources available to carry out a research as to whether a criminal case is pending against him in Algeria.

In order to substantiate the risk of torture and possibly even his death at the hands of the security forces, the applicant refers to the sources describing the treatment of Islamist terrorism suspects and forcibly returned asylum seekers in Algeria (overview and quotations attached).

The reports mentioned describe the manner in which suspects of Islamist extremism/terrorism are tortured, ill-treated, killed or made to disappear at the hands of the security forces in Algeria. There is no functioning legal protection against these atrocities, which often occur outside the official supervision and legal system and which are surrounded by virtual impunity for its perpetrators - State security agents.

In support of his contentions, the applicant further relies on recent affidavits submitted by experts in the expulsion case to Algeria of Mr Mohamed HAKAT, a person suspected of Islamist terrorism. His case is currently pending before the Canadian authorities. The applicant furthermore submits a copy of the letter from Mr Hakat's counsel to the Canadian Immigration Authorities elaborating on the situation in Algeria of suspects of terrorism.

- Letter to Stéphanie Chenier, Acting Manager – CBSA Ottawa, dated 21 April 2005 from Mr Hakat's counsel, Paul D. Copeland;
- Affidavit of Prof. Mr E.G.H. Joffe, dated 20 April 2005, director of the Centre for North African Studies at the Centre of International Studies in the University of Cambridge, affiliated lecturer at the Centre for International Studies at Cambridge, teaching a postgraduate course on the contemporary Middle East and North Africa;
- Affidavit of Mr J.P Entails, April 2005, professor of Political Science and Director of the Middle East Studies Program at Fordham University, NYC, USA.

These documents and submissions elaborate and show the concrete concerns for persons suspected of Islamist extremist activities/terrorism links when returned to Algeria. It must be noted that Mr Hakat's situation, e.g. publicity of his trial, nature of charges/suspensions are to a large extent comparable to the applicant's.

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We would like to ask you to register this application and inform us of further proceedings.

We also look forward to your decision on the applicant's request for application of Rule 39.

Yours faithfully,

on behalf of the applicant,

M. Ferschtman

M.F. Wijngaarden

B.J.P.M. Ficq

**Enclosures**

- Judgement of the AJDCS of 6 July 2005;
- The applicant's reply to the minister's appeal of 6 February 2005 (only by mail);
- The minister's (further) appeal pleadings to the AJDCS of 19 January 2005 (only by mail);
- Judgment of the Haarlem Regional Court of 23 December 2004;
- The applicant's appeal pleadings to the Haarlem Regional Court of 2 December 2004 (only by mail);
- Decision of the Minister on Aliens Affairs and Integration of 25 August 2004;
- Correspondence between the applicant's defence counsel and the Advocaat-Generaal of 13 and 16 June 2003;
- Judgment in the applicant's criminal case in the Netherlands of 5 June 2003;
- Reports concerning the applicant from the AIVD/BVD of 22 and 24 April 2002;
- Overview and excerpts from human rights reports concerning Algeria;
- Overview of press coverage of the applicant's trial (parts only by mail);
- Letter to Stéphanie Chenier Acting Manager – CBSA Ottawa, of 21 April 2005 from Mr Hakat's counsel, Paul D. Copeland (only by mail);
- Affidavit of Mr E.G.H. Joffe, of 20 April 2005 (only by mail);
- Affidavit of Mr J.P Entails, of April 2005 (only by mail);
- Power of authority by the applicant to his counsels.

*Anti-Terrorism Crime and Security Act 2001, Part IV – Detention of foreign nationals where removal or deportation not possible – appeals to Special Immigration Appeals Commission – admissibility of evidence procured by torture and degrading treatment of a third party by foreign agents – rule against involuntary confessions – abuse of the process – Articles 3,5(4), 6 ECHR – Articles 1, 15 UNCAT*

Law Reports

Court of Appeal: [2004] EWCA Civ 1123; [2005] 1 WLR 414

Time Occupied below:

Before the Court of Appeal: 5 days (excluding judgement)

**ON APPEAL**

**FROM HER MAJESTY’S COURT OF APPEAL (ENGLAND)**

**BETWEEN:**

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**A and OTHERS**

*Appellants*

**-v-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

*Respondent*

**A and OTHERS (FC) and ANOTHER**

*Appellants*

**-v-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

*Respondent*

**(Conjoined appeals)**

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**CASE FOR THE INTERVENERS  
(AMNESTY INTERNATIONAL & OTHERS)**

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## INTRODUCTION

1. These written submissions are presented on behalf of the AIRE Centre (Advice on Individual Rights in Europe), Amnesty International Ltd, the Association for the Prevention of Torture, British Irish Rights Watch, The Committee on the Administration of Justice, Doctors for Human Rights, Human Rights Watch, The International Federation of Human Rights, INTERIGHTS, The Law Society of England and Wales, Liberty, the Medical Foundation for the Care of Victims of Torture, REDRESS and The World Organisation Against Torture.
2. Brief details of each of these organisations are set out in the schedule to this case.
3. These Interveners have extensive experience of working against the use of torture and other cruel, inhuman or degrading treatment or punishment around the world. Between them, they have investigated and recorded incidents of torture and other forms of ill-treatment,<sup>1</sup> worked with survivors of such treatment, and carried out research into such practices. Some have contributed to the elaboration of international law and standards related to the prohibition of torture and other forms of ill-treatment. Some monitor and report on states' implementation in law and practice of these standards. Some of the Interveners have been engaged in litigation in national and international fora involving states' obligations arising from the prohibition of torture and other forms of ill-treatment. All of the Interveners have extensive knowledge of the relevant international law and standards and jurisprudence.
4. The prohibition of torture and other forms of ill-treatment (hereinafter "the prohibition") under international law is absolute and non-derogable. The Interveners oppose the use, reliance, proffering and admission in any proceedings of information which has been or may have been obtained as a result of a violation of the prohibition, by or against any person anywhere, except in proceedings

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<sup>1</sup> The expression 'other forms of ill-treatment' is used here as an abbreviation for cruel, inhuman or degrading treatment or punishment.

against a person suspected of responsibility for a violation of the prohibition, as evidence that such information was obtained.

5. The decision of the fourteen national and international organizations to intervene in this appeal is motivated by grave concern about the undermining and circumvention of the absolute prohibition and the attendant obligations that give it effect. The Interveners are concerned that states, individually and collectively, are increasingly resorting to counter-terrorism measures that effectively bypass their obligations in respect of the absolute prohibition. Some states torture or ill-treat persons suspected of involvement in terrorism. Some have been “outsourcing” torture or other ill-treatment to third countries; some use statements in judicial or other proceedings obtained as a result of a violation of the prohibition in their own or other countries. In this context and in light of the global influence of the jurisprudence of Your Lordships’ House, the Interveners consider that the outcome of this appeal will have profound and lasting implications in respect of the efforts to eradicate torture or other ill-treatment world-wide.
6. The Interveners believe that the obligations of states to take lawful measures to counter terrorism and their obligations to prevent and prohibit torture or other ill-treatment serve fundamentally the same purpose: the protection of the integrity and dignity of human beings.
7. The Interveners consider that there is a real danger that if the decision of the Court of Appeal in this case is upheld states would effectively be provided with a means of circumventing the absolute prohibition, rather than fulfilling their international human rights law obligations, which include the obligation to take effective measures to prevent torture or other ill-treatment wherever it occurs. This would give a “green light” to torturers around the world, whose unlawful conduct would find not only an outlet but also a degree of legitimacy in UK courts.
8. The Interveners also consider that the use as evidence in legal proceedings of statements obtained as a result of a violation of the prohibition of torture and other ill-treatment would bring the administration of justice into disrepute, and provide a cloak of legality for that which is unlawful.

9. Finally, the Interveners submit that if the decision of the Court of Appeal in this case were upheld, there would be an irreconcilable conflict between the UK's international obligations flowing from the prohibition of torture and other ill-treatment and the exclusionary rule on the one hand and domestic law on the other.

### SUMMARY OF SUBMISSIONS

10. The Prohibition of Torture and Other Forms of Ill-Treatment<sup>2</sup>:
- a. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all the major international and regional human rights instruments;
  - b. The prohibition of torture and other forms of ill-treatment is absolute and non-derogable;
  - c. The prohibition of torture has achieved *jus cogens* status and imposes obligations *erga omnes*;
  - d. The prohibition of torture and other forms of ill-treatment gives rise to an obligation on states to take appropriate and effective steps to *prevent* torture;
  - e. As a consequence of the *erga omnes* nature of the obligations arising under the prohibition, all States have a legal interest in the performance of the obligations arising from the prohibition. Moreover, as a consequence of the *jus cogens* status of the prohibition, no State may recognise as lawful a situation arising from breach of the prohibition of torture.

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<sup>2</sup> As noted above, the words 'other forms of ill-treatment' refer to cruel, inhuman or degrading treatment and punishment.

11. The Exclusionary Rule:

- a. The history of the exclusionary rule provides strong evidence that it is inherent in the prohibition of torture and other forms of ill-treatment;
- b. Article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') is part of that history, and constitutes an explicit codification of the minimum requirements of the exclusionary rule in an international treaty;
- c. The scope of the exclusionary rule is that, at a minimum, it prohibits the invoking of any statement which has been or may have been made as a result of torture, whether instigated or committed by or with the consent or acquiescence of the public officials of the State in question or by those of another State, as evidence in any proceedings, except against a person accused of such treatment as evidence that the statement was made;
- d. The exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment and arguably enjoys the same *jus cogens* status as the prohibition, or at the very least, has itself attained the status of customary international law.

12. The Applicability of the Exclusionary Rule in Domestic Law:

- a. Article 6 of the European Convention on Human Rights ('ECHR') requires the exclusion of evidence obtained by torture or other forms of ill-treatment. It should be interpreted consistently with the exclusionary rule including, at a minimum, the formulation enshrined in Article 15 of UNCAT.

- b. By virtue of its status as customary international law, the exclusionary rule is already part of the common law. In the absence of unambiguous conflicting legislation, effect should be given to it.
- c. Even if your Lordships House considers that the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK that directly affect statutory interpretation and the development of the common law.
- d. Furthermore, the rule of law requires domestic courts to give effect to the exclusionary rule.

## **I. THE PROHIBITION OF TORTURE**

- 13. The first section of these submissions deals with the origins and nature of the prohibition of torture and others forms of ill-treatment in human rights law.
- 14. The Interveners advance the following submissions:
  - a. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in international and regional human rights instruments;
  - b. The prohibition of torture and other forms of ill-treatment is absolute and non-derogable;
  - c. The prohibition of torture has achieved *jus cogens* status and imposes obligations *erga omnes*;
  - d. The prohibition of torture and other forms of ill-treatment gives rise to an obligation on states to take appropriate and effective measures to *prevent* torture.

- e. As a consequence of the *erga omnes* nature of the obligations arising under the prohibition, all States have a legal interest in the performance of the obligations arising from the prohibition. In addition, as a consequence of the *jus cogens* status of the prohibition of torture, no State may recognise as lawful a situation arising from breach of the prohibition of torture.

### **The prohibition of torture and other forms of ill-treatment in international human rights instruments**

15. The Universal Declaration of Human Rights was the first international human rights instrument adopted after World War II to contain a prohibition of torture and other ill treatment.<sup>3</sup> It was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. Article 5 states:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

16. On the same day that the General Assembly adopted the Universal Declaration of Human Rights, it requested the UN Commission on Human Rights (‘UNCHR’<sup>4</sup>) to prepare a draft covenant on human rights and draft measures of implementation. The International Covenant on Civil and Political Rights 1966 (‘ICCPR’) was one of two covenants that resulted from this mandate. The ICCPR has been ratified by 154 states, including the United Kingdom. The prohibition of torture and other ill treatment is contained in Article 7 ICCPR, the first sentence of which mirrors Article 5 of the Universal Declaration on Human Rights, quoted above. Article 4(2) provides that the prohibition in Article 7 is non-derogable,

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<sup>3</sup> A general prohibition against torture is also set out in numerous international humanitarian law instruments, including the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the ‘Martens clause’ laid down in the Preamble to the same Convention, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

<sup>4</sup> The UN Commission on Human Rights was established in 1946 by the UN Economic and Social Council pursuant to Article 68 of the UN Charter. It sets the standards governing the human rights conduct of States and examines the implementation of those standards. It is composed of 53 States members. It is assisted in its work by the Special Rapporteur on Torture and the Special Rapporteur on the promotion and protection of human rights while countering terrorism.

“even in time of public emergency which threatens the life of the nation”. The absolute prohibition of torture and other ill treatment in international treaty law is therefore contained in Article 7 in conjunction with Article 4(2).

17. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration against Torture”) was adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 as a “guideline” to States of measures that should be taken to give effect to the absolute prohibition of torture and other ill-treatment. Article 3 of the Declaration provides:

“No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment”.

18. The General Assembly has since reiterated this condemnation of torture, most recently in Resolution 59/182 (December 2004), by which the General Assembly:

“*Condemns* all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the prohibition of torture and other cruel, inhuman or degrading treatment or punishment”.<sup>5</sup>

19. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘UNCAT’) was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, and entered into force on 26 June 1987. As its preamble implies, UNCAT is founded on the prohibition of torture and other ill treatment contained in Article 5 of the Universal Declaration of Human Rights and Article 7 ICCPR. In particular, it was based on the Declaration against Torture as a means to “make more effective the struggle against torture and other cruel, inhuman or degrading

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<sup>5</sup> General Assembly Resolution 59/182, 20 December 2004, UN Doc. A/RES/59/182



treatment or punishment throughout the world” and to “reinforce” states’ commitment to the Declaration against Torture. UNCAT requires States parties to take “effective measures” to “prevent acts of torture” (Article 2(1)) and to “prevent...other acts of cruel, inhuman or degrading treatment or punishment” (Article 16(1)) (as well as to investigate suspected or alleged incidents, prosecute those responsible and ensure reparation, including redress to victims).

20. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was formulated under the auspices of the UNCHR and approved by General Assembly Resolution 43/173 of 9 December 1988. Principle 6 contains the prohibition of torture and other ill treatment. The Guidelines on the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990.<sup>6</sup> Principle 16 requires prosecutors, *inter alia*, to refuse to use as evidence statements obtained by torture or other ill treatment, except in proceedings against those who are accused of using such means, and to take all necessary steps to ensure that those responsible for such actions are brought to justice. Both of these instruments constitute important guidelines to States.
21. Further expression of the prohibition is found in the regional human rights instruments: Article 3 of the ECHR, Article 5 of the American Convention on Human Rights and Article 5 of the African Convention on Human and People’s Rights and Article 13 of the Arab Charter on Human Rights.

### **The absolute nature of the prohibition of torture and other forms of ill-treatment**

22. The prohibition of torture and others forms of ill-treatment is absolute. This is reflected in international customary and treaty law. All of the international instruments that contain a prohibition of torture expressly recognise its absolute,<sup>7</sup>

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<sup>6</sup> UN Doc. A/CONF.144/28/Rev.1 at 189

<sup>7</sup> The UN Convention against Torture provides, in Article 2(2), that,

non-derogable character.<sup>8</sup> The absolute, non-derogable character of these obligations has consistently been reiterated by human rights courts and monitoring bodies.<sup>9</sup>

23. For example, the European Court of Human Rights has recognised the absolute nature of the prohibition of torture in cases such as *Tomasi v France*,<sup>10</sup> *Aksoy v Turkey*<sup>11</sup> and *Chahal v UK*.<sup>12</sup>

24. In its General Comment 20 the UN Human Rights Committee<sup>13</sup> ('HRC') emphasised that:

“The text of article 7 [of the ICCPR] allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force... [N]o justification

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“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Article 5 of the Inter-American Convention to Prevent and Punish Torture contains a similar provision:

“The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”

<sup>8</sup> The prohibition of torture is specifically excluded from the derogation provisions of human rights instruments of general scope: Article 4(2) ICCPR; Article 3 UN Torture Declaration; Article 15 European Convention of Human Rights; Article 27(2) American Convention on Human Rights; and Article 4(c) Arab Charter of Human Rights. No clause on derogation for national emergency is contained in the African Charter of Human and Peoples' Rights.

<sup>9</sup> The Committee Against Torture (CAT) has consistently followed this line in its conclusions and recommendations to states parties. See e.g. UN. Doc. A/51/44 (1996), para. 211 (Egypt); A/52/44 (1997) para. 80 (Algeria); para. 258 (Israel); UN Doc. A/54/44 (1999), para. 206 (Egypt); UN Doc. A/57/44 (2001), para. 90 (Russian Federation); UN Doc. A/58/44 (2002), para. 40 (Egypt); para. 51 (Israel); para. 59 (Spain).

<sup>10</sup> (1992) 15 EHRR 1, para. 115

<sup>11</sup> (1996) 23 EHRR 553, para. 62

<sup>12</sup> (1997) 23 EHRR 413, para. 79. See also *Ireland v UK* (1978) 2 EHRR 25, para. 163; *Selmouni v France* (1999) 29 EHRR 403, para. 95; *Kmetty v Hungary* (Application no. 57967/00), judgment of 16 December 2003, para. 32. For Inter-American cases see e.g. *Loayza-Tamayo Case* (Peru), Series C No. 33, judgment of September 17, 1997, para 57; *Castillo-Petruzzi et al.* (Peru), judgment of May 30, 1999. Series C No. 52, para. 197; *Cantoral Benavides case* (Peru), Series C No. 69, judgment of 18 August 2000, para 96; *Maritza Urrutia v Guatemala, supra* n. 524, para. 89.

<sup>13</sup> The UN Human Rights Committee was created by Article 28 of the ICCPR and monitors the implementation of the ICCPR.

or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons".<sup>14</sup>

25. The absolute prohibition of torture is reaffirmed in Article 2(2) of UNCAT, which has been expressly commented upon by the Committee Against Torture ('CAT'):<sup>15</sup>

“[A] State party to the Convention [against Torture]...is precluded from raising before [the] Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention”.<sup>16</sup>

26. Regional human rights courts have similarly so provided<sup>17</sup> and the same view was expressed by the ICTY in *Prosecutor v Furundzija*.<sup>18</sup>

27. The absolute nature of the prohibition of torture is reinforced by the *jus cogens* nature of that prohibition (see below). As the ICTY has noted, "the most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force...".<sup>19</sup> Any norm conflicting with the prohibition is therefore void.<sup>20</sup>

28. The prohibition of torture and other forms of ill-treatment does not yield to the threat posed by terrorism. On the contrary, the UN Security Council, the European Court of Human Rights, the Committee of Ministers of the Council of Europe and the UN Committee against Torture, among others, have all made clear that all anti-terrorism measures must be implemented in accordance with

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<sup>14</sup> HRC, General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7), UN Doc. XXX (Forty-fourth session, 1992), para. 3

<sup>15</sup> The CAT, created by Article 17 of UNCAT, is the body of independent experts which monitors implementation of the UNCAT by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of 'concluding observations.'

<sup>16</sup> A/52/44, para. 258 (1997) (report to the General Assembly); and see also A/51/44, paras. 180-222 (1997) (Inquiry under article 20).

<sup>17</sup> See footnote 13.

<sup>18</sup> ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 144

<sup>19</sup> *Prosecutor v Furundzija*, paras 153-54

international human rights and humanitarian law, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>21</sup>

29. The Human Rights Chamber for Bosnia and Herzegovina<sup>22</sup> has analysed the position in international law in the following way:

“The Chamber fully acknowledges the seriousness and utter importance of the respondent Parties’ obligation, as set forth in paragraph 2 of the UN Security Council Resolution 1373 ... [H]owever, the Chamber finds that the obligation to co-operate in the international fight against terrorism does not relieve the respondent Parties from their obligation to ensure respect for the rights protected by the Agreement... In summary, the Chamber finds that the international fight against terrorism cannot exempt the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicants to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention”.<sup>23</sup>

30. This was affirmed in the subsequent case of *Bensayah*.<sup>24</sup>

31. The European Court of Human Rights, for its part, has a long history of affirming that the prohibition of torture and other forms of ill-treatment does not yield to the threat posed by terrorism. In *Klass and Others v Germany*, the Court held:

“The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”.<sup>25</sup>

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<sup>20</sup> See also Vienna Convention on the Law of Treaties 1969, Article 53.

<sup>21</sup> See respectively, UNSC Resolution 1456 (2003), Annex para.6; *Aksoy v Turkey* (1996) 23 EHRR 553, para. 62; Guideline IV of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, 11 July 2002; “*Statement of the Committee against Torture in connection with the events of 11 September 2001*” of 22 November 2001, UN Doc. A/57/44 (2002), para. 17.

<sup>22</sup> The Human Rights Chamber of Bosnia and Herzegovina, a domestic court which included both national and international jurists, was set up under the Dayton Peace Agreement to examine cases of violations of the rights enshrined in the ECHR and other international human rights treaties and standards. It was empowered to issue decisions binding upon the authorities of the entities and the state government.

<sup>23</sup> *Boudellaa and others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 11 October 2002, case no. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691) paras. 264 to 267.

<sup>24</sup> *Bensayah v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 4 April 2003, case no. CH/02/9499) para. 183.

<sup>25</sup> *Klass and Others v Germany* (1978) 2 EHRR 214

32. In *Leander v Sweden*<sup>26</sup> and in *Rotaru v Romania*<sup>27</sup> the European Court of Human Rights again warned of the danger of “destroying democracy on the ground of defending it.”
33. In *Chahal v UK*<sup>28</sup>, the European Court of Human Rights was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the positive obligations arising from it (such as non-refoulement), even in the context of terrorism:
34. “Article 3 enshrines one of the most fundamental values of democratic society” (see the above-mentioned *Soering* judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.
35. The same approach was taken by the Special Rapporteur on Torture (Sir Nigel Rodley). In response to the events of 11 September 2001 he said:

“However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill-treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and peremptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signalling

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<sup>26</sup> (1987) 9 EHRR 433, para. 60: “Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse”.

<sup>27</sup> (2000) 8 BHRC 449, para. 59: “The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it”.

<sup>28</sup> (1997) EHRR 413 at para. 79

to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists”.<sup>29</sup>

36. Similarly, the HRC has expressly confirmed that the “fight against terrorism” is no justification for torture or other ill treatment:

“Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: ...article 7 [prohibition of torture or cruel, inhuman or degrading punishment]...The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2”.<sup>30</sup>

37. And later:

“The Committee is aware of the difficulties that State party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose”.<sup>31</sup>

38. See also the response of the Committee Against Torture to the events of 11 September 2001, where it made a statement reaffirming the content of Article 2:

“The Committee against Torture reminds State parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. The obligations contained in Articles 2 (whereby ‘no exceptional circumstances whatsoever may be invoked as a justification of torture’)... must be observed in all circumstances”.<sup>32</sup>

39. In its Second Periodic Report to the Committee Against Torture, Israel claimed that physical and psychological pressure techniques had prevented 90 terrorist attacks.<sup>33</sup> The Committee concluded that the techniques that Israel had employed were in breach of UNCAT, even though they were designed with the purpose of

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<sup>29</sup> Statement by the Special Rapporteur to the Third Committee of the General Assembly, delivered on 8 November 2001, Annex III, UN Doc. E/CN.4/2002/76, p. 14

<sup>30</sup> General Comment No. 29 (2001) (States of Emergency), para. 7

<sup>31</sup> CCPR/CO/76/EGY, para. 4 (2002)

<sup>32</sup> Statement CAT/C/XXVII/Misc.7 (22 November 2001)

protecting Israeli citizens from terrorist attacks. The Committee had previously stated that:

“The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before the Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention”.<sup>34</sup>

40. Again, in the context of counter-terrorism measures taken since 9/11, the following joint statement was adopted by the Committee Against Torture, the Special Rapporteur on Torture, the Chairperson of the twenty-second session of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and the Acting United Nations High Commissioner for Human Rights on 26 June 2004, the International Day in Support of Victims of Torture:

“We wish to take this opportunity to express our serious concern about continuing reports of torture and other cruel, inhuman or degrading treatment or punishment taking place in many parts of the world.

There is an absolute prohibition of torture under international human rights and humanitarian law. The non-derogable nature of this prohibition is enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as in several other instruments. States must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction and no exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture.

Under international law States also have the duty to investigate torture whenever it occurs, prosecute the guilty parties and award compensation and the means of rehabilitation to the victims. Too often, public authorities are remiss in fulfilling their duties in this respect, allowing torture to continue to occur with impunity”.<sup>35</sup>

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<sup>33</sup> CAT/C/33/Add.2/Rev.1, paras. 2-3, and 24, cited in S. Joseph, J. Schultz and M. Castan, *International Covenant on Civil and Political Rights: cases, materials and commentary* (1<sup>st</sup> ed., 2000), pp. 150-151

<sup>34</sup> CAT/C/18/CRP1/Add.4, para. 134. A similar view was held by the HRC: see CCPR/C/79/Add.93, paras. 19, 21 (1998)

<sup>35</sup> See CAT report to the General Assembly, A/59/44 (2004), at para. 17 (emphasis added).

41. The Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism also categorically confirm that no measures taken against terrorism must be permitted to undermine the rule of law or the absolute prohibition of torture and other forms of ill-treatment.<sup>36</sup>
42. In the context of counter-terrorism measures, the General Assembly has reaffirmed that any measures taken must comply with international human rights law and that the rights specified under Article 4 ICCPR (which refers to Article 7) are non-derogable in all circumstances. Resolution 59/191 of 2005:

“1. Reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;

2. Also reaffirms the obligation of States, in accordance with article 4 of the International Covenant on Civil and Political Rights, to respect certain rights as non-derogable in any circumstances, recalls, in regard to all other Covenant rights, that any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases, and underlines the exceptional and temporary nature of any such derogations”.<sup>37</sup>

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<sup>36</sup> Adopted by the Council of Europe Committee of Ministers on 11 July 2002, H(2002)004. See in particular Guidelines II to IV:

“II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV. Absolute prohibition of torture

The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.”

<sup>37</sup> UN Doc. A/RES/59/191 (2005)



43. The same position has been taken by the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>38</sup>

44. This is also the position endorsed by the General Assembly in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

“No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment”.<sup>39</sup>

45. The UN Security Council has, in a declaration on the issue of combating terrorism attached to Security Council Resolution 1456 (2003), stated that:

“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”.<sup>40</sup>

46. Most recently, the UN Summit Declaration of September 2005 has again emphasised that measures taken to combat terrorism must comply with international law including international human rights law:

“We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international Conventions and Protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law”.<sup>41</sup>

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<sup>38</sup> See Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Robert K. Goldman), E/CN.4/2005/103, 7 February 2005, at para. 49, referring to the absolute prohibition of torture and other forms of ill-treatment in human rights law.

<sup>39</sup> UN Doc. A/RES/43/173 (1988), Principle 6

<sup>40</sup> UN Doc. S/RES/1456 (2003), Annex, para. 6

<sup>41</sup> UN World Summit Declaration 2005, para. 85, adopted by the Heads of State and Government gathered at the UN Headquarters from 14-16 September 2005, UN Doc. A/60/L.1, A/RES/60/1

## **The *jus cogens* and *erga omnes* nature of the prohibition of torture**

47. As a consequence of the fundamental importance of the prohibition of torture to the international community, it is widely accepted that the prohibition of torture constitutes both a norm of *jus cogens* and an obligation owed by every State to the international community as a whole (*erga omnes*).

### *The concepts of jus cogens and erga omnes*

48. The category of obligations arising under peremptory norms of general international law (or *jus cogens*) was established as part of positive international law in the Vienna Convention on the Law of Treaties 1969, which defines the concept of “peremptory norm” in Article 53 in the following way:

“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

49. *Jus cogens* status thus connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, “intransgressible”.<sup>42</sup>
50. The notion of obligations *erga omnes* was identified by the International Court of Justice in the *Barcelona Traction* case,<sup>43</sup> in which the Court found that:

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<sup>42</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226 at p. 257, para. 79. Although the ICJ found that there was no need to decide whether the basic rules of international humanitarian law were *jus cogens*, in view of its description of them as “intransgressible” it would seem justified to treat them as peremptory. See James Crawford, *The International Law Commission’s Articles on State Responsibility; Introduction, Text and Commentaries* (Cambridge, CUP, 2002), p. 246.

<sup>43</sup> Cf. the discussion in Ragazzi, *The Notion of Obligations Erga Omnes*, (Oxford, OUP, 1997), pp. 7-12, attributing the notion to Manfred Lachs, later a judge and president of the International Court of Justice, and a member of the court which decided the *Barcelona Traction case* I.C.J. Reports 1970, p. 3. Arnold (Lord) McNair had earlier used the phrase in relation to treaties: “Treaties Producing Effects ‘Erga Omnes’”, *Scritti di Diritto Internazionale in onore di T. Perassi*, vol. II, (Giuffrè, Milan, 1957), p. 23.

“... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.<sup>44</sup>

51. The concept of obligations *erga omnes* is now widely accepted. It has been applied in international jurisprudence<sup>45</sup> and in the work of the International Law Commission (‘ILC’) in its Articles on the Responsibility of States for Internationally Wrongful Acts (‘Articles on State Responsibility’), which it adopted in August 2001.<sup>46</sup>
52. *Jus cogens* goes to the overriding, unconditional and non-derogable nature of the obligation while *erga omnes* goes to the reach of the obligation, denoting the legal interest of all states in the protection of the correlative right and their standing to invoke its breach.
53. Although the two categories (*jus cogens* and *erga omnes*) are not coterminous, there is at the very least substantial overlap in their content. In the context of its codification of the international law of State responsibility, the International Law Commission discussed the relationship between the two in the following way:

“Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a

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<sup>44</sup> *Barcelona Traction, Light and Power Company Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 33. Cf the discussion in Ragazzi.

<sup>45</sup> *Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, p. 595 at pp. 615-616, paras. 31-32 *East Timor (Portugal v Australia)*, ICJ Reports 1995, p. 90 at p. 102, para. 29 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at pp. 199-200 (paras. 155-158)

<sup>46</sup> For the Articles and Commentaries see *Report of the International Law Commission on the Work of its Fifty Third Session*, UN Doc. A/56/10, Chapter IV. The Articles and Commentaries are reproduced with an introduction and accompanying analysis in Crawford, op. cit..

difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e., in terms of the present articles, in being entitled to invoke the responsibility of any State in breach”.<sup>47</sup>

*The prohibition of torture as a jus cogens norm and erga omnes obligation*

54. The prohibition of torture is incontrovertibly a *jus cogens* norm giving rise to obligations *erga omnes*.
55. The *jus cogens* nature of the prohibition of torture is well established in international and domestic case law.
56. In his first report to the UNCHR in 1986, the Special Rapporteur on Torture stated that the prohibition of torture is a rule of *jus cogens*:

“Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes*, obligations which a State has vis-à-vis the community of States as a whole and in the implementation of which every State has a legal interest. The International Law Commission in its draft articles on State responsibility has labelled serious violations of these basic human rights as ‘international crimes’, giving rise to the specific responsibility of the State concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture”.<sup>48</sup>

57. There is now an ample body of case law recognising the prohibition of torture as having *jus cogens* status.

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<sup>47</sup> ILC, Introductory Commentary to Part II, Chapter 3, paragraph (7) [footnotes omitted]. See also Crawford, *op. cit.*, pp. 244-245.

<sup>48</sup> Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15, at para. 3

58. As long ago as 1980, the prohibition of torture was found to have achieved at least the status of customary international law. In *Filartiga v Peña-Irala*,<sup>49</sup> the US Second Circuit Court of Appeals had to decide whether torture was a “violation of the law of nations”, from which customary international law is the direct descendant. If it were, the US federal courts would enjoy jurisdiction in a tort claim brought under the Judicial Act 1789.<sup>50</sup> The question was answered in the affirmative:

“[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody...

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations... The international consensus surrounding torture has found expression in numerous international treaties and accords... The substance of these international agreements is reflected in modern municipal i.e. national law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations...

Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens”.<sup>51</sup>

59. Similarly, the District of Columbia Circuit held in *Tel-Oren v Libyan Arab Republic*<sup>52</sup> that “commentators have begun to identify a handful of heinous actions – each of which violates definable, universal and obligatory norms,” and that these include, at a minimum, bans on governmental “torture, summary execution, genocide, and slavery”.<sup>53</sup>

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<sup>49</sup> 630 F. 2d 876 (30 June 1980)

<sup>50</sup> Codified at 28 USC §1350 (Alien Tort Claims Act)

<sup>51</sup> per Kaufmann J at 881-84

<sup>52</sup> 726 F.2d 774 (3 February 1984)

<sup>53</sup> 726 F.2d 774 (3 February 1984) at 781, 791, per Edwards J. See also *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1541, in which the Northern District Court of California held that “official torture constitutes a cognizable violation of the law of nations” and described the prohibition against official torture as “universal, obligatory, and definable”.

60. Subsequently, in the landmark case of *Siderman de Blake v Republic of Argentina*,<sup>54</sup> the Ninth Circuit suggested that the prohibition of torture had already achieved the status of *jus cogens* in 1980, when the Second Circuit delivered its ruling in *Filartiga*. It was in any event clear to the Ninth Circuit that by 1992 the prohibition of ‘official torture’ had been elevated from ‘ordinary’ customary international law to a *jus cogens* peremptory norm. Referring to jurisprudence and treaty law subsequent to *Filartiga*, including the adoption of UNCAT, the Court held:

“In light of the unanimous view of these authoritative voices, it would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status. In *CUSCLIN*, 859 F.2d at 941 -42, the D.C. Circuit announced that torture is one of a handful of acts that constitute violations of *jus cogens*. In *Filartiga*, though the court was not explicitly considering *jus cogens*, Judge Kaufman's survey of the universal condemnation of torture provides much support for the view that torture violates *jus cogens*. In Judge Kaufman's words, “[a]mong the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture.” 630 F.2d at 890. Supporting this case law is the Restatement [of the Foreign Relations Law of the United States], which recognizes the prohibition against official torture as one of only a few *jus cogens* norms: Restatement 702 Comment n (also identifying *jus cogens* norms prohibiting genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination). Finally, there is widespread agreement among scholars that the prohibition against official torture has achieved the status of a *jus cogens* norm...

Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. See

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<sup>54</sup> 965 F. 2d 699 (22 May 1992)

*Filartiga*, 630 F.2d at 884 (noting that no contemporary state asserts ‘a right to torture its own or another nation's citizens’); *id.* at n. 15 (‘The fact that the prohibition against torture is often honoured in the breach does not diminish its binding effect as a norm of international law.’). Under international law, any state that engages in official torture violates *jus cogens*.<sup>55</sup>

61. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*<sup>56</sup> Lord Hope cited *Siderman de Blake* as persuasive authority for the proposition that at the time of UNCAT’s adoption, there was already widespread agreement that the prohibition of torture had achieved the status of *jus cogens*.<sup>57</sup>

62. The ICTY has also recognised the *jus cogens* status of the prohibition of torture. In *Prosecutor v Delalic and others*<sup>58</sup>, the Court emphasised that both treaty and customary international law prohibit torture. It continued:

“Based on the foregoing, it can be said that the prohibition of torture is a norm of customary law. It further constitutes a norm of *jus cogens*, as has been confirmed by the United Nations Special Rapporteur for Torture”.<sup>59</sup>

63. In *Prosecutor v Furundzija*, the ICTY held that:

“Because of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm of general international law, that is, a norm which enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority

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<sup>55</sup> per Fletcher J

<sup>56</sup> (*No. 3*) [2000] AC 147

<sup>57</sup> [2000] 1 AC 147, 247

<sup>58</sup> ICTY Trial Chamber, IT-96-21-T (16 November 1998)

<sup>59</sup> para. 454, citing the Report of the Special Rapporteur, P Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, dated 19 Feb. 1986, para. 3

that the prohibition of torture is an absolute value from which nobody must deviate”.<sup>60</sup>

64. And in *Prosecutor v Kunarac* the ICTY held:

“Torture is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*”.<sup>61</sup>

65. In the English courts the status of the prohibition of torture as *jus cogens* has been recognised by Your Lordships’ House in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)*.<sup>62</sup> In that case it was conceded by Chile that the prohibition of torture had *jus cogens* status. Lord Browne-Wilkinson held that “the international law prohibiting torture has the character of *jus cogens* or a peremptory norm, i.e. one of those rules of international law which have a particular status”.<sup>63</sup> Lord Hope cited with approval US decisions that the prohibition of torture constitutes *jus cogens* as well as constituting an obligation owed to the international community as a whole.<sup>64</sup>

66. Likewise, the European Court of Human Rights. In *Al-Adsani v UK*,<sup>65</sup> the European Court emphasised the special stigma attached to torture under Article 3 of the ECHR, especially when read in the context of prohibitions in other international instruments:

“Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances (see, for example, *Aksoy*, cited above, p. 2278, § 62, and the cases cited therein).

Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is

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<sup>60</sup> ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, paras 153-54

<sup>61</sup> ICTY Trial Chamber, IT-96-23-T and IT-96-23/1-T (22 February 2001), para. 466

<sup>62</sup> [2000] AC 147

<sup>63</sup> per Lord Browne-Wilkinson, p.198

<sup>64</sup> [2000] AC 147, 247

<sup>65</sup> (2002) 34 EHRR 11



forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens* [reference is made to *Furundzija* and *Pinochet (No. 3)*]...

...the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law...".<sup>66</sup>

67. Most recently, in *Jones v Ministry of Interior of Saudi Arabia*,<sup>67</sup> Lord Phillips of Worth Matravers MR described the prohibition of torture in the following terms, referring to the widespread ratification of UNCAT:

"The crime of torture has acquired a special status under international law. It is an international crime or a breach of *jus cogens*. That status is reflected by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('the Torture Convention') to which there are 148 signatories, including the United Kingdom and Saudi Arabia".<sup>68</sup>

68. The *erga omnes* nature of the obligations arising under the prohibition of torture has long been established. In the *Barcelona Traction case*<sup>69</sup> in 1970 the ICJ observed that:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination".<sup>70</sup>

69. See also UN General Comment 31, which makes clear that every state has a legal interest in the performance by every other State Party to the ICCPR of its

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<sup>66</sup> paras 59-61. In the Court of Appeal (*Al-Adsani v Government of Kuwait and ors*, 107 ILR 536, 541), Stuart-Smith LJ refrained from accepting that the prohibition of torture was *jus cogens* but made no finding either way on the issue.

<sup>67</sup> [2005] 2 WLR 808, 28 October 2004, CA

<sup>68</sup> para. 108

<sup>69</sup> (1970) ICJ Reports p.3

obligations.<sup>71</sup>

70. The judgment of the ICTY in *Prosecutor v Furundzija* is to the same effect:

“Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”.<sup>72</sup>

71. So too the approach of the Inter-American Commission on Human Rights:

“The American Convention prohibits the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons under any circumstances. While the American Declaration does not contain a general provision on the right to humane treatment, the Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention. In fact it has specified that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*”.<sup>73</sup>

72. The *jus cogens* nature of the prohibition of torture and the *erga omnes* nature of the obligations arising under the prohibition have important consequences. These consequences – relating to preventative obligations, the duty on States not to endorse, adopt or recognise acts which breach the prohibition of torture, and the scope of the exclusionary rule – are set out below.

### **The obligation to take appropriate and effective steps to prevent torture**

73. The prohibition of torture and other ill-treatment gives rise to an obligation on States to take appropriate and effective steps to *prevent* it. This obligation is

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<sup>70</sup> *Ibid.*, at p. 32, para. 34, emphasis added

<sup>71</sup> CCPR/C/21/Rev.1/Add.13, para. 2

<sup>72</sup> ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 151

<sup>73</sup> Report on Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., para. 155

derived from the requirement that torture and other ill-treatment be prohibited absolutely. It is reinforced by the fact that the prohibition of torture is a *jus cogens* norm of international law and gives rise to *erga omnes* obligations.

74. The notion of prevention runs through UNCAT. It starts with the preamble, which sets out the intention of those ratifying UNCAT to “make more effective the struggle against torture”. It is also found in Article 2 (the general duty to prevent acts of torture), Article 3 (the non-return provision), Articles 4 and 5 (the universal jurisdiction provisions), Article 9 (the international co-operation provision), Article 10 (the education and training provision), Article 11 (the review provision), Articles 12-14 (the investigation, complaint and redress provisions), Article 15 (the exclusionary rule) and Article 16 (the obligation of prevention in relation to other forms of ill-treatment).
75. The duty of prevention is also reflected in ECHR case law starting with the case of *Soering v UK*,<sup>74</sup> which was relied on in *Prosecutor v Furundzija* where the ICTY confirmed that the prohibition of torture imposes preventative obligations:

“given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition”.<sup>75</sup>

76. It is submitted that the admission of evidence that has been or might have been obtained by torture is contrary to the prohibition of torture. A rule permitting the

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<sup>74</sup> (1989) 11 EHRR 439

<sup>75</sup> ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 148

admission of such evidence would contravene the preventative obligations on states in relation to the prohibition of torture.

77. The UN Special Rapporteur on Torture has also stressed the importance of preventative measures:

“Given the fact that the condemnation of torture is so general and unequivocal, it seems surprising indeed that the phenomenon of torture is still so widespread. At any rate it is evident that the outlawry of torture – indispensable as it may be as an initial step – is far from sufficient. The international community has therefore escalated the struggle against torture. In the first place it adopted a convention containing various venues and mechanisms to suppress and ultimately prevent torture.”<sup>76</sup>

78. Likewise, the HRC has also clearly stated that it is not sufficient for states to prohibit torture or other ill treatment. In General Comment No. 7, the HRC described the component parts of the prohibition of torture and cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR. It then continued:

“The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime.

...

As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood”.<sup>77</sup>

79. Subsequently the HRC elaborated on this in General Comment 20:

“The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”<sup>78</sup>

80. General Comment 20 sets out the measures which the HRC considers form the component parts of the prohibition against torture and that are reflected in UNCAT, such as the duty to provide practical safeguards during detention and

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<sup>76</sup> Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15, at para. 6.

<sup>77</sup> HRC General Comment No. 7 (1982) paras. 1 and 2, (emphasis added)

<sup>78</sup> HRC General Comment No. 20, para. 8 (emphasis added)

interrogation (Article 11 UNCAT) and the exclusion of confessions and other statements obtained through torture (Article 15 UNCAT).

81. This General Comment makes a clear link between the prohibition of torture and the exclusionary rule. This link is important because the prohibition of torture has the status of *jus cogens* and, as is submitted further below, this status arguably extends to the exclusionary rule. This link is also important because once it is accepted that the exclusionary rule is inherent in Article 7 ICCPR, the conclusion is inescapable that the exclusionary rule is also inherent in Article 3 ECHR (which is essentially in the same terms as Article 7 ICCPR) with the consequence, as is argued below, that exclusion is required under the Human Rights Act 1998.

**The nature of the obligations arising under the prohibition of torture and the duty to refrain from recognising a situation arising from a breach of the prohibition.**

82. As noted above, the fact that the prohibition of torture is *jus cogens* and gives rise to *erga omnes* obligations has important consequences in relation to the obligation to prevent torture, the duty not to endorse, adopt or recognise acts that breach the prohibition and the scope of the exclusionary rule of evidence.
83. A breach of such a norm entails international legal consequences not only for the State in breach of its international obligations, but also for all other States. The clearest articulation of this is the recent Advisory Opinion concerning the separation barrier constructed in the Occupied Palestinian Territories. In that case the ICJ confirmed that the right to self-determination and certain provisions of international humanitarian law give rise to obligations *erga omnes*. It then continued:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem ...

... They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.”<sup>79</sup>

84. Thus there is a clear obligation not to endorse, adopt or recognise any breach of a norm of international law that has acquired the status of *jus cogens* and imposes obligations *erga omnes*.

85. This notion has already found some reflection in English law. In *Kuwait Airways Corporation v Iraqi Airways Company and Others*,<sup>80</sup> Your Lordships’ House held that it would be contrary to English public policy and “wholly alien to fundamental requirements of justice as administered by an English court”<sup>81</sup> for English courts to enforce or recognise a foreign law (in that case an Iraqi law purporting to transfer the property of Kuwait Airways Corporation to Iraqi Airways Corporation after the first Gulf War) which was in breach of a *jus cogens* norm of international law. Lord Nicholls of Birkenhead noted that

“a breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations”.<sup>82</sup>

86. Noting the *jus cogens* nature of the international prohibition of the use of force, Lord Steyn stated:

“An English court may not give direct or indirect recognition to Rule 369 [a provision of Iraqi law] for any purpose whatsoever. An English court may not recognise any Iraqi decree or act which would directly or indirectly enable Iraq or Iraqi enterprises to retain the spoils or fruit of an illegal invasion.”<sup>83</sup>

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<sup>79</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 200, para. 159

<sup>80</sup> (2002) 2 WLR 1353

<sup>81</sup> *Ibid* paragraph 16

<sup>82</sup> *Ibid* Paragraph 29

<sup>83</sup> *Ibid* Paragraph 117

87. It is submitted that that the underlying rationale of the *Kuwait Airways* case – that the English courts can and must enquire into the legality of actions and laws of foreign states where *jus cogens* norms of international law are engaged – applies with even greater force where fundamental human rights are at stake.
88. This position is reinforced by the law relating to serious breaches of *jus cogens* norms of international law. The relevant provisions of the International Law Commission’s Articles on State Responsibility (Articles 40 and 41) make clear that in the event of a serious (gross or systematic) breach of an obligation arising under a peremptory norm of general international law (*jus cogens*), all other States have certain obligations.<sup>84</sup> These include the obligation to cooperate in bringing an end to any such breach, and a duty not to give recognition (in law or otherwise) to situations resulting from a breach of a *jus cogens* norm of international law – and not to aid or assist in maintaining any such situation.<sup>85</sup> The rules on state responsibility in relation to serious breaches of *jus cogens* thus go beyond merely providing a *faculty* for a State to take certain action in the face of torture, as is the case in relation to any obligation owed to it, and instead *oblige* all States to take action in certain circumstances. It is submitted that admitting evidence that has

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<sup>84</sup> Article 40 (2) of the ILC's Articles provide that "a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation".

<sup>85</sup> The regime of consequences attaching to breaches of *jus cogens* norms is codified in Part II, Chapter 3 of the ILC Articles entitled “Serious breaches of obligations under peremptory norms of general international law”. The relevant articles provide:

“Article 40

Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
1. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this Chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
1. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
1. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.”

been or might have been obtained by torture would clearly conflict with this obligation.<sup>86</sup>

89. The *erga omnes* character of obligations resulting from the prohibition of torture is also important. *Erga omnes* obligations are not reducible to bilateral or multilateral right-obligation relationships: they are obligations owed to the international community as a whole – and every State therefore has a legal interest in ensuring the performance of such obligations. Articles 42 and 48 of the ILC’s Articles on State Responsibility underscore this distinction between, on the one hand, normal bilateral or multilateral right/obligation relationships and, on the other, obligations owed to the international community as a whole (*erga omnes*).
90. Under Article 48(1)(b), in the event of the breach of an obligation owed to the international community as a whole, *any* State is entitled to invoke the responsibility of another State even if it is not an “injured State.” This contrasts with the general rule, set out in Article 42, that an injured State is entitled to invoke the responsibility of another State if the obligation breached is either owed to the former individually, or is owed to a group of States, including that State, and specially affects that State. Significant legal consequences flow from this power to invoke responsibility, including the power of all states to take countermeasures that might otherwise be unlawful (e.g. suspending performance of one or more of their own obligations that are owed to the wrong-doing State in order to ensure compliance).
91. The compliance regime associated with *erga omnes* characterisation reflects the importance attributed by the international community to obligations of this type, and the fact that the international legal order depends on other states responding to, and thus ultimately curtailing and preventing, violations which threaten its very foundations.

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<sup>86</sup> The Interveners submit that any breach of the prohibition of torture is by its very nature, serious.



92. The significance in this case of the fact that the prohibition of torture is a *jus cogens* norm of international law and gives rise to *erga omnes* obligations is that all States have a legal interest in breaches of the prohibition wherever those breaches occur, and all states have a duty not to endorse, adopt or recognise such breaches. The admission as evidence in legal proceedings of a statement which has been or may have been obtained by torture purely on the basis that it was obtained abroad without the connivance of UK officials clearly conflicts with this interest and duty. The enforcement of the most fundamental obligations owed to the international community as a whole is not contingent on the locus of the wrong or the nationality of the perpetrator or victim.

## II. THE EXCLUSIONARY RULE

93. The following section sets out the history and scope of the rule prohibiting the use of statements made as a result of torture. The Interveners advance the following submissions:
- a. The history of the exclusionary rule provides strong evidence that it is inherent in the prohibition of torture and other ill-treatment.
  - b. Article 15 UNCAT is part of that history, and constitutes an explicit codification of the minimum requirements of the exclusionary rule in an international treaty.
  - c. The scope of the exclusionary rule is that it prohibits at a minimum the invoking as evidence in any proceedings of any statement which has been or might have been made as a result of torture whether instigated by or with the consent or acquiescence of the public officials of the State in question or by those of any other State, except against a person accused of such treatment as evidence that the statement was made.
  - d. The exclusionary rule is inherent in the prohibition of torture and arguably enjoys the same *jus cogens* status as the prohibition or, at the very least, has itself attained the status of customary international law.

### **The history of the exclusionary rule**

94. The link between the prohibition of torture and other forms of ill-treatment and the exclusionary rule is clear from the origins and history of the exclusionary rule in international human rights law. In 1975, the UN General Assembly adopted a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against

Torture), annexed to GA Resolution 3452 (XXX) of 9 December 1975.<sup>87</sup> The final paragraph of the Resolution states that the Declaration against Torture was adopted “as a guideline for all States and other entities exercising effective power”. Article 12 of the Declaration against Torture provides: “Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.” Resolution 3452 (XXX) was adopted without a vote (i.e. by consensus),<sup>88</sup> which demonstrates its universal acceptance from the very start.

95. The next step was Resolution 3453 (XXX), also adopted on 9 December 1975, in which the General Assembly requested the UN Commission on Human Rights to study the question of torture and any necessary steps for ensuring the effective observance of the Declaration against Torture.

96.

Two years later, in Resolution 32/62 (8th December 1977), which was also adopted by consensus,<sup>89</sup> the General Assembly asked the Commission on Human Rights to draw up a draft Convention against torture and other cruel, inhuman or degrading treatment or punishment “in the light of the *principles* embodied in the Declaration” (emphasis added). In Resolution 32/63 adopted the same day, again by consensus, the General Assembly reiterated that “the Declaration should serve as a guideline for all States and other entities exercising effective power” and requested the UN Secretary-General “to draw up and circulate among Member States a questionnaire soliciting information concerning the steps they have taken,

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<sup>87</sup> For the background to the Declaration, see JH Burgers and H Danelius, *The United Nations Convention Against Torture*, Nijhoff, 1988, pp. 13-16.

<sup>88</sup> Under Art 18 of the UN Charter, decisions of the General Assembly on “important questions” are made by a two-thirds majority of the members present and voting. Decisions on other questions are made by a majority of the members present and voting. Each Member State has one vote. However, the majority of General Assembly resolutions are adopted without a vote. Records show that of the 217 resolutions adopted in 1975, 96 were adopted without a vote, 89 by a two-thirds majority and 2 by a simple majority (<http://www.un.org/law/repertory/art18.htm>). If a vote is taken, it is documented either as a recorded vote or as a summary vote. Only a recorded vote, which must be requested before voting is conducted, clearly identifies the stand that each Member State took on the issue. In the absence of such a request, only the voting summary (i.e. the number of countries which voted for or against a resolution as well as those abstaining) is recorded, without identifying how each Member State voted (<http://www.un.org/Depts/dhl/resguide/gavote.htm>).

<sup>89</sup> See *UN General Assembly Resolutions and Decisions*, 31<sup>st</sup>-33<sup>rd</sup> sessions, 1976-1979

including legislative and other measures, to put into practice the *principles* of the Declaration” (emphasis added).

97. Three years after it was adopted, the European Court of Human Rights relied on the Declaration in *Ireland v United Kingdom*<sup>90</sup> when defining “torture” for the purposes of Article 3 ECHR.<sup>91</sup> And two years later, in *Filartiga v Pena-Irala*,<sup>92</sup> the US Court of Appeals (Second Circuit) held that the Declaration was “particularly relevant” in helping to establish that the prohibition of torture was part of customary international law.
98. Two years later, in 1982, the HRC issued General Comment No. 7 on Article 7 of the ICCPR. This was an important development because it located the exclusionary rule which had first been articulated in Article 12 of the 1975 Declaration Against Torture in Article 7 of the ICCPR itself:

“1. ... The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control.

...  
Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; *provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court*; and measures of training and instruction of law enforcement officials not to apply such treatment.

2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood...”<sup>93</sup>

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<sup>90</sup> (1978) 2 EHRR 25, para. 167

<sup>91</sup> See also the Concurring Opinion of Judge De Meyer in *Tomasi v France* (1993) 15 EHRR 1.

<sup>92</sup> *Loc. cit.*

<sup>93</sup> HRC General Comment No. 7 (1982), paras 1-2 (emphasis added)

99. As will be seen below, the HRC reinforced this connection between the prohibition of torture in Article 7 ICCPR and the exclusionary rule in 1994.

100. In 1984, when the *Filartiga* case returned to the US District Court for the Eastern District of New York for the assessment of damages, that Court also recognised the special significance of the 1975 Declaration against Torture:

“The international law described by the Court of Appeals does not ordain detailed remedies but sets forth norms. But plainly international law does not consist of mere benevolent yearnings never to be given effect. Indeed, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted without dissent by the General Assembly, recites that where an act of torture has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation ‘in accordance with international law’, article 11, and that ‘each State shall ensure that all acts of torture are offences under its criminal law’, article 7”.<sup>94</sup>

101. Meanwhile UNCAT was taking shape. It was drafted in the late 1970s and early 1980s and adopted for signature on 10 December 1984.<sup>95</sup> It entered into force on 26 June 1987. Today it has 142 parties,<sup>96</sup> including nearly all the Member States

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<sup>94</sup> 577 F.Supp. 860, January 10 1984

<sup>95</sup> General Assembly Resolution 39/46, adopted without a vote. The UN Bibliographic Information System (UNBISnet), an online index to UN documentation, includes a database called Voting Records giving access to voting information for General Assembly resolutions adopted either without a vote or with a recorded vote since 1983.

<sup>96</sup> The following 140 States are parties to UNCAT as of 1 September 2005: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo, Costa Rica, Cote d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia and Montenegro, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivian Republic of), Yemen and Zambia

of the Council of Europe<sup>97</sup> and all five permanent members of the UN Security Council (China, France, Russia, United Kingdom, United States of America). This represents around 75% of the members of the international community.

102. Article 15 of UNCAT provides:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

103. This marks an important point in the history of the exclusionary rule in international human rights law and imposes express treaty obligations in its own right on contracting States, such as the UK.

104. No State Party to UNCAT has made a reservation to Article 15.<sup>98</sup> This, it is submitted, is strong evidence of its normative quality and is consistent with the widespread acceptance that has always been afforded to the exclusionary rule.

105. The drafting history of Article 15 is described by Burgers and Danelius in their book *The United Nations Convention Against Torture*.<sup>99</sup> Article 13 of the original Swedish draft convention<sup>100</sup> provided:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment

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<sup>97</sup> Of the 46 Member States of the Council of Europe, only Andorra and San Marino have not ratified UNCAT, though both have signed it.

<sup>98</sup> See <http://www.ohchr.org/english/countries/ratification/9.htm#N12>. According to Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969, a reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

<sup>99</sup> *Op cit*, pp. 69-70. Burgers was a member of the Netherlands delegation to the UN Commission on Human Rights. In 1982-84 he served as Chairman/Rapporteur of the Working Group set up by the Commission to draw up the text of the Convention. Danelius was Under-Secretary for Legal and Consular Affairs in the Swedish Ministry of Foreign Affairs. He wrote the initial draft of both the 1975 Declaration and the Convention and participated in all the sessions of the Working Group. The point of departure for the Working Group’s discussions was a draft convention submitted by Sweden to the thirty-fourth session of the Commission on Human Rights. See Commission on Human Rights, Report on the Thirty-Fifth Session (12 February-16 March 1979), p 36, para. 12 (Doc E/1979/36).

<sup>100</sup> Doc E/CN.4/1285 (Burgers and Danelius, *op. cit.*, p. 203)

or punishment shall not be invoked as evidence against the person concerned or against any other persons in any proceedings”.

106. However, it was suggested that there should be an exception in order to permit use of a statement made under torture as evidence against the torturer. The UK proposed that at the end of the draft Article the words “except against a person accused of obtaining such statement by torture” be added. Similar proposals were made by Austria and the USA. The Swedish draft was then revised to read:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of obtaining that statement by torture.”<sup>101</sup>

107. The principle enshrined in Article 15 was evidently uncontroversial; the final version of that Article was settled and adopted by consensus at the 1980 session of the Working Group set up by the UNCHR to draw up the text of the Convention.<sup>102</sup>

108. One year after UNCAT was adopted and opened for signature, the Organisation of American States concluded the Inter-American Convention to Prevent and Punish Torture 1985. Article 10 of this Convention contains an exclusionary rule similar to Article 15 UNCAT:

“No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.”

109. In 1992, the Special Rapporteur on Torture, Mr P. Kooijmans, in his report to the UN Commission on Human Rights, analysed the rationale for the exclusionary

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<sup>101</sup> Doc E/CN.4/WG.1/WP.1 Burgers and Danelius, *op. cit.*, p. 208). By this time the provision had become Article 15 of the draft convention.

<sup>102</sup> Commission on Human Rights, Report on Thirty-Sixth Session (4 February – 14 March 1980) Economic and Social Council, Official Records, 1980, Supplement No. 3 p. 66, para. 84 (Doc E/1980/13-E/CN.4/1408. For confirmation that the wording of Article 15 was settled in 1980, see UNCHR, Report on the Thirty-Seventh

rule and observed in forceful terms how the toleration of torture by, *inter alia*, the courts' acceptance of statements obtained under torture was responsible for the "flourishing of torture". He noted that by excluding such evidence the courts could make torture "unrewarding and therefore unattractive". He continued as follows:<sup>103</sup>

"588. The Committee further states that those who violate article 7, whether by encouraging, ordering, *tolerating* or perpetrating prohibited acts, must be held responsible... [emphasis added]

589. Without exception, these measures have been recommended by the Special Rapporteur. If each and every State took such measures and vigorously supervised their implementation by the various branches of State authority, no torturer could do his dirty work in the expectation that he could evade punishment. For it is impunity which makes torture attractive and feasible. Far too often the Special Rapporteur receives information...that courts admitted and accepted statements and confessions in spite of the fact that during trial the suspect claimed that these had been obtained under torture...

590. It is no exception that this chain of situations, which are all extremely conducive to the practice of torture, is in clear violation of the prevalent rules. Laxity and inertia on the part of the highest executive authorities and of the judiciary in many cases are responsible for the flourishing of torture.

591. Governments should be aware that they cannot go on condemning the evil of torture on the international level while condoning it on the national level. The judiciary in each and every country should bear in mind that they have sworn to apply the law and to do justice and that it is within their competence, even when the law is not in conformity with international standards, to bring the law nearer to these standards through the interpretation process. The judiciary should be aware that there is no place for impartiality if basic human rights are violated because, by virtue of their oath, they can only choose the side of the downtrodden. It is within their competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is within their power to make torture unrewarding and therefore unattractive and they should use that power".<sup>104</sup>

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Session (2 February –13 March 1981), Economic and Social Council, Official Records, 1981, Supplement No. 5, p. 69 (Doc E/1981/25-E.CN.4/1475).

<sup>103</sup> Doc E/CN.4/1993/26, 15 December 1992

<sup>104</sup> E/CN.4/1993/26



110. Like the HRC, the Special Rapporteur thus acknowledged and maintained the essential link between the prohibition of torture and the exclusionary rule.

111. Two years later, the HRC itself returned to Article 7 of the ICCPR in its General Comment 20 (1994):<sup>105</sup>

“It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.<sup>106</sup>

112. This further supports the link between the prohibition of torture and the exclusionary rule.

113. In February 1994 the International Criminal Tribunal for Yugoslavia (‘ICTY’) adopted its Rules of Procedure and Evidence. These included a rule dealing specifically with the admissibility of evidence obtained in violation of human rights norms. In its original form, Rule 95 (“Exclusion of Certain Evidence”) rendered inadmissible evidence which was “obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights”. The rule was amended in 1995 and now reads:

“No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

114. This amendment was introduced, in part at the instigation of the British Government, in order to remove ambiguity in the original text and to make it clear that evidence obtained improperly would not be admitted. According to the ICTY’s second Annual Report,

“The amendment to Rule 95, which was made on the basis of proposals from the Governments of the United Kingdom and the United States, puts parties on notice that although a Trial Chamber is not bound by national rules of

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<sup>105</sup> HRC General Comment No. 20 replaces General Comment No. 7 while “ reflecting and further developing it”.

<sup>106</sup> HRC General Comment No. 20 (1994), para. 12

evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods.”<sup>107</sup>

115. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (‘ICTR’) contain a provision identical to the ICTY provision.<sup>108</sup>

116. Similar provisions were included in the rules governing proceedings in the International Criminal Court (‘ICC’). The Rome Statute of the ICC was adopted in 1998 and has 99 States parties. Article 69(7) provides:

“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”<sup>109</sup>

117. This provision refers to a violation of “internationally recognised human rights” (i.e. the whole range of human rights), not simply torture (which has been universally condemned as one of the gravest violations of human rights). It is submitted that while not every breach of human rights will necessarily be serious enough to qualify, the admission of a statement established to have been made as a result of torture would certainly be treated as “antithetical to and would seriously damage the integrity of the proceedings.”<sup>110</sup>

118. In 1999 the UN Special Rapporteur on Torture (Sir Nigel Rodley) made further important comments on the exclusionary rule, and in particular about its scope:

“The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and

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<sup>107</sup> Note by the Secretary-General to the UN Security Council, UN Doc. A/50/365-S/1995/728, 23 August 1995, footnote 9

<sup>108</sup> ICTR Rules of Procedure and Evidence, Rule 95. See Jones and Powles, *International Criminal Practice* (OUP, 3<sup>rd</sup> ed, 2003), pp. 753-54.

<sup>109</sup> Jones and Powles, *op. cit.*, p. 892

<sup>110</sup> In accordance with Article 21 of the Statute, Article 69 must be interpreted in light of international law, which would include Article 15 UNCAT.

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes other legal obligations to prevent torture and other cruel, inhuman or degrading treatment. These... legal obligations, which the Special Rapporteur takes into consideration when he communicates with a State or undertakes an *in situ* visit, include the following:

...(e) Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings”.<sup>111</sup>

119. As will be seen, this approach to the scope of the exclusionary rule is consistent with statements made by other bodies charged with supervising and adjudicating allegations of breaches of the prohibition of torture.

120. In 2002, the Committee against Torture overtly followed the lead of the HRC in linking the exclusionary rule (in its case, the rule in Article 15 UNCAT) to the general prohibition of torture itself. In *PE v France* the Committee observed that:

“the generality of the provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture”.<sup>112</sup>

121. In 2003 the UN Special Rapporteur on the human rights situation in Sudan, Gerhart Baum, also commented on the scope of the exclusionary rule in his report to the UN Commission on Human Rights on the human rights situation in Sudan. He relied on the 1975 Declaration against Torture as authority for the principle that:

“Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.”<sup>113</sup>

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<sup>111</sup> UN Doc. A/54/426, 1 October 1999, para. 12, emphasis added

<sup>112</sup> CAT/C/29/D/193/2001, 19 December 2002, para. 6.3

<sup>113</sup> Doc E/CN.4/2003/42, 6 January 2003, Annex 1, para. 3

122. In 2004, the UN General Assembly itself took further measures to reinforce the exclusionary rule and emphasise its scope. Paragraph 6 of General Assembly Resolution 59/182 (20th December 2004) on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which like the 1975 Resolution and Declaration was adopted without a vote:

*"Urges* States to ensure that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

123. The word "urges" is among the strongest formulations used by the General Assembly. Identical language was employed by the UN Commission on Human Rights in its Resolution 2005/39, also adopted by consensus. This Resolution was co-sponsored by the EU (including the UK), as has been the practice for several years, and has been described by the Foreign and Commonwealth Office in its latest annual human rights report as "a good resolution on torture".<sup>114</sup>

124. The Council of Europe has also endorsed and adopted the exclusionary rule. On 26th April 2005, the Parliamentary Assembly of the Council of Europe adopted Resolution 1433 (2005) on the Lawfulness of detentions by the United States in Guantanamo Bay. In paragraph 8 the Assembly called on the US Government:

“vi. to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made”.

125. Similarly, in paragraph 10 the Assembly called on Member States of the Council of Europe:

“iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel,

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<sup>114</sup> FCO Human Rights Report 2005, p.128

inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made”.

### **The scope of the exclusionary rule**

#### *Broad interpretation*

126. It is submitted that the exclusionary rule should be given a broad interpretation. The absolute nature of the rule has been repeatedly emphasised by the persons and bodies charged internationally with supervising and monitoring compliance with the rule. It is arguable that the rule covers evidence that has been or might have been obtained by torture or other forms of ill-treatment. Article 12 of the Declaration against Torture (which has been heavily relied on throughout the history of the rule), the HRC’s location of the exclusionary rule in Article 7 of the ICCPR (which prohibits torture and cruel, inhuman or degrading treatment or punishment) and the consistent approach of the UN Special Rapporteur on Torture support such an approach to the exclusionary rule. On the other hand, Article 15 UNCAT and Article 10 of the Inter-American Convention to Prevent and Punish Torture are cast in narrower terms and confine the rule to evidence that has been obtained by torture.
127. Against that background, it is submitted that it is clear that the exclusionary rule *at a minimum* requires the exclusion of evidence that has been or may have been obtained by *torture* and that it may also require the exclusion of a wider body of evidence.
128. As to the scope of the rule, the Interveners submit that a plain and ordinary reading of the exclusionary rule set out in Article 12 of the Declaration against Torture and Article 15 UNCAT is that it prohibits the use of *any* evidence obtained by torture in *any* proceedings. As noted above, the absolute nature of the rule has been repeatedly emphasised by the persons and bodies charged internationally with supervising and monitoring compliance with the rule. It has

never been suggested that the rule is confined to criminal proceedings, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained from a third party, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained without the connivance of the State with jurisdiction over the proceedings in question. Again, as noted above, no State Party to UNCAT has made any reservation to Article 15 (whether confining its scope or otherwise).

129. The Committee against Torture, which is charged with supervising and monitoring compliance with Article 15 UNCAT, and whose views on its proper interpretation thus carry considerable weight, has always interpreted the exclusionary rule as requiring the exclusion in *all proceedings* of evidence that has been or may have been obtained by torture.

130. In *GK v Switzerland* the Committee against Torture, emphasising the absolute nature of the exclusionary rule, observed that:

“... the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence ‘in any proceedings’, is a *function* of the absolute nature of the prohibition.”<sup>115</sup>

131. This is consistent with its repeated insistence by the Committee Against Torture that Article 15 contains a “categorical prohibition”.<sup>116</sup>

132. Examination of the concluding observations of the Committee against Torture on states parties’ reports discloses the same approach. For instance, in its concluding observations about Ukraine, the Committee recommended that Ukraine:

“Ensure in practice *absolute* respect for the principle of the inadmissibility of evidence obtained through torture”.<sup>117</sup>

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<sup>115</sup> Views adopted on 7 May 2003, CAT/C/30/D/219/2002, para.6.10, emphasis added

<sup>116</sup> CAT/C/33/L/GBR, List of Issues for the UK, 15-26 November 2004, no 22

<sup>117</sup> UN Doc. A/57/44 (2002), para. 58(h), re Ukraine, emphasis added

133. In relation to Yugoslavia, the Committee Against Torture similarly observed that:

“One of the essential means in preventing torture is the existence, in procedural legislation, of detailed provisions on the inadmissibility of unlawfully obtained confessions and other tainted evidence... Evidence obtained in violation of article 1 of the Convention should *never* be permitted to reach the cognizance of the judges deciding the case, in any legal procedure”.<sup>118</sup>

134. Other observations show that the Committee against Torture always interprets Article 15 UNCAT as requiring the adoption of “clear legal provisions prohibiting the use as evidence of any statement obtained under torture” and their strict observance in practice.<sup>119</sup>

135. UN Special Rapporteurs on Torture have consistently adopted a similarly broad approach. As noted above, in his report to the UN Commission on Human Rights in 1992, Mr P. Kooijmans emphasised that Article 7 ICCPR is breached not only by the perpetration of acts that violate the prohibition of torture, but also by the *toleration* of such acts. In 1999, Sir Nigel Rodley observed that the exclusionary rule prohibits the invoking of “any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment ... as evidence against the person concerned or against any other person in any proceedings”.<sup>120</sup> And in 2003, the Special Rapporteur on the human rights situation in Sudan, Gerhart Baum, adopted exactly the same approach in his report to the Commission on Human Rights.

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<sup>118</sup> UN Doc. A/54/44 (1999), para. 45, re Yugoslavia, emphasis added

<sup>119</sup> See e.g. CAT/C/CR/34/ALB, 21 June 2005 (Albania); CAT/C/CR/31/2, 10 December 2004 (Morocco); CAT/C/CR/31/6, 5 February 2004 (Cameroon); CAT/C/CR/30/2, 27 May 2003 (Cambodia); CAT/C/CR/30/3, 27 May 2003 (Iceland); CAT/C/CR/30/6, 27 May 2003 (Belgium); CAT/C/CR/28/4, 6 June 2002 (Russian Federation); CAT/C/CR/28/6, 6 June 2002 (Sweden); CAT/C/CR/28/7, 6 June 2002 (Uzbekistan); CAT/C/XXVII/Concl.2, 21 November 2001 (Ukraine); A/56/44, paras 121-129, 17 May 2001 (Kazakhstan); A/56/44, paras 115-120, 16 May 2001 (Brazil); and A/56/44, paras 60-66, 6 December 2000 (Cameroon).

<sup>120</sup> UN Doc A/54/426, 1 October 1999, para.12

*Extension to third parties and third States*

136. It is submitted the exclusionary rule prohibits the invoking as evidence in any proceedings of *any* statement that has been or might have been obtained by torture whoever is the victim and irrespective of the identity or nationality of the torturer. As noted above, it has never been suggested by the persons or bodies charged with supervising and monitoring compliance with the exclusionary rule that it does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained from a third party, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained without the connivance of the State with jurisdiction over the proceedings in question.

137. On the contrary, in 1997 the Committee against Torture specifically stated that:

“Statements obtained *directly or indirectly* under torture should not be admissible as evidence in the courts”.<sup>121</sup>

138. And, as Neuberger LJ recognised in the Court of Appeal,<sup>122</sup> the Committee Against Torture had no hesitation in 2002 in holding in *PE v France*<sup>123</sup> that Article 15 of UNCAT precluded evidence obtained by torture in one country being used in the courts of another country, although, on the evidence, the Committee was not persuaded that torture had in fact been used (see paras 6.3 and 6.6). A similar approach was adopted in *GK v Switzerland*<sup>124</sup> (also a 2002 case) which also concerned extradition and where the complainants also alleged that evidence against them had been obtained through torture in another country.<sup>125</sup>

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<sup>121</sup> UN Doc. A/52/44 (1997), para. 109, re Poland, emphasis added. The Committee has made similar or identical statements regarding, for instance, Finland, UN Doc. A/51/44 (1996), para. 137; Germany, UN Doc. A/53/44 (1998), para. 193; and Yugoslavia, UN Doc. A/54/44 (1999), para. 51.

<sup>122</sup> Paragraph 450

<sup>123</sup> (2002) 10 IHRR 421

<sup>124</sup> CAT 219/2002

<sup>125</sup> Article 15 has been raised in other complaints, but the Committee has not made any notable comments: *Imed ABDELLI v Tunisia* (CAT 188/2001), *Dhaou Belgacem THABTI v Tunisia* (CAT 187/2001), *Bouabdallah LTAIEF v Tunisia* (CAT 189/2001) - the Committee found violations of articles 12 and 13 but did not go on to consider the alleged violation of article 15; *Encarnación Blanco Abad v Spain* (CAT 59/1996) – the Committee



139. Perhaps most compelling are the comments of the Committee against Torture in 2004 (after the Court of Appeal judgment in this case) in respect of the UK. In its conclusions and recommendations, the Committee emphasised that:

“article 15 of the Convention prohibits the use of evidence gained by torture wherever and by whomever obtained”.

140. The Committee also expressed concern that:

“notwithstanding the State party's assurance set out in paragraph 3 (g), supra, the State party's law has been interpreted to exclude the use of evidence extracted by torture only where the State party's officials were complicit”.<sup>126</sup>

141. The Committee's recommendation in response to these concerns was as follows:

“[T]he State party should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention as expressed by the delegation not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture; the State party should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture”.<sup>127</sup>

142. Having analysed the work of the Committee Against Torture in detail, the Interveners submit that these comments are consistent with the Committee's general approach; none of its reports and conclusions in respect of any State Party suggests that the exclusionary rule in Article 15 is limited to evidence obtained by torture by, or at the instigation of, public officials of the State in question.

143. Equally compelling evidence of the scope of the exclusionary rule comes from the Council of Europe's Commissioner for Human Rights. He visited the UK in November 2004 and published a report on 8th June 2005, in which he observed:

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found that the allegation of a violation of article 15 was not sufficiently corroborated; and *Qani Halimi-Nedzibi v Austria* (CAT 8/1991) – the allegations of ill-treatment were not sustained therefore article 15 did not fall to be considered.

<sup>126</sup> CAT/C/CR/33/3, para. 4(i), 10 December 2004

<sup>127</sup> Para. 5(d)

“A subsidiary issue to arise in relation to control order proceedings concerns the possible reliance on evidence obtained through torture in the determination of the suspicion of involvement in terrorism-related activity. Such evidence is clearly inadmissible in criminal proceedings, which may, indeed, render an effective prosecution more difficult. There is good reason for this inadmissibility however. To use evidence obtained under torture to secure criminal convictions is to condone an entirely indefensible practice. The same consideration should apply to any proceedings affecting the liberty of an individual, as is evidently the case with control orders. The Government has variously announced its refusal to rule out taking evidence suspected of being obtained under torture into account in its assessment of the threat presented by individuals, so long as the evidence was not extracted by, or with the connivance of, UK agents. A Court of Appeal ruling examining the admissibility of such evidence in the context of proceedings under the derogating provisions of the 2001 Act accepted that such evidence might be used in support of the Home Secretary’s suspicion. Consideration would, however, have to be attached to the weight to be given to the evidence in the light of its possible provenance. This view is difficult to reconcile with the absolute nature of the prohibition of torture in Article 3 of the ECHR; *torture is torture whoever does it*, judicial proceedings are judicial proceedings, whatever their purpose –the former can never be admissible in the latter”<sup>128</sup>.

144. The Commissioner recommended that the British authorities “ensure that evidence suspected of having been extracted through torture is in no case admissible and in particular is not relied on in control order proceedings.”<sup>129</sup> The United Kingdom, commenting on the report, noted that the issue would be considered by the House of Lords in October 2005, and that “it is not the Home Secretary’s intention to rely on, or present to Special Immigration Appeals Committee or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture”.<sup>130</sup>

145. There is also the material put before Your Lordships’ House by the Commonwealth Lawyers’ Association, which is hereby adopted without repetition. That material establishes that:

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<sup>128</sup> Strasbourg, 8 June 2005: CommDH(2005)6, paras 26-7, emphasis added

<sup>129</sup> Recommendation 2 at page 9

<sup>130</sup> p. 16

- a. In those few comparative law and domestic cases where the implications of the alleged torture of a third party by agents of a foreign State have been considered the case law is almost exclusively to the effect that such evidence should not be admitted.<sup>131</sup> This has been held to be the case in the context of both criminal proceedings and extradition proceedings.
- b. Comparative law sources indicate that the rationale behind the general prohibition of the admission of evidence obtained by torture includes the following elements (i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in

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<sup>131</sup> Cases cited: Canada: *India v Singh* [1996] BCJ No. 2792; France: *Le Ministere Public et Irastorza Dorronsoro* (No. 238/2003 Arrêt 16/5/03); *Haramboure et al v The French Republic, No. of Appeal 94-81254*; Netherlands: *Hoge Raad* 1996 1 October 1996, NJ 1997, 90; United States of America: *Emilio Valdez Mainero et al. v Stephen S Gregg, United States Marshal for the Southern District of California* 164 F. 3d 1199; *LaFrance v Bohlinger* 499 F. 2d 29; *Clanton v Cooper*, 129 F. 3d 1147; *Buckley v Fitzsimmons* 20 F 3d 789; England & Wales: *R v Governor of Brixton Prison ex p. Levin* [1997] AC 741; *Re Proulx* [2001] 1 All ER 57; *R (Saifi) v Governor of Brixton Prison* [2001] WLR 1134; European Union review of evidence obtained illegally: CFR-CDF.opinion3-2003 (November 2003): the sections of the report relating to Cyprus, Denmark, Finland, Germany and Ireland each indicate that evidence obtained as a result of torture or other serious ill-treatment would be excluded under the law of those countries.

Two contrary decisions in USA, *Gill v Imundi No. 88 Civ 1530 (RWS) (1990) 450 Federal Supplement 672* and *In the Matter of the Extradition of Mahmoud Abed Atta aka Mahmoud El-Abed Ahmad No. 88 CV 2008 (ERK) (1989) 706 Federal Supplement 1032* are distinguished from the present case where the proceedings under consideration are determinative in effect and where no question of extradition to face a conventional criminal process, with all its attendant safeguards and mechanisms for challenging evidence, is contemplated.

The Interveners note, in addition, a recent Canadian case, *Charkaoui (Re)* [2004] FCJ No 1236, judgment of 23 July 2004 (Federal Court, Montreal) the applicant had been detained under the Immigration and Refugee Protection Act since 21 May 2003 on the ground that he was a danger to national security. He sought judicial review of his detention, arguing that in accordance with Article 15 UNCAT (to which Canada is a party), the statements of Abu Zubaida and Ahmed Ressam (that they had seen him at a training camp in Afghanistan) should be withdrawn from the record since they had been obtained by “contracted-out” torture. Noël J rejected the application insofar as it concerned the evidence of Mr Ressam, as the interviews “were held in the presence of a lawyer who was representing him and... at two distinct points Mr Ressam instantly and without hesitation identified Mr Charkaoui on two different photographs” and “the Court had verified this statement” (paras 28-29). However, the judge held that Mr Zubaida’s statement had to be treated differently: “bearing in mind the objectives of the Convention against Torture and the conflicting evidence presented by the two parties” (i.e. concerning the alleged torture), the judge decided not to take Mr Zubaida’s statement into consideration but did not withdraw it from the record “in view of the type of evidence presented by the parties and the contradiction that exists in the evidence” (paras 30-31). Nevertheless, it is evident that the Court would have excluded the statements if it could have been established that they had been made as a result of torture.

particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

- c. The fundamental nature of each of these elements indicates that the exclusionary rule is itself of a fundamental nature and is not to be categorised simply as a rule of evidence.<sup>132</sup>

146. The applicability of the exclusionary rule to extraterritorial torture has also been recognised by scholars.<sup>133</sup>

147. It is also submitted that the *jus cogens* nature of the prohibition of torture and the *erga omnes* nature of the obligations arising from the prohibition support a broad interpretation of the exclusionary rule. As has already been argued, there is a clear obligation in international law not to endorse, adopt or recognise any breach of a norm of international law that has acquired the status of *jus cogens* and imposes obligations *erga omnes*.

148. It should also be observed that this approach to the scope of the exclusionary rule is consistent with the approach taken in respect of other measures designed to give practical effect to the prohibition of torture. For example, torture is a crime of universal jurisdiction and in England and Wales, section 134(1) of the Criminal Justice Act 1988 confers jurisdiction on our courts to try crimes of torture committed anywhere in the world. As a result, trials are taking place involving torture abroad even when the perpetrator and the victim are both foreign.<sup>134</sup> In a similar vein, *Jones & Mitchell v Kingdom of Saudi Arabia Prince Naif &*

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<sup>132</sup> Cited in support: Argentina: *Corte Suprema de Justicia de la Nación, Fallos 303/1938*; Australia: *Bunning v Cross* (1978) 141 CLR 54, 74; Canada: *R v Oickle* [2000] 2 SCR 3; [2000] SCJ No. 38; *R v Collins* [1987] 1 SCR 265; Ireland: *The People (AG) v O'Brien* [1965] IR 142; New Zealand: *R v Shaheed* [2002] 2 NZLR 377; United States of America: *Rochin v People of California* 242 US 165 (S. Ct. 1952); *Jackson v Denno* 378 US 368 (S. Ct. 1964); *In re Guantanamo Detainees 02-CV-0299 et al* (2005); Zimbabwe: *S v Nkomo* 1989 3 ZLR (SC) 117

<sup>133</sup> See e.g. A Byrnes, "Civil Remedies for Torture Committed Abroad", in Scott (ed), *Torture as Tort* (Hart, 2001), pp. 538, 541 and D Sloss, "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties" (1999) *Yale Journal of International Law* 129 at 205, n 362.

<sup>134</sup> For example, in July 2005 the Afghan warlord Faryadi Zardad was sentenced in the Central Criminal Court to 20 years' imprisonment for torture and hostage taking of Afghan citizens in Afghanistan.

*Others*<sup>135</sup> the Court of Appeal recognised that while foreign states themselves retain immunity from being sued for their agent's acts of torture, such immunity does not extend to the agents of the state when they are sued as individuals.

149. The Interveners submit that any use of any evidence that has been or may have been obtained by torture violates the prohibition of torture and is wholly inconsistent with the UK obligations in international law not to endorse, adopt or recognise the results of torture, the prohibition of which is *jus cogens* and gives rise to *erga omnes* obligations in international law.

### **The status of the exclusionary rule in international law**

150. The Interveners advance two propositions about the status of the exclusionary rule in international law. First, that the exclusionary rule is clearly rooted in the prohibition of torture and integral to it. As such, it arguably enjoys the same *jus cogens* status. Secondly, that, at the very least, the exclusionary rule has attained the status of customary international law in its own right.
151. As to the first proposition, the history and origins of the exclusionary rule, set out above, plainly support the proposition that the exclusionary rule is integral to the prohibition of torture. The rule was conceived of as a measure to give effect to the prohibition of torture and both the HRC and the Committee against Torture have observed the link between the prohibition of torture and the exclusionary rule. Moreover, to admit evidence which has been or may have been obtained under torture is to endorse, adopt or at least to recognise torture and is thus incompatible with the *jus cogens* nature of the prohibition and the *erga omnes* obligations that flow from it: see above.
152. As to the second submission, the Interveners note that customary international law is evidenced by a general practice accepted as law.<sup>136</sup> As Rosalyn Higgins observes,

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<sup>135</sup> [2004] EWCA Civ 1349

“[I]t is the practice of the vast majority of states that is critical, both in the formation of new norms and in their development and change and possible death... A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*”.<sup>137</sup>

153. The emergence of an exclusionary rule in customary international law is clear. As noted above, General Assembly Resolution 3452 (XXX), which contains the 1975 Declaration against Torture, was adopted without a vote (i.e. by consensus and therefore without dissent). Brownlie explains that although General Assembly resolutions are not binding on UN Member States,

“when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules”.<sup>138</sup>

154. Elsewhere he states that “the mere formulation of principles may elucidate and develop the customary law”.<sup>139</sup>

155. In the *Nuclear Weapons Case*,<sup>140</sup> the ICJ observed:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or

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<sup>136</sup> Article 38(1)(b) of the Statute of the International Court of Justice states that the Court shall apply “international custom as evidence of a general practice accepted as law”. However, this provision is interpreted to mean “international custom as evidenced by a general practice accepted as law”. It is practice which evidences custom, not the other way round. See Higgins, *op cit*, pp. 18-19.

<sup>137</sup> Higgins, *op. cit.*, p 22. HE Judge Rosalyn Higgins has been a member of the International Court of Justice since 12 July 1995.

<sup>138</sup> Brownlie, *Principles of Public International Law*, OUP, 6<sup>th</sup> edition, 2003, pp. 14-15

<sup>139</sup> *Ibid*, p 663

<sup>140</sup> *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, p 226, para. 70

a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”<sup>141</sup>

156. Reflecting its authoritative status as a source of fundamental principles, and as noted above, the 1975 Declaration against Torture has been invoked by a number of courts and quasi-judicial bodies. Of particular relevance to the customary status of the exclusionary rule is *Prosecutor v Furundzija*, in which the ICTY Trial Chamber observed that the Declaration against Torture’s adoption by consensus showed that no UN Member State had objected to its definition of “torture” and added: “In other words, all the members of the United Nations concurred in and supported that definition”.<sup>142</sup> Similarly, the Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 states that the Declaration’s “adoption by consensus...offers evidence of an emerging norm of international criminality as of 1975”.<sup>143</sup>
157. The very extensive ratification of UNCAT, and the fact that no State Party has made any reservation in respect of Article 15 UNCAT, has already been observed. The exclusionary rule in Article 15 can thus be said to reflect a consensus which is representative of customary international law.<sup>144</sup> Article 15 is part of the history of the exclusionary rule, and expresses the minimum requirements of that rule in treaty form.

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<sup>141</sup> In para. 71, the Court noted that several of the resolutions under consideration in that case (proclaiming the illegality of the use of nuclear weapons) had been adopted with substantial numbers of negative votes and abstentions. It concluded: “thus although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.”

<sup>142</sup> ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 160

<sup>143</sup> Delivered on 18 February 1999, <http://www1.umn.edu/humanrts/cambodia-1999.html>, para. 78.

<sup>144</sup> Cf *Prosecutor v Delalic* Case no IT-96-21-T, judgment of 16 November 1998, para. 459, where the ICTY Trial Chamber held that although the definition of torture in UNCAT was broader than that laid down in the Declaration, the UNCAT definition “reflects a consensus which the Trial Chamber considers to be representative of customary international law”. The Trial Chamber in *Furundzija*, *loc cit*, paras 160-161, shared that conclusion, observing: “The broad convergence of... international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.”

158. The relationship between treaties and customary international law is explained by Antonio Cassese<sup>145</sup> in his book *International Law*.<sup>146</sup> He states that treaties may have the following effects: (i) a declaratory effect - simply codifying or restating an existing customary rule;<sup>147</sup> a crystallising effect - bringing to maturity an emerging customary rule, that is, a rule that was still in the formative stage;<sup>148</sup> and/or a generating effect - when a treaty provision creating new law sets in motion a process whereby it gradually brings about, or contributes to, the formation of a corresponding customary rule.<sup>149</sup>
159. Article 38(1)(b) of the Statute of the ICJ implicitly recognises that treaty provisions can represent customary international law when they constitute “evidence of a general practice accepted as law”. ICJ case law reflects this. In the *Nicaragua Case (Merits)*, the ICJ observed that “customary international law continues to exist and apply, separately from international treaty law, even where the two categories of law have an identical content.”<sup>150</sup>
160. Examples of non-compliance with the exclusionary rule do not necessarily compromise the rule’s normative quality. In the *Nicaragua Case (Merits)*, the International Court of Justice held:

“If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained

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<sup>145</sup> Professor of International Law, University of Florence, former President of the Council of Europe Committee for the Prevention of Torture and former Judge and President of the International Criminal Tribunal for the former Yugoslavia (ICTY).

<sup>146</sup> OUP, 2<sup>nd</sup> edition, 2005, p168. See also Higgins, *op cit*, pp. 28-32 ‘The Overlap between Treaty and Custom’.

<sup>147</sup> See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia* ICJ Reports 1971, p 47, *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction)* ICJ Reports 1973, p 18 and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997, para. 46 (re Articles 60-62 of the Vienna Convention on the Law of Treaties 1969, concerning the termination and suspension of the operation of treaties). See also the Geneva Convention on the High Seas 1958, which was “declaratory of established principles of international law”.

<sup>148</sup> See e.g. *North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands)* ICJ Reports 1969, p 39 (re Articles 1 and 3 of the Geneva Convention on the Continental Shelf 1958, defining the continental shelf and the rights of States related thereto) and *Fisheries Jurisdiction Case (UK v Iceland) (Merits)* ICJ Reports 1974, p 14 (re Article 52 of the Vienna Convention on the Law of Treaties, concerning the invalidity of treaties concluded under the threat or use of force).

<sup>149</sup> In the *North Sea Continental Shelf Cases (FRG v Denmark; FRG v Netherlands)*, ICJ Reports 1969, p 3, paras 72-74, the ICJ explained how a treaty provision can generate a rule of customary international law.

<sup>150</sup> ICJ Reports 1986, p 14, para. 179



within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule".<sup>151</sup>

162. Furthermore, while a State may contract out of a custom in the process of formation by consistently and unequivocally manifesting a refusal to accept it, it cannot do so (without the acquiescence of other States, at least) once the customary rule has come into existence.<sup>152</sup>
163. Since the conclusion of UNCAT in 1984, the exclusionary rule has repeatedly been confirmed and consolidated. The observations and findings of the HRC, the Committee Against Torture and UN Special Rapporteurs on Torture have already been noted. The exclusionary rule has been incorporated into the Inter-American Convention to Prevent and Punish Torture. It has also been incorporated into the rules of the ICC, the ICTY and the ICTR. In addition the exclusionary rule has been re-affirmed by the UN General Assembly as recently as 2004<sup>153</sup> – again without a vote – and has been endorsed and adopted by the Council of Europe in Resolution 1433 (2005).
164. Moreover, such evidence as there is of internal state practice supports the proposition that the exclusionary rule has at least attained the status of customary international law. The Interveners have analysed all the country reports to the Committee against Torture on compliance with the provisions of UNCAT: 136 reports in all covering the period 1993 to 2003.<sup>154</sup> This analysis suggests that 85% of countries purport to comply with Article 15 UNCAT in that they identify provisions in their law enshrining the exclusionary rule and the Committee Against Torture has raised no comment of concern in their individual cases.
165. Against that background it is submitted that the origins and history of the exclusionary rule establish that, even if the rule does not enjoy *jus cogens* status as

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<sup>151</sup> *Loc cit*, at p 98. *A fortiori* if the State denies acting inconsistently with a recognised rule.

<sup>152</sup> Brownlie, *op. cit.*, pp. 11-12

<sup>153</sup> Resolution 59/182 (20<sup>th</sup> December 2004)

<sup>154</sup> CAT reports are held on the Office of the High Commissioner for Human Rights' website, [www.ohchr.org](http://www.ohchr.org).

an inherent aspect of the general prohibition of torture, it has, at the very least, attained the status of customary international law in its own right.

166. It is accepted that international courts and tribunals have not yet expressed the exclusionary rule in terms of a rule of customary international law. But, it is submitted, that is not conclusive. It is the evidence of State practice and *opinion juris* (i.e. a belief that a norm is accepted as law)<sup>155</sup> that matters. As Nourse LJ has observed,

“An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or to some other usage, custom or general principle of law recognised by all civilised nations. The authorities show that where it is necessary for an English court to decide such a question, it can and must do so; being guided by municipal legislation and judicial decisions, treaties and conventions and the opinions of international jurists; and, where no consensus is there found, by those opinions which are the most nearly consistent with reason and justice”.<sup>156</sup>

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<sup>155</sup> See Higgins, *op. cit.*, p. 19.

<sup>156</sup> *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry and others* [1989] 1 Ch 72, 209H-210A

### **III. THE APPLICABILITY OF THE EXCLUSIONARY RULE IN DOMESTIC LAW**

167. The interveners make the following submissions on the applicability of the exclusionary rule in domestic law:
- a. Article 6 of the ECHR should be interpreted as including within it the exclusionary rule and effect should be given to the exclusionary rule by the Human Rights Act 1998.
  - b. Because the exclusionary rule has attained the status of customary international law it is already part of the common law. Unless clear and conflicting legislation requires otherwise, effect should be given to it.
  - d. Even if your Lordships House considers that the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK which directly affect statutory interpretation and the development of the common law.
  - e. The rule of law requires domestic courts to give effect to the exclusionary rule.
168. Each of these propositions will be developed below.

#### **The Human Rights Act 1998**

169. It is submitted that there are three reasons why Article 6 of the ECHR should be interpreted as including within it the exclusionary rule. They can be summarised as follows:
- a. First, because Article 6 should be interpreted consistently with Article 15 of UNCAT.

- b. Second, because Article 6 has always been read as requiring the exclusion of evidence obtained by torture or improper compulsion.
- c. Third, because the exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment in Article 3 of the ECHR and Article 6 should be interpreted so as to give effect to Article 3.

170. Although each of these reasons has a separate foundation, it is submitted that their effect is cumulative. It is further submitted that by incorporating Article 6 into domestic law, the Human Rights Act requires domestic courts to give effect to the exclusionary rule.

*Article 6 of the ECHR and Article 15 of UNCAT*

171. It is submitted that the European Court of Human Rights has a long history of examining and using other human rights instruments to assist in the proper interpretation of the ECHR itself and as evidence of present-day standards when considering how to interpret the ECHR as a living instrument.

172. In *Loizidou v Turkey* the European Court held:

“[T]he Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" (see, inter alia, the *Golder v the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 14, para. 29, the *Johnston and Others v Ireland* judgment of 18 December 1986, Series A no. 112, p. 24, para. 51, and the above-mentioned *Loizidou* judgment (preliminary objections), p. 27, para. 73). In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum”.<sup>157</sup>

173. Similarly, in *Al Adsani v UK* the European Court stated:

“The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must 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.... 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”.<sup>158</sup>

174. Consistently with this approach, the European Court has repeatedly relied on other international instruments in order to interpret the scope of ECHR rights and safeguards. For example, in *V v United Kingdom*<sup>159</sup> it relied on Article 40(2) (b) of the UN Convention on the Rights of the Child, rule 8 of the Beijing Rules and the 1987 Recommendation of the Committee of Ministers of the Council of Europe in assessing whether the subjection of a child to public criminal proceedings designed for adults breached Article 3 of the ECHR. In *Kosik v Germany*<sup>160</sup> the EcomHR interpreted Article 10 of the ECHR in light of the International Convention on the Elimination of All Forms of Racial Discrimination. In *Muller v Switzerland*<sup>161</sup> and *Groppera Radio AG v Switzerland*<sup>162</sup> the European Court relied on Article 19 of the ICCPR, including its drafting history, in interpreting the scope of Article 10 of the ECHR. And in *Jersild v Denmark*<sup>163</sup> the European Court examined the International Convention on the Elimination of All Forms of Racial Discrimination in assessing the scope of Article 10 of the ECHR.
175. There are numerous other examples. These include *Preto v Italy*,<sup>164</sup> in which the European Court examined the ICCPR to determine the scope of the obligation to pronounce judgments in public under Article 6 of the ECHR. In *Can v Austria*,<sup>165</sup> the EcomHR interpreted Article 6 of the ECHR to conform with Article 14 of the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners. In *H.N. v Poland*,<sup>166</sup> the European Court made the following observation:

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<sup>157</sup> (1995) 20 EHRR 99, para. 43

<sup>158</sup> (2002) 34 EHRR 11, para. 55

<sup>159</sup> (1999) 30 EHRR 121

<sup>160</sup> (1986) 9 EHRR 328

<sup>161</sup> (1991) EHRR 212

<sup>162</sup> (1990) 12 EHRR 321

<sup>163</sup> (1995) 19 EHRR 1

<sup>164</sup> (1983) 6 EHRR 182

<sup>165</sup> (1986) 8 EHRR 121

<sup>166</sup> App. no 77710/01 (13 September 2005)

“Lastly, the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights ... Consequently, the Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, all the more so where the respondent state is also a party to that instrument”.<sup>167</sup>

176. Most significantly, the European Court has often relied on UNCAT itself when interpreting the ECHR. For example, in *Aydin v Turkey*,<sup>168</sup> the European Court relied on Article 12 of UNCAT to interpret Article 13 of the ECHR as including a duty to proceed to a prompt and impartial investigation of allegations of torture. In *Soering v UK*,<sup>169</sup> the European Court relied on Article 3 of UNCAT in finding that the prohibition of torture under Article 3 of the ECHR was absolute. And in *Selmouni v France*<sup>170</sup> and *Mahmut Kaya v Turkey*<sup>171</sup> the Court relied on Article 1 of UNCAT in defining treatment amounting to torture.

177. Hence, it is submitted that Neuberger LJ was correct when he said in the present case:

“I have come to the conclusion that, bearing in mind that ECHR Article 6(1) must be treated as informed by other international treaties, the general international determination to eliminate torture in all circumstances, and the terms of Article 15 of CAT... I do not think that any party mounting a s25 appeal before SIAC can be said to have had fair trial within ECHR Article 6 (1) ECHR if evidence obtained by torture is used against him”.<sup>172</sup>

178. The interveners further submit that to interpret Article 6 of the ECHR in light of Article 15 of UNCAT is not, as was suggested by Laws LJ and Pill LJ in the Court of Appeal, an improper incorporation by another route of non-incorporated international obligations. The scope of the ECHR obligations that are incorporated

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<sup>167</sup> Para. 75

<sup>168</sup> (1998) 25 EHRR 251

<sup>169</sup> (1989) 11 EHRR 439

<sup>170</sup> (1999) 29 EHRR 403

<sup>171</sup> App. no. 22535/93 (28 March 2000)

<sup>172</sup> [2005] 1 WLR 414, para. 467

in English law by the Human Rights Act 1998 must be interpreted by reference to the European Court of Human Rights' own approach, which as noted takes account of other relevant international human rights instruments, including those which are not incorporated into the domestic law of all States Parties to the ECHR. Moreover, such an approach has been endorsed by the English courts at the highest level. For example, in the derogation case (*A and Others v Secretary of State for the Home Department*), Lord Bingham interpreted Article 14 of the ECHR in light of Resolution 1271 of the Parliamentary Assembly of the Council of Europe, the General Policy Recommendations of the European Commission against Racism and Intolerance, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and comments by the UN Human Rights Committee on the scope of Article 26 of the ICCPR.<sup>173</sup>

*Article 6 and the exclusionary rule*

179. Adopting a generous and purposive interpretation intended to give practical effect to the ECHR, the Strasbourg bodies and domestic courts have repeatedly found that Article 6 ECHR is breached by the admission of evidence obtained under torture or other improper compulsion from the accused in a criminal trial.
180. As long ago as 1963, in the case of *Austria v Italy*,<sup>174</sup> the European Commission on Human Rights held, *obiter*, that the use of evidence obtained contrary to Article 3 of the ECHR against an accused person in criminal proceedings would breach the presumption of innocence under Article 6(2) of the ECHR.<sup>175</sup>

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<sup>173</sup> [2005] 2 AC 68, paras 47-63

<sup>174</sup> [1963] YB 740 at 784

<sup>175</sup> 'Since Article 6 (2) is thus primarily concerned with the spirit in which the judges must carry out their task, it may be asked whether it does not also apply to the attitude of other persons taking part in the proceedings such as counsel for the Prosecution and for the civil plaintiff, experts and witnesses. If such persons express themselves towards the accused in flights of language such as might disturb the calm of the Court by their violence or insulting nature, such behaviour would nonetheless bring no blame upon the Court from the point of view of Article 6(2) except inasmuch as the presiding judge, by failing to react against such behaviour, might give the impression that the Court shared the obvious animosity towards the accused and regarded him from the outset as guilty. *The same applies if the accused, during the preliminary investigation, has been subjected to any maltreatment with the object of extracting a confession from him; Article 6 (2) could only be regarded as being*

181. In more recent cases, the European Court and Commission have consistently examined whether confessions were extracted by torture or coercion in assessing whether there has been a breach of Article 6 of the ECHR. In *Magee v UK*<sup>176</sup> the European Court held that the admission in evidence of statements made by person detained under the Prevention of Terrorism Act 1984 at a police station in austere detention conditions which were “intended to be psychologically coercive” and without access to a lawyer breached Article 6(1) of the ECHR. In *Ferrantelli v Italy*<sup>177</sup> the European Court, in assessing whether a breach of Article 6(1) had taken place, examined the question of whether a confession had been extracted by physical coercion. In *Dikme v Turkey*<sup>178</sup> the EcomHR, in finding that there had been a breach of Article 6(3)(c) (access to a lawyer), examined the question of whether confessions had been extracted by torture.
182. In *Montgomery v HM Advocate*,<sup>179</sup> Lord Hoffmann took it to be axiomatic that the admission in evidence of a confession obtained under torture from the accused in a criminal trial would breach Article 6(1) ECHR. He stated obiter:
- “If the reception of evidence makes the trial unfair, it is the court that is responsible. Of course, events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But a breach of Article 6 (1) ECHR lies not in the use of torture (which is separately a breach of Article 3) but in the reception of the evidence by the court for the purpose of determining the charge”.<sup>180</sup>
183. In this case in the Court of Appeal, Laws LJ accepted that Article 6(1) ECHR, like the common law, required the exclusion of involuntary confessions made by the defendant in a criminal trial:

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*violated if the Court subsequently accepted as evidence any admissions extorted in this manner.* ’ [emphasis added].

<sup>176</sup> (2001) 31 EHRR 822

<sup>177</sup> (1996) 23 EHRR 288

<sup>178</sup> 20869/92, 11th July 2000

<sup>179</sup> [2003] 1 AC 641

<sup>180</sup> 649D-E



“... the Strasbourg cases sit easily with the common law: a man will not be confronted with a confession wrung out of him and proceedings based on State misconduct will not be entertained.”<sup>181</sup>

184. Pill LJ also appears to have accepted that Article 6(1) ECHR required the exclusion of involuntary confessions made by the defendant in a criminal trial.<sup>182</sup>
185. However, the majority in the Court of Appeal held that to read the exclusionary rule as excluding evidence obtained from a third party would be inconsistent with the European Court’s insistence that evidential rules are matters for domestic law. The Interveners respectfully disagree. Although it is true that the European Court has frequently expressed the view that rules of evidence are matters for the domestic authorities, that principle is not without limits and the exclusion of evidence that has been or might have been obtained by torture is one such limit.
186. The case law shows that the European Court limits the application of the principle that rules of evidence are for the domestic authorities at a much lower threshold than the admission of evidence that has been or may have been obtained by torture. In *Saunders v United Kingdom*<sup>183</sup> and in *Teixeira de Castro v Portugal*,<sup>184</sup> for example, the admission of evidence obtained by compulsion and by police entrapment respectively was found to breach a defendant’s right to a fair trial. As was accepted by Pill LJ in the Court of Appeal in this case, *Looseley*<sup>185</sup> provides an example of a domestic case “where Article 6 has required the existence of an exclusionary rule in a criminal trial”.<sup>186</sup>
187. The rationale for the inadmissibility under Article 6(1) ECHR of evidence obtained by improper compulsion, appears to be the Court’s abhorrence of compulsion, its concern about the unreliability of the evidence and the need to protect the integrity of its proceedings. Once this rationale is accepted, it is clear

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<sup>181</sup> [2005] 1 WLR 414, para. 265

<sup>182</sup> See para. 98.

<sup>183</sup> (1997) 23 EHRR 313

<sup>184</sup> (1998) 28 EHRR

<sup>185</sup> *Attorney-General’s Reference (No.3 of 2000)*, [2001] 1 WLR 2060

<sup>186</sup> Para. 98

that the prohibition of torture and the rules of evidence that inform the interpretation of Article 6(1) also require the exclusion of evidence obtained under torture from a third party, including where instigated or committed by the public officials of another State.

188. The approach of the Divisional Court in two extradition cases is instructive on this issue.

189. *R (on the application of Ramda) v Secretary of State for the Home Department*<sup>187</sup> concerned extra-judicial confessions extracted, potentially under torture, from a third party. Sedley LJ and Poole J found that there was a “risk of a fundamentally unfair trial” and that Article 6(1) of the ECHR would be breached if such confessions were relied on against a defendant at trial in France. Where the Home Secretary was making an extradition decision,

“among the issues for the Home Secretary to determine may be whether the trial to be faced by the wanted person will be a fair trial. This may involve the voluntariness of extra-judicial confessions relied on as evidence against him... Both Articles 3 and Article 6(1) ECHR require the state to conduct a sufficiently thorough investigation to explain injuries received in police custody.”<sup>188</sup>

190. In *Re Saifi*<sup>189</sup> the Divisional Court found that the activities of the Indian police, including allegations of torture against a third party to extract a confession implicating the applicant, were such that the applicant could not have a fair trial if extradited. The Court was satisfied that:

“the appearance of misbehaviour by the [Indian] police in pursuing their inquiries and the significant risk that the activities surrounding that misbehaviour have so tainted the evidence as to render a fair trial impossible”.<sup>190</sup>

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<sup>187</sup> [2002] EWHC 1278 (Admin)

<sup>188</sup> Paras 9, 22

<sup>189</sup> [2001] 1 WLR 1134

<sup>190</sup> Para. 66

191. Furthermore, the rationale for the inadmissibility of evidence obtained by compulsion based on unreliability applies with even greater force where the evidence has been or might have been obtained by compulsion from a third party. The third party is less likely to be present in court to give evidence about the circumstances under which his statement was obtained, and thus reliability can never be properly tested. This point was powerfully made by Neuberger LJ in this case in the Court of Appeal:

“[I]t appears to me that in some respects it would be even more unfair on a detainee to rely upon a statement extracted from a third party under torture, than to rely upon a confession extracted from the detainee himself under torture. In the latter type of case, the detainee will normally know of all the circumstances in which the confession was extracted, and will be able to give evidence of those circumstances, and possibly to give other evidence to rebut the reliability of the confession. However, it will be a very rare case where the detainee would know very much about the circumstances in which the statement was extracted from a third party, or where the detainee would be able to arrange for evidence to be given about those circumstances. Almost by definition, he will not be able to call or cross-examine the third party with a view to the third party explaining or rebutting the statement. Indeed, if the third party were available the statement extracted under torture would normally not be admitted, as he would be able to give evidence directly to the court”<sup>191</sup>.

192. Thus it is submitted that Article 6(1) ECHR should be read as including a rule excluding evidence obtained under torture whether from the accused or from a third party.

*Article 6 and Article 3 of the ECHR*

193. The clear links between the prohibition of torture and other forms of ill-treatment and the exclusionary rule have already been noted. Article 12 of the Declaration against Torture (which has been heavily relied on throughout the history of the rule), the HRC’s location of the exclusionary rule in Article 7 of the ICCPR (which prohibits torture or “cruel, inhuman or degrading treatment or punishment”) and the consistent approach of the UN Special Rapporteur on

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<sup>191</sup> Para. 464

Torture support the proposition that the exclusionary rule is inherent in the prohibition itself. On that analysis, it is submitted that the exclusionary rule is also inherent in Article 3 of the ECHR, which protects against torture and other forms of ill-treatment in almost identical words to Article 7 ICCPR.

194. It is well established in the case law of the European Court and Commission of Human Rights that the ECHR, as an international treaty and as a human rights instrument, requires an interpretation which has regard to the objects and purpose of the Convention as a whole and which renders it practical and effective.

195. In *Wemhoff v Germany*, the European Court held that:

“given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties.”<sup>192</sup>

196. In *Artico v Italy*, the European Court stated that:

“the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>193</sup>

197. And in *Soering v United Kingdom* the Court held that:

“The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2”.<sup>194</sup>

198. Against that background, it is submitted that because the exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment in Article 3 of the ECHR, Article 6 should be interpreted so as to give effect to Article 3.

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<sup>192</sup> (1979-1980) 1 EHRR 55

<sup>193</sup> (1981) 3 EHRR 1

<sup>194</sup> (1989) 11 EHRR 439

### Customary international law and the common law

199. It is submitted that because the exclusionary rule enshrined in Article 15 of UNCAT is a rule of customary international law, it forms part of the law of England and Wales and should be applied by the courts as such.

200. It has long been established that customary international law is part of the law of England and Wales. In his Commentaries on the Laws of England (1769) (Book 4 Public), Sir William Blackstone, in Chapter V at page 66 stated that:

“The law of nations is a system of Rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world, in order to decide all disputes to regulate all ceremonies and civilities and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle that different nations ought in time of peace to do one another all the good they can; and in time of war do as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow superiority in the other, therefore neither can dictate nor prescribe the rules of this law to the rest. But such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual contact or treaties between the respective communities, in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary states this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land.”

201. In *Trendtex Trading Corp v Central Bank of Nigeria*, Lord Denning stated that:

“Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.”<sup>195</sup>

202. Shaw LJ stated that:

“What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of *stare decisis* operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule.”<sup>196</sup>

203. The authorities and commentaries were recently reviewed by the Court of Appeal in *R v Jones*.<sup>197</sup> Latham LJ, giving the judgment of the Court, referred to the following passage by Nourse LJ in *Maclaine Watson & Co v Department of Trade*:

"For up to two and a half centuries it has been generally accepted amongst English judges and jurists that international law forms part of the law of this country, at all events if it can be shown there is an established rule which, first, is derived from one or more of the recognised sources of international law and, secondly, has already been carried into English law by statute, judicial decision or ancient custom".<sup>198</sup>

204. Latham LJ continued:

“There is no doubt, therefore, that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty. The second requirement referred to by Nourse LJ, namely that it has been carried into English law by statute, judicial decision or ancient custom is, it seems to us, more doubtful. Whilst clearly its recognition by statute will ipso facto, give it effect, in so far as it is suggested that there must be either a previous judicial decision or ancient custom, in other words, in effect, some clear acceptance by the court of the existence of the rule as part of English law, that would emasculate the principle. It would in effect prevent any clearly established rule of international law becoming part of English law other than by statute”.<sup>199</sup>

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<sup>195</sup> [1977] 1 QB 529, 554G

<sup>196</sup> [1977] 1 QB 529, 579A

<sup>197</sup> [2005] QB 259

<sup>198</sup> [1988] 3 WLR 1033, 1115, cited at para. 23 of *Jones*

<sup>199</sup> para. 24

205. It is submitted that the approach adopted by Latham LJ is plainly correct with the result that if the exclusionary rule is a rule of customary international law, it already forms part of the law of England and Wales and should be applied by the courts as such.

206. If your Lordships House considers, as contended, the exclusionary rule is part of the common law, it is submitted that it is protected by the principle of legality as it was articulated by Lord Hoffmann in *R v SSHD, ex parte Simms*:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”<sup>200</sup>

207. In this case, as is submitted further below, there is no clear legislative provision that requires the common law exclusionary rule to be abrogated.

### **Statutory interpretation and development of the common law**

208. It is further submitted that even if the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK which directly affect statutory interpretation and the development of the common law.

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<sup>200</sup> [2000] 2 AC 115, 131E-132B

*Statutory interpretation*

209. The basic principles are well known and uncontroversial. The Interveners obviously accept that, if their submission in respect of the proper interpretation of Article 6 of the ECHR and/or their submission in respect of the customary international law/the common law are rejected, then, as a provision in an unincorporated treaty, Article 15 of UNCAT is not part of domestic law with the result that clear and unambiguous statutory provisions are to be enforced notwithstanding any inconsistency with Article 15 of UNCAT.<sup>201</sup>
210. However, it is very well established that, in construing any legislation (whether primary or subordinate) which is ambiguous, *in the sense that it is capable of a meaning which either conforms to or conflicts with treaty obligations*, the courts will presume that the legislature intended to legislate in conformity with treaty obligations, not in conflict with them.<sup>202</sup>
211. In *Garland v British Rail Engineering Ltd*, Lord Diplock formulated the presumption as follows:
- “... it is a principle of construction of the United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out that obligation, and not to be inconsistent with it”.<sup>203</sup>
212. This emphasises that legislation should be treated as ambiguous if it is “reasonably capable of bearing such a meaning”, i.e. a meaning consistent with a treaty obligation as well as a meaning inconsistent with that obligation. It also represented an expansion in the scope of the treaty presumption in that the range of legislation to which the presumption applied was extended beyond

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<sup>201</sup> See the analysis of Lord Bridge in *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696 at p.747.

<sup>202</sup> See further the analysis of Lord Bridge in *ex parte Brind* at pp. 747-748.

<sup>203</sup> [1983] 2 AC 751, p. 771A-B



implementing legislation to any legislation “dealing with the subject matter of the international obligation”.

213. This approach has become entrenched. In *Ahmad v ILEA*<sup>204</sup> and *Williams v Home Office (No.2)*,<sup>205</sup> the presumption was applied to non-implementing legislation. And in *ex parte Brind*, Lord Bridge referred to the “canon of construction” whereby the courts, when confronted with a simple choice between two possible interpretations of some statutory provision, “prefer that which avoids conflict between our domestic legislation and our international obligations”.<sup>206</sup>

214. More recently, in *R v Lyons*<sup>207</sup> Lord Hutton said:

“This House has stated that international treaties do not create rights enforceable in domestic law: see *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476-477, 483C, 500C-D. But the present case relates to the fairness of the appellants' trial and is not one where the appellants claim to enforce a right which is given to them only by the Convention and is not recognised by English domestic law. As Lord Woolf CJ stated in *R v Togher* [2001] 3 All ER 463, 472, para 33: ‘The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance.’ Therefore in a case such as the present one concerned with the issue of fairness, I consider that the principle stated in Rayner's case does not mean that an English court should not regard a judgment of the European Court on that issue as providing clear guidance and should not consider it right to follow the judgment unless (as I would hold in the present case) it is required by statute to reach a different conclusion. As Lord Goff of Chieveley stated in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283G: ‘I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty’ [the ECHR]”.<sup>208</sup>

215. In the same case, Lord Hoffmann observed:

“Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United

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<sup>204</sup> [1978] QB 36

<sup>205</sup> [1981] 1 All ER 1211

<sup>206</sup> p. 748

<sup>207</sup> [2003] 1 AC 976

<sup>208</sup> Para. 69

Kingdom in breach of an international obligation”.<sup>209</sup>

216. See also Lord Bingham:

“It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complimentary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept as [counsel] strongly contended, with reference to a number of sources, that the efficacy of the Convention depends on the loyal observance by member states of the obligations that have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the Convention so far as they are free to do so”.<sup>210</sup>

217. Against that background it is submitted that, unless the provisions of the Anti Terrorism Crime and Security Act 2001 (‘ATCSA’) relating to the admission of evidence clearly show a Parliamentary intention to establish rules of evidence that are incompatible with Article 15 of UNCAT, they should be interpreted in accordance with the exclusionary rule in Article 15 of UNCAT, bearing in mind that peremptory norms of general international law generate strong interpretative principles.<sup>211</sup> It is submitted further below that ATCSA does not clearly show a Parliamentary intention to establish rules of evidence that are incompatible with UNCAT.

#### *The common law*

218. The authorities establishing that the common law should be interpreted and developed compatibly with international human rights obligations are very well

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<sup>209</sup> Para. 27

<sup>210</sup> Para. 13

<sup>211</sup> See Crawford, *op. cit.*, p. 187.

known,<sup>212</sup> as are the authorities that international human rights obligations can be used when a court is considering how to exercise a judicial discretion.<sup>213</sup> Indeed, before this case, it was treated as obvious that the common law reflected the UK's international human rights obligations under Article 15 of UNCAT. In *Re Saifi* Rose LJ stated that:

“In our judgment reference to the Torture Convention adds nothing to the case. The intent of Article 15 has been ensured in our law, by the common law and statute”.<sup>214</sup>

219. The scope and extent of the jurisdiction of domestic courts to prevent an abuse of their process is already broad. In *R v Horseferry Magistrates Court ex p Bennett*<sup>215</sup> and *R v Latif*<sup>216</sup> jurisdiction to prevent an abuse of process was established even where the fairness of the trial was not in issue. In *Bennett* Lord Lowry observed that:

“the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused...the principle goes...even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law.”<sup>217</sup>

220. Lord Griffiths, for his part, stated:

“If the court is to have the power to interfere with the prosecution in the present circumstances, it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The

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<sup>212</sup> *Derbyshire CC v Times newspapers Ltd* [1992] QB 770; *DPP v Jones and Lloyd* [1999] 2 All ER 257

<sup>213</sup> *AG v Guardian Newspapers* [1987] 1 WLR 1248; *Rantzen v Mirror Group Newspapers* [1994] QB 670

<sup>214</sup> [2001] 1 WLR 1134, 1156

<sup>215</sup> [1994] 1 AC 42

<sup>216</sup> [1996] 1 WLR 104, [1996] 1 All ER 353

<sup>217</sup> [1994] 1 AC 42, 76C-H

great growth of administrative law in the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it”.<sup>218</sup>

221. In *Latif* Lord Steyn observed that:

“If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with...In this case, the question is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system”.<sup>219</sup>

222. In *R v Governor of Brixton Prison ex p Levin*,<sup>220</sup> Lord Hoffman found that it would be very rare for evidence to be excluded from extradition proceedings but held, *obiter*, that evidence which ‘has been obtained in a way which outrages civilized values’ might be excluded. This test (whether evidence ‘has been obtained in a way which outrages civilized values’) was adopted and applied by the Divisional Court in *Armand Proulx v The Governor of Brixton Prison and the Government of Canada*.<sup>221</sup>

223. The Interveners submit that in so far as common law rules of fairness apply to SIAC, the common law should be interpreted and/or developed compatibly with the UK’s international human rights treaty obligations, including Article 15 of UNCAT. The Interveners also submit that in so far as SIAC has a common law abuse of process jurisdiction, the scope and extent of that jurisdiction should be interpreted and/or developed compatibly with the UK’s international human rights treaty obligations, including Article 15 of UNCAT.

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<sup>218</sup> 61H-62C

<sup>219</sup> [1996] 1 WLR 104, 112G-H

<sup>220</sup> [1997] AC 741, 748

<sup>221</sup> [2001] 1 All ER 57

**The rule of law**

224. It is clear that running through the cases and commentaries on the exclusionary rule is the notion that the admission of evidence that has been or might have been obtained by torture is antithetical to and would seriously damage the integrity of the proceedings.

225. Burgers and Danelius identified this notion when they indicated that the drafters of UNCAT were motivated by two concerns when setting out the exclusionary rule in Article 15 of UNCAT:

“ ... the rule laid down in article 15 [UNCAT] would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement and it could therefore be contrary to the principle of “fair trial” to invoke such a statement as evidence before a court. Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings. In the second place, it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture.”<sup>222</sup>

226. Article 69(7) of the Rome Statute, which addresses the admissibility of evidence in the International Criminal Court, also indicates the same two justifications for the exclusionary rule of fairness and expressing the Courts’ abhorrence of torture. As noted above, Article 69(7) provides that:

“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- a) the violation casts substantial doubt on the reliability of the evidence; or
- b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings”.

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<sup>222</sup> JH Burgers and H Danelius, *op. cit.*, p. 148

227. A similar approach has been taken in the US Supreme Court. In *Rochin v People of California* the Court said of a case in which police officers had forcibly opened a man's mouth to extract the contents of his stomach:

“This is conduct that shocks the conscience. . . They are methods too close to the rack and the screw... Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct that naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.”<sup>223</sup>

228. The United States Supreme Court said with regard to involuntary confessions in *Jackson v Denno*:

“It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will’, *Blackburn v Alabama*, 361 U.S. 199, 206 -207, and because of ‘the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves’, *Spano v New York*, 360 U.S. 315, 320 –321”.<sup>224</sup>

229. A similar approach has been taken in Canada. In *R v Oickle*, the Canadian Supreme Court said of the Canadian common law rule excluding confessions made as a result of oppression:

“ ... the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice...

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<sup>223</sup> 242 US 165 (S. Ct. 1952)

<sup>224</sup> 378 US 368 (S. Ct. 1964) at pp. 385-386

A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession ... this doctrine is a distinct inquiry. While it is still related to voluntariness its more specific objective is maintaining the integrity of the criminal justice system ....”<sup>225</sup>

230. In *R v Collins* the Canadian Supreme Court examined s.24(2) of the Canadian Charter, which provides that evidence obtained in breach of Charter protected rights should be excluded if its admission would ‘bring the administration of justice into disrepute:

“ ... the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory or prosecutorial authorities”.<sup>226</sup>

231. In *Wong Kam-Ming v The Queen*,<sup>227</sup> the Judicial Committee of the Privy Council held that even if evidence obtained under torture were demonstrably reliable and true, it should nonetheless be excluded as a mark of the Courts’ abhorrence of oppression. In that case, the Privy Council decided that where a defendant asserts his confession was extracted by oppression, the sole permissible questioning on a *voir dire* is to determine the voluntariness of the confession – not whether the confession is true or false. Giving judgment, Lord Edmund-Davies noted that to allow questioning of the defendant as to the truth or falsity of his confession would have ‘startling consequences’. Such an approach would suggest that if a statement were true, it would be admissible regardless of how much physical or mental torture or abuse had been inflicted to extract that confession. Lord Edmund Davies cited with approval the following passage of Hall CJ from the Canadian case of *Regina v Hnedish*:

“I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards

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<sup>225</sup> [2000] 2 SCR 3; [2000] SCJ No. 38, paras 32, 65

<sup>226</sup> [1987] 1 SCR 265, para. 31

<sup>227</sup> [1980] 1 AC 247

and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences.”<sup>228</sup>

232. A similar approach has been taken by English courts. In *R v Mushtaq*, Lord Hutton reviewed common law principles relating to the admissibility of confession evidence:

“It is clear that there are two principal reasons underlying the rule that a confession obtained by oppression should not be admitted in evidence. One reason, which has long been stated by the judges, is that where a confession is made as a result of oppression it may well be unreliable, because the confession may have been given, not with the intention of telling the truth, but from a desire to escape the oppression imposed on, or the harm threatened to, the suspect. A further reason, stated in more recent years, is that in a civilised society a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to ill-treatment or improper pressure in order to extract a confession.”<sup>229</sup>

233. Notably, in this case, Pill LJ accepted that these two considerations underlay the common law rule as to the exclusion of forced confession evidence in criminal proceedings as well as s.76 of the Police and Criminal Evidence Act 1984:

“The rule was based not merely on concerns about the reliability of evidence obtained by oppression; it protected accused persons from oppression and marked the repugnance of the common law, in the context of criminal trials, to evidence so obtained from a defendant. Section 76 of the 1984 Act, influenced I would expect by the jurisprudence under Article 6 of the Convention, embodied the same principle.”<sup>230</sup>

234. The Interveners submit that the rule of law requires domestic courts to give effect to the exclusionary rule. The twin considerations that underpin the courts’ abuse of process jurisdiction – the concern over the unreliability of evidence obtained by oppression and the courts’ abhorrence of oppression and desire to maintain the integrity of judicial proceedings – apply with the same or greater force where the evidence in question comes from a third party who is not available to be cross-examined, and where the agents of another State are implicated in torture.

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<sup>228</sup> (1958) 26 W.W.R. 685, 688; cited at [1980] 1 AC 247, 257A

<sup>229</sup> (2005) 1 WLR 1513, para. 7

<sup>230</sup> Para. 92



## **The Court of Appeal's judgment**

### *Weight and admissibility*

235. The Interveners respectfully submit that Laws LJ in the Court of Appeal<sup>231</sup> erred in finding (as had the Special Immigration Appeals Commission), that the fact that evidence had been or might have been obtained through torture from a third party would be a matter of weight rather than admissibility.

236. It is submitted that if evidence that had been or might have been obtained by torture was admitted, assessing its weight would inevitably involve Courts in an extremely unattractive and potentially debasing exercise. Courts would arguably have to conduct a more thorough, and evidentially difficult, investigation into the circumstances in which the evidence in question was obtained. Moreover, some assessment would have to be given to different degrees of torture. This would imply that some forms of torture were more acceptable than others, which is wholly inconsistent with the absolute nature of the prohibition on torture.

### *The distinction between evidence obtained by torture, with the connivance of the UK authorities, and evidence obtained by torture without such connivance*

237. In this case, Pill LJ accepted that neither Part 4 of ATCSA nor Rule 44(3) of the SIAC Procedure Rules:

“ ... deprive the Commission of an abuse of process jurisdiction. Indeed, the existence of such a jurisdiction is inherent in the judicial function. It is a fundamental principle of the rule of law... There remains a residual jurisdiction even in this context.”<sup>232</sup>

238. Similarly, Laws LJ accepted that if torture were brought about with the connivance of the English authorities, the courts, including the Special

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<sup>231</sup> Paras 262-265

Immigration Appeals Commission, would have jurisdiction to exclude the resulting evidence because “it is a cardinal principle of the rule of law” that:

“ ... the courts will not entertain proceedings or receive evidence in ongoing proceedings if to do so would lend aid or reward to the perpetration of ... wrongdoing by an agency of the State<sup>233</sup> ...”

239. Therefore,

“... were the Secretary of State to rely before SIAC on a statement which his agents had procured by torture, or which had been procured with his agents’ connivance at torture, SIAC should decline to admit the evidence, and this is so however grave the emergency.”

240. The Interveners respectfully submit that this distinction between evidence obtained by torture with the connivance of the UK authorities which courts *would be obliged to exclude*, and evidence obtained without such connivance, which the courts *would lack the power to exclude*, is unsustainable.

241. First, because if the Courts, under the ACTSA and SIAC legislation, retain the power to exclude improperly obtained evidence, then it follows that the nothing in the legislation itself precludes the legislation from being read subject to the exclusionary rule set out in these submissions. Second, because the distinction drawn by the majority in the Court of Appeal is incompatible with the absolute nature of the prohibition of torture, the preventive function of the exclusionary rule and the *erga omnes* nature of the obligations relating to the prohibition on torture. Third, because the rationale underlying the rule of law and the abuse of process jurisdiction – the concerns over the unreliability of evidence obtained by torture, the courts’ abhorrence of torture and desire to maintain the integrity of judicial proceedings – apply whether or not the evidence has been obtained with the connivance of the UK authorities. Fourth, because the Secretary of State, in seeking to rely on the proceeds of torture by the agents of another State, adopts that torture. As Neuberger LJ pointed out in his judgment in the Court of Appeal:

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<sup>232</sup> Para. 137

“it is the UK Government, through the Secretary of State which is seeking to rely on evidence which, at least according to the appellants, was extracted under torture While this is not a case where there is any question of the executive having been in any way connected with the torture, it remains the case that it is the executive which is seeking to rely in legal proceedings upon the evidence which is alleged to have been obtained through torture. In a sense, therefore, it can be said that the executive has “adopted” the means by which the evidence was extracted, and therefore that the duty of the court to intervene has arguably been triggered.”<sup>234</sup>

*The interpretation of ATCSA and the SIAC Procedure Rules*

242. The Interveners respectfully submit that Pill LJ<sup>235</sup> in the Court of Appeal erred in finding that Part 4 of ATCSA and rule 44 of the SIAC Procedure Rules prohibited SIAC from excluding from its consideration statements obtained through torture.

243. Under s. 21 (1) ATCSA, the Secretary of State may certify a person as a suspected international terrorist

“If the Secretary of State reasonably –

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist”

244. Under s.25(2) ATCSA,

“The Commission must cancel the certificate if -

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21 (1) (a) or (b) or

(b) it considers that for some other reason the certificate should not have been issued.”

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<sup>233</sup> Paras 248-252

<sup>234</sup> Para. 413

<sup>235</sup> Paras 129-133

245. Rule 44(3) of the Special Immigration Appeals (Procedure) Rules 2003 which applies to procedures in s.25 appeals before the Special Immigration Appeals Commission provides:

“The Commission *may* receive evidence that would not be admissible in a court of law” [emphasis added].

246. Nothing in Part 4 of ATCSA 2001 addresses the question of what evidence may be considered by the Secretary of State, or by the Special Immigration Appeals Commission, in determining whether there are reasonable grounds to believe that a person's presence in the United Kingdom is a risk to national security (ATCSA s.21(1) (a)) or reasonable grounds to suspect that he is a terrorist (ATCSA s. 21 (1) (b)).

247. Rule 44(3) confers a discretion to admit evidence not normally admissible in a court of law. Rule 44(3) does not require the Commission to accept all evidence submitted to it. Nor, if it is submitted, does it follow from Rule 44(3) that there are *no* rules of evidence; or, more narrowly, that any evidence can be admitted whatever its source.

248. As already set out above, it was accepted in the Court of Appeal that the Courts would be required to exclude evidence obtained by torture with the connivance of the UK authorities. It is respectfully submitted that this is inconsistent with the suggestion that the ATCSA and SIAC legislation *requires* the courts to admit *all* evidence.

249. Further, the Secretary of State has himself accepted that the statutory scheme does not prevent the UK from complying with its international obligations under Article 15 UNCAT. In the Conclusions and Recommendations following consideration of the United Kingdom's report under article 19 of the Convention, the Committee against Torture noted under the heading “positive aspects”:

“... the State party's affirmation that ‘evidence obtained as a result of any acts of torture by British officials, or with which British authorities were complicit,

would not be admissible in criminal or civil proceedings in the United Kingdom,' and that the Home Secretary does not intend to rely upon or present 'evidence where there is a knowledge or belief that torture has taken place'".<sup>236</sup>

## CONCLUDING OBSERVATIONS

250. The Special Rapporteur on Torture's first report to the UNCHR in 1986 sets out the rationale for the prohibition of torture:

"What distinguishes man from other living beings is his individual personality. It is this individual personality that constitutes man's inherent dignity, the respect of which is, in the words of the preamble of the Universal Declaration of Human Rights, "the foundation of freedom, justice and peace in the world". It is exactly this individual personality that is often destroyed by torture, in many instances, torture is even directed at wiping out the individual personality".<sup>237</sup>

251. Because torture strikes at human dignity, the prohibition of torture has an almost unique status in international human rights law: it is absolute and non-derogable and has the status of *jus cogens*. The prohibition not only requires States to refrain from torture but requires them to take measures to prevent torture. All States are under obligations, *erga omnes*, not to endorse, adopt or recognise any breach of the prohibition of torture.

252. The purpose of torture being often to extract information, the exclusionary rule is integral to the prohibition of torture and fundamental to efforts to prevent and eradicate torture. The exclusionary rule must be interpreted broadly and has been interpreted by authoritative human rights bodies to include evidence obtained from third parties and evidence obtained at the instigation of the agents of a foreign State.

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<sup>236</sup> Para. 3(g)

<sup>237</sup> Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15

253. The right to a fair trial under Article 6 of the ECHR includes within it the rule excluding evidence which has been or might have been obtained under torture. This is because the admission of evidence which has been or might have been obtained under torture is inimical to the right to a fair trial and to the integrity of judicial proceedings; it is also because Article 6 of the ECHR must be read in light of other international human rights instruments, including Article 15 of UNCAT and because Article 6 of the ECHR must be read in a manner which gives effect to the prohibition of torture contained in Article 3 of the ECHR.
254. Arguably, because it is integral to the prohibition of torture, the exclusionary rule itself enjoys the status of *jus cogens*. At a minimum, the exclusionary rule is so widely accepted in state practice and *opinio juris* that it has attained the status of a customary norm of international law and is therefore part of the UK's common law. Further, the exclusionary rule as contained in Article 15 of UNCAT forms part of the UK's international treaty obligations and must inform statutory interpretation and the development of the UK common law. Because the admission of evidence which has been or might have been obtained under torture is inimical to a fair trial and debases the integrity of judicial proceedings, the exclusionary rule is also integral to the rule of law.
255. If the ATCSA and SIAC statutory framework precluded the application of the exclusionary rule, the legislation would be incompatible with Article 6 of the ECHR.
256. However, Rule 44(3) of the SIAC Procedure Rules – one, generally or ambiguously worded line in subordinate legislation – is manifestly insufficient to indicate Parliament's intention to override the fundamental human rights or the UK's international obligations which are at stake in this case.
257. Laws LJ accepted in the Court of Appeal that the exclusionary rule would apply in s.25 ATCSA proceedings if:

“there exists some over-arching or constitutional principle, not capable of being abrogated by [rule 44(3) of the SIAC Procedure Rules] ...in particular, the principle must be one which by force of its constitutional or fundamental nature, subordinate legislation such as rule 44(3) cannot lawfully override in the absence of express or at least specific authority.”<sup>238</sup>

258. The Interveners submit that the exclusionary rule holds such a status and that nothing in the ACTSA legislation or SIAC Procedure Rules precludes the Courts from applying the exclusionary rule:

- a. as required by s.3 Human Rights Act 1998, to read and give effect to the ACTSA and SIAC legislation in a manner compatible with the UK’s obligations under Article 6 ECHR;
- b. as required by the principle of legality, to give effect to a common law rule, because the exclusionary rule, as, at a minimum, a norm of customary international law, forms part of the common law and/or because the common law has developed to reflect the UK’s international human rights obligations and/or because the exclusionary rule is integral to the rule of law; and
- c. as required by principles of statutory interpretation to give effect to the UK’s international treaty obligations under Article 15 UNCAT.

Professor Nicholas Grief  
Bournemouth University

Keir Starmer QC  
Mark Henderson  
Joseph Middleton  
Peter Morris  
Laura Dubinsky  
Doughty Street Chambers

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<sup>238</sup> Para. 243

## **SCHEDULE: THE INTERVENERS**

### *The AIRE Centre*

The AIRE Centre provides direct legal representation in applications to the European Court of Human Rights, and has been involved in more than 60 cases against 12 jurisdictions. A number of these cases concerned applicants who were threatened by expulsion to countries where they might have faced torture, inhuman or degrading treatment. The organisation also provides training for judges, public officials, lawyers and human rights NGOs across the 46 member states of the Council of Europe. This has included training at ELENA/ECRE courses and training for the International Association of Refugee Law Judges.

### *Amnesty International Ltd*

Amnesty International Ltd is a company limited by guarantee. Amnesty International aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. Amnesty International monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe

Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organisation works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community.



It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognised human rights.

*The Association for the Prevention of Torture*

The Association for the Prevention of Torture (APT) is an independent non-governmental organization based in Geneva, Switzerland, since 1977. Its objective is to prevent torture and ill-treatment of persons deprived of their liberty, in all countries of the world. To achieve this the APT: advocates for the adoption and implementation of legal norms that prohibit torture and ill-treatment; promotes monitoring of places of detention and other control mechanisms that can prevent torture and ill-treatment; strengthens the capacity of persons seeking to prevent torture, especially national human rights organizations. In December 2004 it was awarded the French Republic's Human Rights Prize for its prevention work.

*British Irish Rights Watch.*

British Irish Rights Watch is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Its services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and the organisation takes no position on the eventual constitutional outcome of the peace process. One of BIRW's charitable objects is the abolition of torture, and the organisation has fifteen years' experience of working to combat torture and cruel, inhuman or degrading treatment and of monitoring conditions in detention.

### *The Committee on the Administration of Justice*

The Committee on the Administration of Justice Ltd.(CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. The Committee seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the 1998 Council of Europe Human Rights Prize.

### *Doctors for Human Rights*

Doctors for Human Rights' is the trading name of 'Physicians for Human Rights - UK', which is a registered in England and Wales as a charity [No. 1078420] and as a limited company [No. 03792515]. Doctors for Human Rights is an organization of British health professionals dedicated to ensuring that the ideals, skills and expertise of their discipline are brought to the service of human rights.

### *Human Rights Watch*

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It maintains offices in Berlin, Brussels, Geneva, London, Los Angeles, Moscow, New York, San Francisco, Tashkent, Toronto, and Washington. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including the European Court of Human Rights, courts in the European Union and United States, and international tribunals.

*The International Federation for Human Rights*

The mandate of the International Federation for Human Rights (FIDH) is to act effectively and practically to ensure the respect of all the rights laid down in the Universal Declaration of Human Rights and in other Human Rights treaties. The FIDH was set up in 1922. It is now a federation of 141 national or regional Human Rights organisations. The FIDH co-ordinates and supports their activities and provides them with a voice at the international level. Like its member organisations, the FIDH is linked to no party, no religion, and is independent vis-à-vis all governments.

*INTERIGHTS*

INTERIGHTS is an international human rights law centre based in London. It conducts human rights litigation before international, regional and domestic courts and tribunals. It also frequently intervenes as *amicus curia* in cases that raise issues of general importance concerning the interpretation of fundamental rights. INTERIGHTS has intervened in cases before the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples Rights and the UN Human Rights Committee, as well as domestic courts. INTERIGHTS also engages in legal education of judges and lawyers and the publication of legal resource materials. Its main purpose is to assist judges and lawyers to understand and apply international and comparative law for the more effective protection of human rights and the rule of law.

*The Law Society of England and Wales*

The Law Society regulates and represents the solicitors' profession in England and Wales and has a public interest role in working for reform of the law.

### *Liberty*

Liberty, a company limited by guarantee, was formed in 1934 and is a respected and independent body whose central objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom. It has had a legal department with employed staff for 25 years, although supporting cases has been part of its work since 1934. Liberty acts for clients as solicitor and regularly practises in the courts in this country and in the ECHR. Liberty has also developed considerable experience in providing written submissions to the European Court of Human Rights and domestic courts as intervener. In addition, Liberty has a particular interest and expertise in anti-terror legislation, and assists Parliamentary Committees in their scrutiny of anti-terror and civil emergency policy.

### *The Medical Foundation for the Care of Victims of Torture*

The Medical Foundation for the Care of Victims of Torture is a human rights organisation that works exclusively with survivors of torture and organised violence, both adults and children. It has received more than 40,000 referrals since it began in 1985. The Foundation offers its patients medical treatment and documentation of the signs and symptoms of torture, providing 750 to 1,000 forensic medical reports each year as well as a range of therapeutic services.

### *REDRESS*

REDRESS is an international human rights nongovernmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation. Over the past 12 years, it has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and

tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.

*World Organization Against Torture (OMCT)*

The World Organization Against Torture (OMCT), based in Geneva, Switzerland, is the largest international coalition of non governmental organisations (NGOs) fighting against torture, summary executions, forced disappearances and all forms of cruel, inhuman or degrading treatment. As the coordinator of the SOS-Torture network which comprises 282 national, regional, and international organizations in 89 countries, OMCT has 20 years of experience assisting victims of torture and local NGOs including through litigation in national systems in many different regions of the world. OMCT brings to this *amicus* intervention its legal expertise on the prohibition of torture and ill-treatment under international law developed also in the context of its advocacy activities before the United Nations Treaty Bodies (HRC and CAT) and interventions in regional human rights *fora* including the African and Inter-American systems.

**IN THE HOUSE OF LORDS**

**ON APPEAL FROM HER MAJESTY'S COURT OF  
APPEAL (ENGLAND)**

**BETWEEN:**

**A and Others**

**Appellants**

**-v-**

**SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Respondent**

**A and Others (FC) and ANOTHER**

**Appellants**

**-v-**

**SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Respondent**

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**CASE FOR THE INTERVENERS  
(AMNESTY INTERNATIONAL and Others)**

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Leigh Day & Co.  
Priory House  
25 St John's Lane  
London EC1M 4LB

Tel: 020 7650 1200

Fax: 020 7650 1294

Ref: RS/Amnesty

**NOTES**  
for the guidance of persons wishing to apply to the  
**EUROPEAN COURT OF HUMAN RIGHTS**

## **I. WHAT CASES CAN THE COURT DEAL WITH?**

1. The European Court of Human Rights is an international institution which **in certain circumstances** can examine complaints from persons claiming that their rights under the European Convention on Human Rights have been infringed. This Convention is an international treaty by which a large number of European States have agreed to secure **certain fundamental rights**. The rights guaranteed are set out in the Convention itself, and also in Protocols Nos. 1, 4, 6, 7 and 13 which only some of the States have accepted. You should read these texts and the accompanying reservations, which are all enclosed.
2. If you consider that you have **personally and directly been the victim** of a breach of one or more of these fundamental rights by one of the States, you may complain to the Court.
3. The Court can only deal with complaints relating to infringements of one or more of **the rights set forth in the Convention and Protocols**. It is not a court of appeal *vis-à-vis* national courts and cannot annul or alter their decisions. Nor can it intervene directly on your behalf with the authority you are complaining about.
4. The Court can only examine complaints that are directed against States which have ratified the Convention or the Protocol in question and concern **events after a given date**. The date varies according to the State and according to whether the complaint relates to a right set out in the Convention itself or in one of the Protocols.
5. You can only complain to the Court about **matters which are the responsibility of a public authority** (legislature, administrative authority, court of law, etc.) of one of these States. **The Court cannot deal with complaints against private individuals or private organisations.**
6. By the terms of Article 35 § 1 of the Convention, the Court can only deal with an application after **all domestic remedies have been exhausted** and within a period of **six months from the date on which the final decision was taken**. The Court will not be able to consider any application that does not satisfy these admissibility requirements.
7. It is therefore absolutely essential that before applying to the Court, you should have tried **all judicial remedies** in the State concerned by means of which it might have been possible to redress your grievance; failing that, you will have to show that such remedies would have been ineffective. You must accordingly have first applied to the domestic courts, up to and including the highest court with jurisdiction in the matter, where you must have raised, at least in substance, the complaints that you wish to submit subsequently to the Court.
8. When availing yourself of the appropriate remedies, you must normally **comply with national rules of procedure**, including time-limits. If, for instance, your appeal is dismissed because you have brought it too late or in the wrong court or have not used the proper procedure, the Court will not be able to examine your case.

9. However, if you are complaining of a court decision such as a conviction or sentence, it is not necessary to have tried to have your case reopened after going through the normal appeal procedures in the courts. Nor do you have to have made use of non-contentious remedies or seek a pardon or an amnesty. Petitions (to Parliament, the Head of State or Government, a minister or an ombudsman) are not regarded as effective remedies that you must have used.

10. After a decision of the highest competent national court or authority has been given, you have **six months** within which you may apply to the Court. The six-month period begins when the final court decision in the ordinary appeal process is served on you or your lawyer, not on the date of any later refusal of an application to reopen your case or of a petition for pardon or amnesty or of any other non-contentious application to an authority.

11. Time only stops running when the Court first receives from you either your **first letter** clearly setting out – even if only in summary form – the subject-matter of the application you may wish to lodge or a completed application form. A mere request for information is not sufficient to stop time running for the purposes of complying with the six-month time-limit.

12. Purely for information purposes, you should be aware that **more than 90% of the applications examined by the Court** are declared inadmissible for failure to comply with one or more of the conditions referred to above.

## II. HOW TO APPLY TO THE COURT

13. The Court's **official languages** are English and French but if it is easier for you, you may alternatively write to the Registry in an official language of one of the States that have ratified the Convention. During the initial stage of the proceedings you may also receive correspondence from the Court in that language. Please note, however, that at a later stage of the proceedings, namely when the Court does not declare your application inadmissible on the basis of the file as submitted by you but decides to ask the Government to submit written comments on your complaints, all correspondence from the Court will be sent to you in English or French and you or your representative will in principle also be required to use English or French in your subsequent submissions.

14. Applications to the Court may be made only by post (not by telephone). If you send your application by e-mail or fax, you must confirm it by post. No purpose will be served by your coming to Strasbourg in person to state your case orally.

15. All correspondence relating to your complaint should be sent to the following **address**:

The Registrar  
European Court of Human Rights  
Council of Europe  
F-67075 STRASBOURG CEDEX.

Please do not staple, seal with adhesive tape, or otherwise bind any correspondence or documents you send to the Court. All pages should be numbered consecutively.

16. On receipt of your first letter or the application form, the Registry of the Court will reply, telling you that **a file (whose number must be mentioned in all subsequent correspondence) has been opened in your name**. Subsequently, you may be asked for further information, documents or particulars of your complaints. On the other hand, the Registry cannot inform you about the law of the State against which you are making your complaint or give legal advice concerning the application and interpretation of national law.



17. It is in your interests to **be diligent in conducting your correspondence** with the Registry. Any delay in replying or failure to reply is likely to be regarded as a sign that you are not interested in continuing to have your case dealt with. Thus, if you do not answer any letter sent to you by the Registry subsequently within one year of its dispatch to you, your file will be destroyed.

18. If you consider that your complaint does concern one of the rights guaranteed by the Convention or its Protocols and that the conditions set out above are satisfied, **you should fill in the application form carefully and legibly and return it within six weeks at most.**

19. By the terms of Rule 47 of the Rules of Court, **it is essential that in your application you:**

(a) give a brief **summary of the facts** of which you wish to complain and the nature of your complaints;

(b) indicate which of your **Convention rights** you think have been infringed;

(c) state **what remedies you have used;**

(d) list the **official decisions** in your case, giving the date of each decision, the court or authority which took it, and brief details of the decision itself. Attach to your letter a full copy of these decisions. (No documents will be returned to you. It is thus in your interest to **submit only copies, not the originals.**)

20. Rule 45 of the Rules of Court requires the application form to be **signed** by you as applicant or by your representative.

21. If you do not wish your identity to be disclosed to the public, you must say so and set out the reasons for such a departure from the normal rule of public access to information in the proceedings. The Court may authorise **anonymity** in exceptional and duly justified cases.

22. For the purpose of lodging the initial complaint, you need not be represented by a lawyer, nor does your representative have to be a lawyer. However, when the Court decides to ask the Government to submit written comments on your complaints, you will in principle be required to be represented by a lawyer for the purpose of the ensuing proceedings. This lawyer must, in the absence of any special exemption, be an advocate authorised to practise in one of the States that have ratified the Convention and he or she must have an adequate knowledge of one of the Court's official languages (English and French). It should be noted that from that stage onwards, the Court's correspondence to you will be in one of the official languages and your submissions must be in one of the Court's official languages, unless you have been granted leave to continue using a non-official language. If you have legal representation, the application form must be accompanied by your **authority for the advocate or other representative to act on your behalf**. A representative of a legal entity (company, association, etc.) or group of individuals must provide proof of his or her legal right to represent it.

23. The Court does not grant **legal aid** to help you pay for a lawyer to draft your initial complaint. At a later stage of the proceedings – after a decision by the Court to communicate the application to the government concerned for written observations – you may be eligible for free legal aid if you have insufficient means to pay a lawyer's fees and if a grant of such aid is considered necessary for the proper conduct of the case.

24. Your case will be dealt with **free of charge**. As the proceedings are initially in writing, there is no point in coming to the Court's premises in person. You will automatically be informed of any decision taken by the Court.

## DATES OF ENTRY INTO FORCE

States	Convention CETS 005	Protocol No. 1 CETS 009	Protocol No. 4 CETS 046	Protocol No. 6 CETS 114	Protocol No. 7 CETS 117	Protocol No. 12 CETS 177	Protocol No. 13 CETS 187
Albania	02/10/96	02/10/96	02/10/96	01/10/00	01/01/97	01/04/05	
Andorra	22/01/96			01/02/96			01/07/03
Armenia	26/04/02	26/04/02	26/04/02	01/10/03	01/07/02	01/04/05	
Austria	03/09/58	03/09/58	18/09/69	01/03/85	01/11/88		01/05/04
Azerbaijan	15/04/02	15/04/02	15/04/02	01/05/02	01/07/02		
Belgium	14/06/55	14/06/55	21/09/70	01/01/99			01/10/03
Bosnia and Herzegovina	12/07/02	12/07/02	12/07/02	01/08/02	01/10/02	01/04/05	01/11/03
Bulgaria	07/09/92	07/09/92	04/11/00	01/10/99	01/02/01		01/07/03
Croatia	05/11/97	05/11/97	05/11/97	01/12/97	01/02/98	01/04/05	01/07/03
Cyprus	06/10/62	06/10/62	03/10/89	01/02/00	01/12/00	01/04/05	01/07/03
Czech Republic	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		01/11/04
Denmark	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/07/03
Estonia	16/04/96	16/04/96	16/04/96	01/05/98	01/07/96		01/06/04
Finland	10/05/90	10/05/90	10/05/90	01/06/90	01/08/90	01/04/05	01/03/05
France	03/05/74	03/05/74	03/05/74	01/03/86	01/11/88		
Georgia	20/05/99	07/06/02	13/04/00	01/05/00	01/07/00	01/04/05	01/09/03
Germany	03/09/53	13/02/57	01/06/68	01/08/89			01/02/05
Greece	28/11/74	28/11/74		01/10/98	01/11/88		01/06/05
Hungary	05/11/92	05/11/92	05/11/92	01/12/92	01/02/93		01/11/03
Iceland	03/09/53	18/05/54	02/05/68	01/06/87	01/11/88		01/03/05
Ireland	03/09/53	18/05/54	29/10/68	01/07/94	01/11/01		01/07/03
Italy	26/10/55	26/10/55	27/05/82	01/01/89	01/02/92		
Latvia	27/06/97	27/06/97	27/06/97	01/06/99	01/09/97		

<b>States</b>	<b>Convention CETS 005</b>	<b>Protocol No. 1 CETS 009</b>	<b>Protocol No. 4 CETS 046</b>	<b>Protocol No. 6 CETS 114</b>	<b>Protocol No. 7 CETS 117</b>	<b>Protocol No. 12 CETS 177</b>	<b>Protocol No. 13 CETS 187</b>
<b>Liechtenstein</b>	08/09/82	14/11/95	08/02/05	01/12/90			01/07/03
<b>Lithuania</b>	20/06/95	24/05/96	20/06/95	01/08/99	01/09/95		
<b>Luxembourg</b>	03/09/53	18/05/54	02/05/68	01/03/85	01/07/89		
<b>Monaco</b>	30/11/05		30/11/05	01/12/05	01/02/06		01/03/06
<b>Malta</b>	23/01/67	23/01/67	05/06/02	01/04/91	01/04/03		01/07/03
<b>Moldova</b>	12/09/97	12/09/97	12/09/97	01/10/97	01/12/97		
<b>Netherlands</b>	31/08/54	31/08/54	23/06/82	01/05/86		01/04/05	
<b>Norway</b>	03/09/53	18/05/54	02/05/68	01/11/88	01/01/89		
<b>Poland</b>	19/01/93	10/10/94	10/10/94	01/11/00	01/03/03		
<b>Portugal</b>	09/11/78	09/11/78	09/11/78	01/11/86	01/03/05		01/02/04
<b>Romania</b>	20/06/94	20/06/94	20/06/94	01/07/94	01/09/94		01/08/03
<b>Russia</b>	05/05/98	05/05/98	05/05/98		01/08/98		
<b>San Marino</b>	22/03/89	22/03/89	22/03/89	01/04/89	01/06/89	01/04/05	01/08/03
<b>Serbia</b>	03/03/04	03/03/04	03/03/04	01/04/04	01/06/04	01/04/05	01/07/04
<b>Slovakia</b>	01/01/93	01/01/93	01/01/93	01/01/93	01/01/93		
<b>Slovenia</b>	28/06/94	28/06/94	28/06/94	01/07/94	01/09/94		01/04/04
<b>Spain</b>	04/10/79	27/11/90		01/03/85			
<b>Sweden</b>	03/09/53	18/05/54	02/05/68	01/03/85	01/11/88		01/08/03
<b>Switzerland</b>	28/11/74			01/11/87	01/11/88		01/07/03
<b>the former Yugoslav Republic of Macedonia</b>	10/04/97	10/04/97	10/04/97	01/05/97	01/07/97	01/04/05	01/11/04
<b>Turkey</b>	18/05/54	18/05/54		01/12/03			
<b>Ukraine</b>	11/09/97	11/09/97	11/09/97	01/05/00	01/12/97		01/07/03
<b>United Kingdom</b>	03/09/53	18/05/54		01/06/99			01/02/04

**Reservations made to the Convention and to Protocols Nos. 1, 4, 6, 7 and 13 under article 57 (former article 64) of the Convention, and other relevant communications  
(updated on 14 November 2003)**

*(To consult the full text of the provisions mentioned below on the Council of Europe Treaty Office's Internet website, [ctrl] click [here](#), select a state, the appropriate CETS number<sup>1</sup> OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.)*

## **ALBANIA**

### **Reservations to Protocol no. 1 of 2 October 1996 valid until 2 October 2001 – Or. Engl.**

Article 3 of the [additional] Protocol shall be applied in accordance with the provisions of Albanian Laws No. 8001 dated 22.09.1995 and No. 8043 dated 30.11.1995, for a period of 5 (five) years from the date of deposit of the instrument of ratification.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

### **Derogation under article 15 § 3 of the Convention of 4 March 1997, withdrawn 26 July 1997 – Or. Engl.**

Decision of the People's Assembly of the Republic of Albania to declare the state of emergency as from 2 March 1997

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

## **ANDORRA**

### **Reservations to the Convention of 22 January 1996 - Or. Cat./Fr.**

The provisions of Article 5 of the Convention relating to deprivation of liberty shall apply without prejudice to what is laid down in Article 9, paragraph 2, of the Constitution of the Principality of Andorra.

Article 9, paragraph 2, of the Constitution states:

*Police custody shall take no longer than the time needed to carry out the enquiries in relation to the clarification of the case, and in all cases the detained shall be brought before the judge within forty-eight hours.*

The provisions of Article 11 of the Convention relating to the right to form employers', professional and trade-union associations shall be applied to the extent that they are not in conflict with what is laid down in Articles 18 and 19 of the Constitution of the Principality of Andorra.

Article 18 of the Constitution states:

*The right to form and maintain employers', professional and trade-union associations shall be recognised. Without prejudice to their links with international institutions, these organisations shall operate within the limits*

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<sup>1</sup> Convention: ETS 005; Additional Protocol (no 1): 009; Protocol no. 4: ETS 046; Protocol no. 6: ETS 114; Protocol no. 7: ETS 117; Protocol no. 13: ETS 187

*of Andorra, shall have their own autonomy without any organic dependence on foreign bodies and shall function democratically.*

Article 19 of the Constitution states:

*Workers and employers have the right to defend their own economic and social interests. A law shall regulate the conditions to exercise this right in order to guarantee the functioning of the services essential to the community.*

The provisions of Article 15 of the Convention concerning a time of war or public emergency shall be applied within the limits provided for in Article 42 of the Constitution of the Principality of Andorra.

Article 42 of the Constitution states:

*1. A 'Llei Qualificada' shall regulate the states of alarm and emergency. The former may be declared by the 'Govern' in the event of natural catastrophe, for a term of fifteen days, notifying the 'Consell General'. The latter shall be declared by the 'Govern' for a term of thirty days in the case of interruption of the normal functioning of democratic life and this shall require the previous authorisation of the 'Consell General'. Any extension of these states requires the necessary approval of the 'Consell General'.*

*2. In the event of the state of alarm the exercise of the rights recognised in Articles 21 and 27 may be limited. In the event of the state of emergency the rights covered by Articles 9.2, 12, 15, 16, 19 and 21 may be suspended. The suspension of the rights covered by Articles 9.2 and 15 must be always carried out under the control of the judiciary notwithstanding the procedure of protection established in Article 9, paragraph 3.*

#### **General declaration of 22 January 1996 – Or. Cat./Fr.**

The Government of the Principality of Andorra, while resolutely committing itself not to provide or authorise any derogation from obligations assumed, believes that it is necessary to emphasise that the fact that it forms a state with limited territorial dimensions requires it to pay special attention to problems of residence, work and other social measures in respect of foreigners, even if these questions are not covered by the Convention for the Protection of Human Rights and Fundamental Freedoms.

## **ARMENIA**

#### **Reservation to the Convention of 26 April 2002 – Or. Engl.**

The provisions of Article 5 shall not affect the operation of the Disciplinary Regulation of the Armed Forces of the Republic of Armenia approved by Decree No. 247 of 12 August 1996 of the Government of the Republic of Armenia, under which arrest and isolation as disciplinary penalties may be imposed on soldiers, sergeants, ensigns and officers.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

*Authorities entitled to impose disciplinary penalties*

*Paragraph 62: Subparagraph d. Officers commanding a company are entitled to arrest and isolate soldiers, sergeants in the guard-house for up to three days.*

*Paragraph 63: Subparagraph d. Officers commanding a battalion are entitled to arrest and isolate in the guard-house conscripted soldiers and sergeants for up to five days and soldiers and sergeants serving under a contract for up to three days.*

*Paragraph 64: Subparagraph d. Officers commanding a regiment and a brigade are entitled to arrest in the guard-house conscripted soldiers and sergeants for up to ten days and servicemen and sergeants serving under a contract for up to seven days.*

*Paragraph 70: Subparagraph b. Officers commanding a regiment and a brigade are entitled to arrest and isolate ensigns in the guard-house for up to three days.*

*Paragraph 71: Subparagraph b. Officers commanding a brigade and a division are entitled to arrest and isolate ensigns in the guard-house for up to five days.*

*Paragraph 72: Subparagraph b. Officers commanding corps are entitled to arrest and isolate ensigns in the guard-house for up to seven days.*

*Paragraph 77: Subparagraph c. Officers commanding a regiment and a brigade are entitled to arrest and isolate officers of ensigns in the guard-house for up to three days.*

*Paragraph 78: Subparagraph a. Officers commanding corps, a brigade and a division are entitled to arrest and isolate officers of ensigns in the guard-house for up to four days.*

*Paragraph 79: Subparagraph a. Army commander is entitled to arrest and isolate officers in the guard-house for up to five days.*

## **AUSTRIA**

### **Reservations to the Convention and to Protocol no. 1 of 3 September 1958 – Or. Ger.**

The Federal President declares the Convention to be ratified with the reservation:

1. The provisions of Article 5 of the Convention shall be so applied that there shall be no interference with measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl. No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution;
2. The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law;<sup>2</sup>

... and being desirous of avoiding any uncertainty concerning the application of Article 1 of the Protocol [No. 1] in connection with the State Treaty of 15th May 1955 for the Restoration of an Independent and Democratic Austria, declares the Protocol ratified with the reservations that there shall be no interference with the provisions of Part IV ‘Claims arising out of the War’ and Part V ‘Property, Rights and Interests’ of the above-mentioned State Treaty.

### **Reservation to Protocol no. 4 of 18 September 1969 – Or. Fr.**

Protocol No. 4 is signed with the reservation that Article 3 shall not apply to the provisions on the Law of 3rd April 1919, StGBI. No. 209, concerning the banishment of the House of Habsburg-Lorraine and the confiscation of their property, as set out in the Act of 30th October 1919, StGBI. No. 501, in the Constitutional Law of 30th July 1925, BGBl. No. 292, in the Constitutional Law of 26th January 1928, BGBl. No. 30, and taking account of the Federal Constitutional Law of 4th July 1963, BGBl. No. 172.

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<sup>2</sup> The Austrian reservations relative to article 6 of the Convention and article 4 of Protocol no. 7 were deemed invalid by the Court in the cases of *Eisenstecken v. Austria*, no 29477/95, judgement of 3 October 2000, § 29 ECHR 2000-X and *Gradinger v. Austria*, judgement of 23 October 1995, Series A no 328-C, p. 65, § 51 respectively.

**Declaration concerning Protocol no. 7 of 14 May 1986 – Or. Engl./Fr.**

1. Higher Tribunals in the sense of Article 2, paragraph 1, include the Administrative Court and the Constitutional Court.

2. Articles 3 and 4 exclusively relate to criminal proceedings in the sense of the Austrian code of criminal procedure.

**AZERBAIJAN**

**Declarations concerning the Convention and Protocols no 1, 4, 6 and 7 of 15 April 2002 – Or. Engl.**

The Republic of Azerbaijan declares that it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation (the schematic map of the occupied territories of the Republic of Azerbaijan is enclosed in the original text).

**Reservations to the Convention of 15 April 2002 – Or. Engl.**

According to Article 57 of the Convention, the Republic of Azerbaijan makes a reservation in respect of Articles 5 and 6 to the effect that the provisions of those Articles shall not hinder the application of extrajudicial disciplinary penalties involving the deprivation of liberty in accordance with Articles 48, 49, 50, 56-60 of the Disciplinary Regulations of Armed Forces adopted by the Law of the Republic of Azerbaijan No. 885 of 23 September 1994.

The relevant provisions of the Disciplinary Regulations of Armed Forces adopted by the Law of the Republic of Azerbaijan No. 885 of 23 September 1994 (Official Gazette of the Supreme Council of the Republic of Azerbaijan ('*Azerbaijan Respublikasi Ali Sovetinin Melumati*'), 1995, No. 5-6, Article 93) are reproduced below.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

*48. Soldiers and sailors:*

*... d) can be arrested up to 10 days in "hauptvakht"(military prison).*

*49. Temporary service ensigns:*

*... g) can be arrested up to 10 days in "hauptvakht"(military prison).*

*50. Outer-limit service ensigns:*

*... g) can be arrested up to 10 days in "hauptvakht"(military prison).*

*56. Battalion (4th degree naval) commander has the power:*

*... g) to arrest soldiers, sailors and ensigns up to 3 days.*

*57. Company (3rd degree naval) commander has the power:*

*... g) to arrest soldiers, sailors and ensigns up to 5 days.*

*58. Regiment (brigade) commander has the power:*

*... g) to arrest soldiers, sailors and ensigns up to 7 days.*

*59. Division, special brigade (naval brigade) commanders have the additional powers other than those given to the Regiment (brigade) commanders:*

*... a) to arrest soldiers, sailors and ensigns up to 10 days.*

60. Corps commanders, commanders of any type of army, of the different types of armed forces, as well as deputies of Defence Minister have the power to wholly impose the disciplinary penalties, prescribed in the present Regulations, in respect of soldiers, sailors and ensigns under their charge,

According to Article 57 of the Convention, the Republic of Azerbaijan makes a reservation in respect of Article 10, paragraph 1, to the effect that the provisions of that paragraph shall be interpreted and applied in accordance with Article 14 of the Law of the Republic of Azerbaijan “on Mass Media” of 7 December 1999.

Law of the Republic of Azerbaijan ‘on Mass Media’ of 7 December 1999 (Compilation of Legislation of the Republic of Azerbaijan (*‘Azerbaijan Respublikasının Qanuvericilik Toplusu’*), 2000, no. 2, Article 82).

Article 14:

*... the establishment of mass media by legal persons and citizens of foreign states in the territory of the Republic of Azerbaijan shall be regulated by interstate treaties concluded by the Republic of Azerbaijan (“legal person of a foreign state” means a legal person of which the charter fund or more than 30% of the shares are owned by legal persons or citizens of foreign states, or a legal person of which 1/3 of founders are legal persons or citizens of foreign states).*

#### **Declaration concerning Protocol no. 1 of 15 April 2002 – Or. Engl.**

The Republic of Azerbaijan declares that it interprets the second sentence of Article 2 of the Protocol in the sense that this provision does not impose on the State any obligation to finance religious education.

### **BULGARIA**

#### **Reservation to Protocol no. 1 of 7 September 1992 – Or. Fr.**

The terms of the second provision of Article 1 of the Protocol shall not affect the scope or content of Article 22, paragraph 1, of the Constitution of the Republic of Bulgaria, which states that: “No foreign physical person or foreign legal entity shall acquire ownership over land, except through legal inheritance. Ownership thus acquired shall be duly transferred.

#### **Declaration also concerning the above Protocol**

The second provision of Article 2 of the Protocol must not be interpreted as imposing on the State additional financial commitments relating to educational establishments with a specific philosophical or religious orientation other than the commitments of the Bulgarian State provided for in the Constitution and in legislation in force in the country.

### **CROATIA**

#### **Reservation to the Convention of 5 November 1997 – Or. Cro./Engl**

In accordance with Article 57 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Republic of Croatia does hereby make the following reservation in respect of the right to a public hearing as guaranteed by Article 6, paragraph 1, of the Convention:



The Republic of Croatia cannot guarantee the right to a public hearing before the Administrative Court in cases in which it decides on the legality of individual acts of administrative authorities. In such cases, the Administrative Court decides in principle in closed session.

The relevant provision of the Croatian law referred to above is Article 34, paragraph 1, of the Law on Administrative Disputes, which reads as follows: *'In administrative disputes the Administrative Court decides in closed session.'*

## **CYPRUS**

### **Declaration under former article 25 of the Convention – Or. Engl.**

... the Government of the Republic of Cyprus recognises ... the competence of the European Commission of Human Rights to receive petitions submitted to the Secretary General of the Council of Europe subsequently to 31 December 1988, by any person, non-governmental organisation or group of individuals claiming, in relation to any act or decision occurring or any facts or events arising subsequently to 31 December 1988, to be the victim of a violation of the rights set forth in that Convention.

... the competence of the Commission by virtue of Article 25 of the Convention is not to extend to petitions concerning acts or omissions alleged to involve breaches of the Convention or its Protocols, in which the Republic of Cyprus is named as the Respondent, if the acts or omissions relate to measures taken by the Government of the Republic of Cyprus to meet the needs resulting from the situation created by the continuing invasion and military occupation of part of the territory of the Republic of Cyprus by Turkey

### **Declaration concerning Protocol no. 4 of 3 October 1989 – Or. Engl.**

The Government of the Republic of Cyprus adopts the position that, according to a proper interpretation of the provisions of Article 4 of the Protocol, they are not applicable to aliens unlawfully in the Republic of Cyprus as a result of the situation created by the continuing invasion and military occupation of part of the territory of the Republic of Cyprus by Turkey.

### **Communication concerning Protocol no. 6 of 19 January 2000 – Or. Engl.**

It is hereby communicated, in accordance with Article 2 of the Protocol, that the death penalty is retained for the following offences under the Military Criminal Code and Procedure Law no. 40 of 1964 as amended:

- *Treason (section 13);*
- *Surrender of entrusted post by military commander (section 14);*
- *Capitulation in open place by officer in command (section 15) (a);*
- *Instigating or leading a revolt within the armed forces (section 42 (2));*
- *Transmission of military secrets to a foreign state, spy of agent (section 70 (1));*
- *Instigating or leading a revolt among war prisoners (section 95 (2)).*

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

It is further communicated that by virtue of the provisions of the Military Criminal Code and Procedure (Amendment) Law no. 91(I) of 1995, the death penalty, wherever provided for in the principal law, is imposed only when the offence is committed in time of war. According to the same provisions, the death penalty is not a mandatory sanction, but may, on the discretion of the Court, be substituted by imprisonment for life or for a shorter period.

To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.

## **CZECH REPUBLIC**

**Reservation confirmed at the time of accession of the Czech Republic to the Council of Europe on 30 June 1993, valid as from 1 January 1993 – Or. Engl.**

During the ceremony of accession to the Council of Europe, the Minister of Foreign Affairs of the Czech Republic declared that the reservation made by the Czech and Slovak Republic to Articles 5 and 6 of the Convention will remain applicable. The reservation reads as follows:

The Czech and Slovak Federal Republic in accordance with Article [57] of the Convention for the Protection of Human Rights and Fundamental Freedoms makes a reservation in respect of Articles 5 and 6 to the effect that those articles shall not hinder to impose disciplinary penitentiary measures in accordance with Article 17 of the Act No. 76/1959 of Collection of Laws, on Certain Service Conditions of Soldiers.<sup>3</sup>

The terms of Section 17 of the law on certain conditions of service of members of the armed forces, No. 76/1959 in the Compendium of Legislation, are as follows:

### *Disciplinary sanctions*

1. *Disciplinary sanctions shall comprise: a reprimand, penalties for petty offences, custodial penalties, demotion by one rank, and in the case of non-commissioned officers, reduction to the ranks.*
2. *Disciplinary custodial penalties shall comprise: confinement after duty, light imprisonment and house arrest.*
3. *The maximum duration of a disciplinary custodial penalty shall be 21 days.*

## **DENMARK**

**Reservation to Protocol no. 7 of 18 August 1988 – Or. Engl.**

Article 2, paragraph 1 does not bar the use of rules of the Administration of Justice Act ('*Lov om rettens pleje*') according to which the possibility of review by a higher court – in cases subject to prosecution by the lower instance of the prosecution ('*politiasger*') – is denied

- a. when the prosecuted, having been duly notified, fails to appear in court;
- b. when the court has repealed the punishment; or
- c. in cases where only sentences of fines or confiscations of objects below the amount or value established by law are imposed.

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<sup>3</sup> Reservation contained in the instrument of ratification of the Czech and Slovak Federal Republic deposited on 18 March 1992 and in a *note verbale* from the Federal Ministry of Foreign Affairs, dated 13 March 1992. The Committee of Ministers of the Council of Europe, during the 496th bis meeting of the Minister's Deputies, on 30 June 1993:

– decided that the Czech Republic and Slovakia are to be regarded as Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols with effect from 1 January 1993 and that both those States are bound as from that date by the declarations made by the Czech and Slovak Federal Republic in respect of old Articles 25 and 46 of the Convention; ...

**Declaration concerning the above Protocol of 2 September 1988, withdrawn 1 September 1994 – Or. Engl.**

With reference to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on 22 November 1984 and ratified by Denmark on 18 August 1988, I have the honour to state that Denmark withdraws its territorial reservation made upon ratification of the said Protocol according to which the Protocol should not apply to the Faroe Islands.

**Declaration with effect as from 2 September 1994 – Or. Engl.**

The Danish reservation made in respect of Article 2, paragraph 1, of the Protocol shall also apply to the Faroe Islands.

**Declaration concerning Protocol no. 13 of 28 November 2003 – Or. Engl.**

In connection with the deposit of Denmark's instrument of ratification of the Protocol, the Government of Denmark declares that until further notice Protocol No. 13 shall not apply to the Faroe Islands and Greenland.

**Partial withdrawal of 25 July 2003 – Or. Engl.**

The Government of Denmark declares that it withdraws the declaration of non-application of Protocol No. 13 to the Faroe Islands (the non-application of Protocol No. 13 to the Faroe Islands (the non-application for Greenland is still valid)).

**ESTONIA**

**Reservation to the Convention of 16 April 1996 – Or. Engl.**

The Republic of Estonia, in accordance with Article 57 of the Convention, declares that while pending the adoption of amendments to the Code on Civil Procedure within one year from entry into force of the Ratification Act, it cannot ensure the right to a public hearing at the appellate court level (*Ringkonnakohtus*), as provided in Article 6 of the Convention, in so far as cases foreseen by Articles 292 and 298 of the Code on Civil Procedure (published in the *Riigi Teataja* [State Gazette] I 1993, 31/32, 538; 1994, 1, 5; 1995, 29, 358; 1996, 3, 57) may be decided through written procedure.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

**Declaration concerning the Convention of 16 April 1996 – Or. Engl.**

In the reservation to Article 6 of the Convention, made in accordance with Article 57 of the Convention, the Republic of Estonia referred to Articles 292 and 298 of the Code on Civil Procedure. Hereby the unofficial translation of the referred Articles is provided.

*Article 292 - Deciding a Case based solely on an application*

*I. The Court shall decide on an appeal or special application without further proceedings, if it unanimously finds that:*

- 1. the application is manifestly ill-founded or the person who filed the application has no right to appeal. In this case, the court shall refuse the application;*

2. *while the case was heard in the Court of First Instance, the procedural norms were violated which, in accordance with the law, results in the revocation of the decision or order (Article 318) and which the Court of Appeal cannot leave unaddressed. In that case, the decision or order shall be disaffirmed and the case shall be referred back to the Court of First Instance for a new trial;*
3. *the copy of the decision of the Court of Appeal shall be sent to the parties involved within five days from the day the decision was signed.*

*II The Court of Appeal does not have the right to decide upon an appeal or a special application against the other party, if the Court of First Instance or the Court of Appeal has not given the other party an opportunity to respond to the application.*

*Article 298 - Settling a Case through written procedure*

*The court may settle the case through written procedure without public hearing:*

1. *if the respondent to the appeal agrees with it;*
2. *if the application claims the violation of procedural norms or the incorrect application of a substantive norm in the Court of First Instance;*
3. *if a special application has been filed and the court considers the public hearing unnecessary.*

**Reservation to Protocol no. 1 of 16 April 1996 – Or. Engl.**

The Estonian *Riigikogu* made a reservation according to which, after restoring its independence, Estonia started large-scale economic and social reforms, which have encompassed the restoration or compensation to previous owners or their heirs' property which was nationalised or otherwise unlawfully expropriated during the period of Soviet annexation; the restructuring of collectivised agriculture and privatisation of state owned property.

In accordance with Article 57 of the Convention, the Republic of Estonia declares that the provisions of Article 1 of the First Protocol shall not apply to the laws on property reform which regulate the restoration or compensation of property nationalised, confiscated, requisitioned, collectivised or otherwise unlawfully expropriated during the period of Soviet annexation; the restructuring of collectivised agriculture and privatisation of state owned property. The reservation concerns the principles of the Property Reform Act (published in *Riigi Teataja* [State Gazette] 1991, 21, 257; RT I 1994, 38, 617; 40, 653; 51, 859; 94, 1609), the Land Reform Act (RT 1991, 34, 426; RT I 1995, 10, 113), the Agricultural Reform Act (RT 1992, 10, 143; 36, 474; RT I 1994, 52, 880), the Privatisation Act (RT I 1993, 45, 639; 1994, 50, 846; 79, 1329; 83, 1448; 1995, 22, 327; 54, 881; 57, 979), the Dwelling Rooms Privatisation Act (RT I 1993, 23, 411; 1995, 44, 671; 57, 979; 1996, 2, 28), the Act on Evaluation and Compensation of Unlawfully Expropriated Property (RT I 1993, 30, 509; 1994, 8, 106; 51, 859; 54, 905; 1995, 29, 357), the Act on Evaluation of Collectivised Property (RT I 1993, 7, 104) and their wording being in force at the moment the Ratification Act entered into force.

**Declaration also concerning the above Protocol – Or. Engl.**

In addition to the reservation to Article 1 of the First Protocol, made in accordance with Article 57 of the Convention, the Republic of Estonia hereby gives a brief summary of the laws mentioned in the reservation.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

## **FINLAND**

### **Partial withdrawal of the reservations of 16 May 2001 – Or. Engl.**

Whereas the instrument of ratification contained a reservation to Article 6, paragraph 1, of the Convention, whereas after partial withdrawals of the reservation on 20 December 1996, 30 April 1998, 1 April 1999, and 16 May 2001, the reservation now reads as follows:

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

For the time being, Finland cannot guarantee a right to an oral hearing insofar as the current Finnish laws do not provide such a right. This applies to:

1. proceedings before the Supreme Court in accordance with Chapter 30, Section 20, of the Code of Judicial Procedure and proceedings before the Courts of Appeal as regards the consideration of petition, civil and criminal cases to which Chapter 26 (661/1978), Sections 7 and 8, of the Code of Judicial Procedure are applied if the decision of a District Court has been made before 1 May 1998, when the amendments made to the provisions concerning proceedings before Courts of Appeal entered into force;

... and the consideration of criminal cases before the Supreme Court and the Courts of Appeal if the case has been pending before a District Court at the time of entry into force of the Criminal Proceedings Act on 1 October 1997 and to which existing provisions have been applied by the District Court;

2. proceedings, which are held before the Insurance Court as the Court of Final Instance, in accordance with Section 9 of the Insurance Court Act, if they concern an appeal which has become pending before the entry into force of the Act Amending the Insurance Court Act on 1 April 1999;

3. proceedings before the Appellate Board for Social Insurance, in accordance with Section 8 of the Decree on the Appellate Board for Social Insurance, if they concern an appeal which has become pending before the entry into force of the Act Amending the Health Insurance Act on 1 April 1999.

## **FRANCE**

### **Reservations to the Convention of 3 May 1974 – Or. Fr.**

In depositing this instrument of ratification, the Government of the Republic in accordance with Article [57] of the Convention, makes a reservation in respect of:

1. Articles 5 and 6 thereof, to the effect that those articles shall not hinder the application of the provisions governing the system of discipline in the armed forces contained in Section 27 of Act No. 72-662 of 13 July 1972, determining the general legal status of military servicemen, nor of the provisions of Article 375 of the Code of Military Justice;

2. paragraph 1 of Article 15 to the effect, firstly, that the circumstances specified in Article 16 of the Constitution regarding the implementation of that Article, in Section 1 of the Act of 3 April 1878 and in the Act of 9 August 1849 regarding proclamation of a state of siege, and in Section 1 of Act No. 55-385 of 3 April 1955 regarding proclamation of a state emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention and that, secondly, for the interpretation and application of Article 16 of the Constitution of the Republic, the terms 'to the extent strictly required by the exigencies of the

situation’ shall not restrict the power of the President of the Republic to take ‘the measures required by the circumstances’.

**Declaration concerning the Convention of 3 May 1974 – Or. Fr.**

The Government of the Republic declares that the Protocol shall apply to the whole territory of the Republic, having due regard, where the overseas territories are concerned, to local requirements, as mentioned in Article [63] ...

It has made the same declaration with regard to Protocols no 1, 4 and 7 at the time of their ratification.

**Reservations to Protocol no. 7 of 17 February 1986 – Or. Fr.**

... only those offences which under French law fall within the jurisdiction of the French criminal courts should be considered as offences within the meaning of Articles 2 to 4 of the present Protocol.

... Article 5 must not prevent the application of the provisions of Chapter II, Title V, of the Third Book of the Civil Code or the application of Article 383 of the Civil Code;

Article 5 should not be interpreted as implying that parental authority may be exercised in common in situations where the French law would recognise the exercise of such authority by only one of the parents.

... Article 5 may not impede the application of the rules of the French legal system concerning the transmission of the patronymic name.

Article 5 may not impede the application of provisions of local law in the territorial collectivity of Mayotte and the territories of New Caledonia and of the Wallis and Futuna Archipelago.

**Declaration also concerning the above Protocol of 22 November 1984, confirmed on 17 February 1986 – Or. Fr.**

The Government of the French Republic declares that, in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court.

**GEORGIA**

**General declaration of 7 June 2002 – Or. Engl./Geo.**

Georgia declares that due to the existing situation in Abkhazia and Tskhinvali region, Georgian authorities are unable to undertake commitments concerning the respect and protection of the provisions of the Convention and its Additional Protocols on these territories. Georgia therefore declines its responsibility for violations of the provisions of the Protocol by the organs of self-proclaimed illegal forces on the territories of Abkhazia and Tskhinvali region until the possibility of realization of the full jurisdiction of Georgia is restored over these territories.

**Reservations to Protocol no. 1 of 7 June 2002 – Or. Engl./Geo.**

The Parliament of Georgia declares that:

1. Article 1 of the Protocol shall not apply to persons who have or will obtain status of “internally displaced persons” in accordance with “the Law of Georgia on Internally Displaced Persons” until the elimination of circumstances motivating the granting of this status (until the restoration of the

territorial integrity of Georgia). In accordance with the aforementioned law, Georgia assumes responsibility to ensure the exercise of rights over property that exist on the place of permanent residence of internally displaced persons after the reasons mentioned in Article 1, paragraph 1, of this law have been eliminated.

2. Article 1 of the Protocol shall be applied to the operational sphere of “the Law of Georgia on the Ownership of Agricultural Land” in accordance with the requirements of Articles 4, 8, 15 and 19 of this Law.

3. Article 1 of the Protocol shall be applied within the limits of Articles 2 and 3 of the Law of Georgia on Transference into Private Property of the Non-Agricultural Lands Being in Possession of Natural Persons and Legal Persons of Private Law”.

4. Article 1 of the Protocol shall be applied within the limits of the “Law of Georgia on Privatisation of the State Property”.

5. With regard to the compensation of pecuniary assets placed on accounts of the former Georgian public-commercial banks, Article 1 of the Protocol shall be applied within the limits of the normative act adopted in pursuance of the Decree No. 258 of the President of Georgia of 2 July 2001.

Georgia declares that it interprets Article 2 of the Protocol as not imposing on the State additional financial commitments relating to special educational establishments (with a specific philosophical or religious orientation) other than those provided by the legislation of Georgia.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR ‘Human Rights’ as subject matter, refine to ‘complete chronology’, and enter.*

#### **Declaration concerning Protocol no. 13 of 22 May 2003 - Or. Engl.**

Georgia declares that until the full jurisdiction of Georgia is restored on the territories of Abkhazia and Tskhinvali Region, it cannot be held liable for the violations on these territories of the provisions of Protocol No. 13.

### **GERMANY**

#### **Reservation to the Convention of 5 December 1952, withdrawn on 1 October 2001 – Or. Engl.**

In conformity with Article 57 of the Convention the German Federal Republic makes the reservation that it will only apply the provisions of Article 7, paragraph 2, of the Convention within the limits of Article 103, clause 2, of the Basic Law of the German Federal Republic. This provides that *‘any act is only punishable if it was so by law before the offence was committed’*.

#### **Declaration concerning Protocol no. 1 of 13 February 1957 – Or. Ger.**

The Federal Republic of Germany adopts the opinion according to which the second sentence of Article 2 of the Protocol [No. 1] entails no obligation on the part of the State to finance schools of a religious or philosophical nature, or to assist in financing such schools, since this question, as confirmed by the concurring declaration of the Legal Committee of the Consultative Assembly and the Secretary General of the Council of Europe, lies outside the scope of the Convention for the Protection of Human Rights and Fundamental Freedoms and of its Protocol.

**Declaration concerning Protocol no. 6 of 5 July 1989 – Or. Ger./Engl./Fr.**

... the obligations deriving from Protocol No. 6 are confined to the abolition of the death penalty within the Protocol's area of application in the respective State and ... national non-criminal legislation is not affected. The Federal Republic of Germany has already met its obligations under the Protocol by means of Article 102 of the Basic Law.

**Declaration concerning Protocol no. 7 of 19 March 1985 – Or. Engl.**

1. By 'criminal offence' and 'offence' in Articles 2 to 4 of the present Protocol, the Federal Republic of Germany understands only such acts as are criminal offences under its law.

2. The Federal Republic of Germany applies Article 2, paragraph 1, to convictions or sentences in the first instance only, it being possible to restrict review to errors in law and to hold such reviews in camera; in addition, it understands that the application of Article 2, paragraph 1, is not dependent on the written judgment of the previous instance being translated into a language other than the language used in court.

3. The Federal Republic of Germany understands the words 'according to the law or the practice of the State concerned' to mean that Article 3 refers only to the retrial provided for in Sections 359 et seq. of the Code of Criminal Procedure (Strafprozessordnung)."

**HUNGARY**

**Reservation to the Convention of 5 November 1992, withdrawn 1 March 2000<sup>4</sup> – Or. Engl.**

In accordance with Article [57] of the Convention, the Republic of Hungary makes the following reservation in respect of the right to access to courts guaranteed by Article 6, paragraph 1 of the Convention:

For the time being in proceedings for regulatory offences before the administrative authorities, Hungary cannot guarantee the right to access to courts, because the current Hungarian laws do not provide such right, the decision of the administrative authorities being final."

The relevant provisions of the Hungarian law referred to above are:

- Section 4 of Act IV of 1972 on courts, modified several times, which provides, that the courts, unless an Act stipulates otherwise, may review the legality of the decisions taken by the administrative authorities;
- An exception is contained in Section 71/A of Act I of 1968 on proceedings for regulatory offences, modified several times, which allows for the offender to request judicial review solely against the measures taken by the administrative authority to commute to confinements the fine the offender had been sentenced to pay; no other access to court against final decisions taken in proceedings for regulatory offences is permitted.

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<sup>4</sup> The National Assembly of the Republic of Hungary, by its law no. CXX/1999, paragraph 44, subparagraph 1 point c has withdrawn - as of 1 March 2000- the reservation by Hungary made to the Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 5) done at Rome, 4 November 1950.



**Declaration of 5 November 1992 recognising the right of individual petition (old article 25) and the compulsory jurisdiction of the Court (old article 46) relating to facts occurring after the Convention and its Protocols have come into force.**

The above declaration is interpreted by the Government of the Republic of Hungary, that measures taken by the Hungarian Republic for the reparation of the violation of the aforesaid rights which had taken place prior to the entry into force of the Convention and its Protocols shall not be considered as facts of the alleged violation of these rights.

**IRELAND**

**Reservation to the Convention of 25 February 1953 – Or. Engl.**

The Government of Ireland do hereby confirm and ratify the aforesaid Convention and undertake faithfully to perform and carry out all the stipulations therein contained, subject to the reservation that they do not interpret Article 6.3.c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland.

**Declaration concerning Protocol no. 1, not confirmed at its ratification – Or. Engl.**

At the time of signing the (First) Protocol the Irish Delegate puts on record that, in the view of the Irish Government, Article 2 of the Protocol is not sufficiently explicit in ensuring to parents the right to provide education for their children in their homes or in schools of the parents' own choice, whether or not such schools are private schools or are schools recognised or established by the State.

**Declaration concerning Protocol no. 4 of 16 September 1963 – Or. Engl.**

The reference to extradition contained in paragraph 21 of the Report of the Committee of Experts on this Protocol and concerning paragraph 1 of Article 3 of the Protocol includes also laws providing for the execution in the territory of one Contracting party of warrants of arrest issued by the authorities of another Contracting Party.

**ITALY**

**Reservation concerning Protocol no. 4 of 27 May 1982, withdrawn on 12 November 2002 – Or. Fr.**

When depositing the instrument of ratification of Protocol No. 4, the Permanent Representative declared, on behalf of his Government, that “paragraph 2 of Article 3 cannot prevent the application of the transitory disposition XIII of the Italian Constitution concerning the interdiction of entry and residence of some Members of the House of Savoy on the territory of the State”.<sup>5</sup>

**Declaration concerning Protocol no. 7 of 4 November 1991 – Or. Fr.**

The Italian Republic declares that Articles 2 to 4 of the Protocol apply only to offences, procedures and decisions qualified as criminal by Italian law.

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<sup>5</sup> Following the entry into force, on 10 November 2002, of the Constitutional Law no. 1 of 23 October 2002, the subparagraphs 1 and 2 of the XIIIth transitory and final disposition of the Italian Constitution cease to apply to members and descendants of the House of Savoy.

Accordingly, as from 10 November 2002, the reservation made by Italy at the time of deposit of the instrument of ratification of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on 27 May 1982, has lost its purpose and has no longer any effect.

## LATVIA

### **Reservation to Protocol no. 1 of 27 June 1997 – Or. Engl.**

In accordance with Article [57] of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Republic of Latvia declares that the provisions of Article 1 of the First Protocol shall not apply to the laws on property reform which regulate the restoration or compensation to the former owners or their legal heirs of property nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of Soviet annexation; and privatisation of collectivised agricultural enterprises, collective fisheries and of State and local self-government owned property.

The reservation concerns the Law On Land Reform in the Republic of Latvia Rural Regions (published in *Zinotajs [The Bulletin]* 1990, No. 49; 1991, No. 41; 1992, No. 6/7; 1992, No. 11/12; 1993, No. 18/19; *Latvijas Vestnesis [The Latvian Herald]* 1994, No. 137), Law On Privatisation of Agricultural Enterprises and Collective Fisheries (*Zinotajs* 1991, No. 31; 1992, No. 40/41; 1993, No. 5/6; *Latvijas Vestnesis* 1995, No. 90; 1996, No. 177), Law On Land Reform in the Republic of Latvia Cities (*Zinotajs* 1991, No. 49/50; *Latvijas Vestnesis* 1994, No. 47; 1994, No. 145; 1995, No. 169; 1997, No. 126/127), Law On Land Privatisation in Rural Regions (*Zinotajs* 1992, No. 32; 1993, No. 18/19; *Latvijas Vestnesis* 1993, No. 130; 1994, No. 148; 1995, No. 162; 1996, No. 111; 1996, No. 225), Law On Privatisation of Property in Agroservice Enterprises (*Zinotajs* 1993, No. 14), Law On Privatisation Certificates (*Latvijas Vestnesis* 1995, No. 52), Law On the Privatisation of Objects of State and Municipal Property (*Latvijas Vestnesis* 1994, No. 27; 1994, No. 77; 1996, No. 192; 1997, No. 16/17/18/19/20/21), Law On Privatisation of Co-operative Apartments (*Zinotajs* 1991, No. 51; *Latvijas Vestnesis* 1995, No. 135), Law On the Privatisation of State and Local Self-Government Apartment Houses (*Latvijas Vestnesis* 1995, No. 103; 1996, No. 149; 1996, No. 223), Law On Denationalisation of Real Estate in the Republic of Latvia (1991, No. 46; *Latvijas Vestnesis* 1994, No. 42; 1994, No. 90; 1995, No. 137; 1996, No. 219/220), Law On the Return of Real Estate to the Legitimate Owners (*Zinotajs* 1991, No. 46; *Latvijas Vestnesis* 1994, No. 42; 1996, No. 97) and their wording being in force at the moment the Law On Ratification entered into force.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

## LIECHTENSTEIN

### **Reservation to the Convention of 8 September 1982, modified on 23 May 1991 – Or. Fr.**

In accordance with Article 57 of the Convention, the Principality of Liechtenstein makes the reservation that the principle that hearings must be held and judgments pronounced in public, as laid down in Article 6, paragraph 1, of the Convention, shall apply only within the limits deriving from the principles at present embodied in the following Liechtenstein laws:

- Act of 10 December 1912 on civil procedure, LGBl. 1912 No. 9/1
- Act of 10 December 1912 on the exercise of jurisdiction and the competence of the courts in civil cases, LGBl. 1912 No. 9/2
- Code of Criminal Procedure of 18 October 1988, LGBl. 1988 No. 62
- Act of 21 April 1922 on non-contentious procedure, LGBl. 1922 No. 19
- Act of 21 April 1922 on national administrative justice, LGBl. 1922 No. 24
- Act of 5 November 1925 on the Supreme Court ("Haute Cour"), LGBl. 1925 No. 8
- Act of 30 January 1961 on national and municipal taxes, LGBl. 1961 No. 7
- Act of 13 November 1974 on the acquisition of immovable property, LGBl. 1975 No. 5.
- The statutory provisions of criminal procedure relating to juvenile delinquency, as contained in the Act on Criminal Procedure in Matters of Juvenile Delinquency of 20 May 1987, LGBl. 1988 No. 39.

**Reservation to the Convention of 8 September 1982 – Or. Fr.**

In accordance with Article 57 of the Convention, the Principality of Liechtenstein makes the reservation that the right to respect for family life, as guaranteed by Article 8 of the Convention, shall be exercised, with regard to aliens, in accordance with the principles at present embodied in the Ordinance of 9 September 1980 (LGBI. 1980 No. 66).

**LITHUANIA**

**Reservations to the Convention of 20 June 1995 – Or. Engl.**

The provisions of Article 5, paragraph 3, of the Convention shall not affect the operation of Article 104 of the Code of Criminal Procedure of the Republic of Lithuania (amended version No. I-551, July 19, 1994) which provides that a decision to detain in custody any persons suspected of having committed a crime may also, by decision of a prosecutor, be so detained. This reservation shall be effective for one year after the Convention comes into force in respect of the Republic of Lithuania.

The provisions of Article 5, paragraph 3, of the Convention shall not affect the operation of the Disciplinary Statute (Decree No. 811, October 28, 1992) adopted by the Government of the Republic of Lithuania under which arrest as disciplinary sanction may be imposed upon soldiers, NCO's and officers of the National Defence Forces.

**LUXEMBOURG**

**Reservation to Protocol no. 1 of 3 September 1953 – Or. Fr.**

The Government of the Grand Duchy of Luxembourg, having regard to Article 57 of the Convention and desiring to avoid any uncertainty as regards the application of Article 1 of the Protocol [No. 1] in relation to the Luxembourg Law of 26th April 1951 concerning the liquidation of certain ex-enemy property, rights and interests subject to measures of sequestration, makes a reservation relating to the provisions of the above-mentioned Law of 26th April 1951.

**Reservation to Protocol no. 7 of 19 April 1983 – Or. Fr.**

... Article 5 of the Protocol [No. 7] must not prevent the application of the rules of the Luxembourg legal system concerning transmission of the patronymic name.

**MALTA**

**Declaration and reservations concerning the Convention of 23 January 1967 – Or. Engl.**

The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts.

2. The Government of Malta, having regard to Article 57 and desiring to avoid any uncertainty as regards the application of Article 10 of the Convention, declares that the Constitution of Malta allows such restrictions to be imposed upon public officers with regard to their freedom of expression as are reasonably justifiable in a democratic society. The Code of conduct of public officers in Malta precludes them from taking an active part in political discussions or other political activity during working hours or on official premises.

3. The Government of Malta, having regard to Article 57 of the Convention declares that the principle of lawful defence admitted under sub-paragraph a of paragraph 2 of Article 2 of the Convention shall apply in Malta also to the defence of property to the extent required by the provisions of paragraphs a and b of section 238 of the Criminal Code of Malta...

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

#### **Declaration concerning Protocol no. 1 of 23 January 1967 – Or. Engl.**

The Government of Malta, having regard to Article 57 of the Convention, declares that the principle affirmed in the second sentence of Article 2 of the Protocol is accepted by Malta only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic.

### **MOLDOVA**

#### **Reservations and declarations concerning the Convention and Protocol no. 1 of 12 September 1997 – Or. Mol./Fr.**

1. The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled.
2. In accordance with Article 57 of the Convention, the Republic of Moldova formulates a reservation to Article 4, with a view to retaining the possibility of enforcing criminal sentences in the form of non-custodial compulsory labour, as provided for in Article 27 of the Criminal Code, and also administrative sentences in the form of compulsory labour, as provided for in Article 30 of the Code of Administrative Offences. This reservation shall be effective for one year from the date of the Convention's entry into force in respect of the Republic of Moldova.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

3. In accordance with Article 57 of the Convention, the Republic of Moldova formulates a reservation to Article 5, paragraph 3, with a view to extending the validity of an arrest warrant issued by the public prosecutor as set out in Article 25 of the Constitution of the Republic of Moldova, Article 78 of the Code of Criminal Procedure and Article 25 of Law No. 902-XII on the Prokuratura of the Republic of Moldova of 29 January 1992. The reservation shall be effective for six months following the Convention's entry into force in respect of the Republic of Moldova.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

4. In accordance with Article 57 of the Convention the Republic of Moldova formulates a reservation to Article 5 with a view to retaining the possibility of applying disciplinary sanctions to soldiers in the form of arrest warrants issued by superior officers, as laid down in Articles 46, 51-55, 57-61 and 63-66 of the Disciplinary Regulations of the Armed Forces, adopted under Law No. 776-XIII of 13 March 1996.

5. The Republic of Moldova interprets the provisions set out in the second sentence of Article 2 of the first Additional Protocol as precluding additional financial obligations for the State in respect of philosophically or religiously oriented schools, other than those provided for in domestic legislation

## **NETHERLANDS**<sup>6</sup>

### **Declaration concerning Protocol no. 1 of 31 August 1954 – Or. Fr.**

In the opinion of the Netherlands Government, the State should not only respect the rights of parents in the matter of education but, if need be, ensure the possibility of exercising those rights by appropriate financial measures.

### **Declaration concerning Protocol no. 4 of 23 June 1982 – Or. Fr.**

Since, following ratification by the Kingdom of the Netherlands, Protocol No. 4 to the Convention on Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already specified in the Convention and the first Protocol, applies to the Netherlands and to the Netherlands Antilles, the Netherlands and the Netherlands Antilles are regarded as separate territories for the application of Articles 2 and 3 of the Protocol, in accordance with Article 5, paragraph 4. Under Article 3, no one may be expelled from or deprived of the right to enter the territory of the State of which he is a national. There is, however, only one nationality (Netherlands) for the whole of the Kingdom. Accordingly, nationality cannot be used as a criterion in making a distinction between the "citizens" of the Netherlands and those of the Netherlands Antilles, a distinction which is unavoidable since Article 3 applies separately to each of the parts of the Kingdom.

This being so, the Netherlands reserve the right to make a distinction in law, for purpose of the application of Article 3 of the Protocol, between Netherlands nationals residing in the Netherlands and Netherlands nationals residing in the Netherlands Antilles.

### **Declaration concerning Protocol no. 6 of 25 April 1986 – Or. Engl.**

...the bills for the abolition of capital punishment, insofar as it is still provided for under Dutch military law and Dutch regulations governing wartime offences, have been before Parliament since 1981. It should be noted, however, that under the provisions of the Constitution of the Netherlands, which came into force on 17 February 1983, capital punishment may not be imposed.

Furthermore I have the honour to communicate herewith, in accordance with Article 2 of the said Protocol, sections 103 and 108 of the criminal Code of the Netherlands Antilles and Aruba.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

### **Declaration concerning Protocol no. 7 of 22 November 1984 – Or. Engl.**

The Netherlands Government interprets paragraph 1 of Article 2 thus that the right conferred to everyone convicted of a criminal offence to have conviction or sentence reviewed by a higher tribunal relates only to convictions or sentences given in the first instance by tribunals which, according to Netherlands law, are in charge of jurisdiction in criminal matters.

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<sup>6</sup> By declarations made in accordance with article 56, the Convention and its Protocols no. 1 and 4 also apply to the Netherlands Antilles and to Aruba (1 September 1979 and 1 January 1986 respectively).

## **PORTUGAL**

### **Reservations to the Convention of 9 November 1978 – Or. Fr.**

- I. Article 5 of the Convention will be applied subject to Articles 27 and 28 of the Military Discipline Regulations, which provide for the placing under arrest of members of the armed forces.
- II. Article 7 of the Convention will be applied subject to Article 309 of the Constitution of the Portuguese Republic, which provides for the indictment and trial of officers and personnel of the State Police Force (PIDE-DGS).

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

## **ROMANIA**

### **Reservation to the Convention of 20 June 1994 – Or. Fr.**

Article 5 of the Convention does not exclude the application by Romania of the provisions of Article 1 of Decree No. 976 of 23 October 1968 regulating the system of military discipline, provided that the period of the deprivation of liberty does not exceed the time-limits specified by the legislation in force.

Article 1 of Decree No. 976/1968 of 23 October 1968 stipulates: *'For breaches of military discipline provided for in the military regulations, the commanding officers and commanders-in-chief may apply to servicemen the disciplinary sanction of arrest for up to 15 days'*.

### **Declaration concerning Protocol no. 1 of 20 June 1994 – Or. Fr.**

Romania interprets Article 2 of the first Protocol to the Convention as not imposing any supplementary financial burdens connected with private educational institutions other than those established by domestic legislation.

## **RUSSIA**

### **Reservation to the Convention of 5 May 1998 – Or. Engl./Fr./Rus.**

In accordance with Article [57] of the Convention, the Russian Federation declares that the provisions of Article 5, paragraphs 3 and 4, shall not prevent the application of the following provisions of the legislation of the Russian Federation:

- the temporary application, sanctioned by the second paragraph of point 6 of Section Two of the 1993 Constitution of the Russian Federation, of the procedure for the arrest, holding in custody and detention of persons suspected of having committed a criminal offence, established by Article 11, paragraph 1, Article 89, paragraph 1, Articles 90, 92, 96, 96<sup>1</sup>, 96<sup>2</sup>, 97, 101 and 122 of the RSFSR Code of Criminal Procedure of 27 October 1960, with subsequent amendments and additions;
- Articles 51-53 and 62 of the Disciplinary Regulations of the Armed Forces of the Russian Federation, approved by Decree no. 2140 of the President of the Russian Federation of 14 December 1993 – based on Article 26, paragraph 2, of the Law of the Russian Federation "On the Status of Servicemen" of 22 January 1993 – instituting arrest and detention in the guard-house as a disciplinary measure imposed under extra-judicial procedure on servicemen – soldiers and seamen serving under a contract, conscripted non-commissioned officers serving under a contract, non commissioned officers and officers.

The period of validity of these reservations shall be the period required to introduce amendments to the Russian federal legislation which will completely eliminate the incompatibilities between the said provisions and the provisions of the Convention.”

*To consult the full text click [here](#), select a state, the appropriate ETS number OR ‘Human Rights’ as subject matter, refine to ‘complete chronology’, and enter.*

## **SAN-MARINO**

### **Declaration and reservation to the Convention of 22 March 1989 – Or. It.**

The Government of the Republic of San Marino, although confirming its firm undertaking neither to foresee nor to authorise derogations of any kind from the obligations subscribed, feels compelled to stress that the fact of being a State of limited territorial dimensions calls for particular care in matters of residence, work and social measures for foreigners even if they are not covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto.

With regard to the provisions of Article 11 of the Convention on the right to form trade unions, the Government of the Republic of San Marino declares that in San Marino two trade unions exist and are active, that Articles 2 and 4 of Law No. 7 of 17 February 1961 on the protection of employment and employees foresee that Associations or trade unions must register with the Law Court and that such registration may be obtained provided the Association includes at least six categories of employees and a minimum of 500 members.

### **Reservation to Protocol no. 1 of 22 March 1989 – Or. It.**

... having regard to the provisions of law in force which govern the use of goods in conformity with the general interest, the principle set forth in Article 1 of the Protocol [No. 1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature, in Paris, on 20 March 1952, has no bearing on the regulations in force concerning the real estate of foreign citizens.

### **Declaration concerning Protocol no. 7 of 22 March 1989 – Or. It.**

With regard to the provisions of Article 3 on the compensation of the victim of a miscarriage of justice, the Government of San Marino declares that although the principle is applied in practice, it is not enshrined in any legislative provision. Therefore the Government of the Republic undertakes to embody the principle and its regulation into a relevant legislative provision to be adopted within two years from today.

## **SERBIA AND MONTENEGRO**

### **Reservations to the Convention of 3 March 2004 - Or. Engl.**

The provisions of Article 5, paragraphs 1[c] and 3, of the Convention shall be without prejudice to the application of rules on mandatory detention. This reservation concerns Article 142, paragraph 1, of the Code of Criminal Procedure (Službeni list Savezne Republike Jugoslavije, Nos. 70/01, 68/02) of the Republic of Serbia, which provides that detention shall be mandatory if a person is under reasonable suspicion of having committed an offence for which the punishment is 40 years imprisonment.

While affirming its willingness fully to guarantee the rights enshrined in Articles 5 and 6 of the Convention, Serbia and Montenegro declares that the provisions of Article 5, paragraph 1[c] and Article 6, paragraphs 1 and 3, shall be without prejudice to the application of Articles 75 to 321 of the Law on Minor Offences of the Republic of Serbia (Službeni glasnik Socijalisticke Republike Srbije,

No. 44/89; Službeni glasnik Republike Srbije, Nos. 21/90, 11/92, 6/93, 20/93, 53/93, 67/93, 28/94, 16/97, 37/97, 36/98, 44/98, 65/2001) and Articles 61 to 225 of the Law on Minor Offences of the Republic of Montenegro (Službeni list Republike Crne Gore, Nos. 25/94, 29/94, 38/96, 48/99) that regulate proceedings before magistrates' courts.

The provisions of Article 13 shall not apply in relation to the legal remedies within the jurisdiction of the Court of Serbia and Montenegro, until the said Court becomes operational in accordance with Articles 46 to 50 of the Constitutional Charter of the State Union of Serbia and Montenegro (Službeni list Srbije i Crne Gore, No. 1/03).

The right to a public hearing enshrined in Article 6, paragraph 1, of the Convention shall be without prejudice to the application of the principle that courts in Serbia do not, as a rule, hold public hearings when deciding in administrative disputes. The said rule is contained in Article 32 of the Law on Administrative Disputes (Službeni list Savezne Republike Jugoslavije, No. 46/96) of the Republic of Serbia.

## **SLOVAKIA**

### **Reservation confirmed at the time of accession to the Council of Europe on 30 June 1993<sup>7</sup> – Or. Cze./Engl.**

During the ceremony of accession to the Council of Europe, the Minister of Foreign Affairs of Slovakia declared that the reservation made by the Czech and Slovak Republic to Articles 5 and 6 of the Convention will remain applicable. The reservation reads follows:

The Czech and Slovak Federal Republic in accordance with Article 57 of the Convention for the Protection of Human Rights and Fundamental Freedoms makes a reservation in respect of Articles 5 and 6 to the effect that those articles shall not hinder to impose disciplinary penitentiary measures in accordance with Article 17 of the Act No. 76/1959 of Collection of Laws, on Certain Service Conditions of Soldiers.

The terms of Section 17 of the Law on certain conditions of service of members of the armed forces, No. 76/1959 in the Compendium of Legislation, are as follows:

- 1. Disciplinary sanctions shall comprise: a reprimand, penalties for petty offences, custodial penalties, demotion by one rank, and in the case of non-commissioned officers, reduction to the ranks.*
- 2. Disciplinary custodial penalties shall comprise: confinement after duty, light imprisonment and house arrest.*
- 3. The maximum duration of a disciplinary custodial penalty shall be 21 days.*

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<sup>7</sup> Reservation contained in the instrument of ratification of the Czech and Slovak Federal Republic deposited on 18 March 1992 and in a *note verbale* from the Federal Ministry of Foreign Affairs, dated 13 March 1992. The Committee of Ministers of the Council of Europe, during the 496th bis meeting of the Minister's Deputies, on 30 June 1993:

- decided that the Czech Republic and Slovakia are to be regarded as Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols with effect from 1 January 1993 and that both those States are bound as from that date by the declarations made by the Czech and Slovak Federal Republic in respect of old Articles 25 and 46 of the Convention; ...



## **SPAIN**

### **Reservations and declarations concerning the Convention of 4 October 1979 – Or. Sp.**

Articles 5 and 6, insofar as they may be incompatible with the disciplinary provisions concerning the armed forces, as they appear in Book 2, Part XV and Book 3, Part XXIV of the Code of Military Justice [as amended by Basic Law 12/1985].

*Brief statement of the relevant provisions:*

*The Code of Military Justice provides that the punishment of minor offences may be ordered directly by an offender's official superior, after having elucidated the facts. The punishment of serious offences is subject to an investigation of a judicial character, in the course of which the accused must be given a hearing. The penalties and the power to impose them are defined by law. In any case, the accused can appeal against the punishment to his immediate superior and so on, up to the Head of State.*

Article 11, insofar as it may be incompatible with Article 28 and 127 of the Spanish Constitution.

*Brief statement of the relevant provisions:*

*Article 28 of the Constitution recognises the right to organise, but provides that legislation may restrict the exercise of this right or make it subject to exception in the case of the armed forces or other corps subject to military discipline and shall regulate the manner of its exercise in the case of civil servants.*

*Article 127, paragraph 1, specifies that serving judges, law officers and prosecutors may not belong to either political parties or trade unions and provides that legislation shall lay down the system and modalities as to the professional association of these groups.*

Spain declares that it interprets the provisions of the last sentence in Article 10, paragraph 1, as being compatible with the present system governing the organisation of radio and television broadcasting in Spain, and

... the provisions of Articles 15 and 17 to the effect that they permit the adoption of the measures contemplated in Articles 55 and 116 of the Spanish Constitution.

### **Reservation to Protocol no. 1 of 27 November 1990 – Or. Sp./Fr.**

... in order to avoid any uncertainty as to the application of Article 1 of the Protocol, Spain expresses a reservation in the light of Article 33 of the Spanish Constitution, which stipulates the following:

- 1. The right to private property and to inheritance is recognised.*
- 2. The social function of these rights shall determine their scope, as provided for by law.*
- 3. No person shall be deprived of their property or their rights except for a cause recognised as being in the public interest or in the interest of society and in exchange for fitting compensation as provided for by law.*

## **SWEDEN**

### **Declaration concerning Protocol no. 7 of 8 November 1985 – Or. Engl.**

Article 1

The Government of Sweden declares that an alien who is entitled to appeal against an expulsion order, may, pursuant to Section 70 of the Swedish Aliens Act (1980: 376), make a statement (termed a declaration of acceptance) in which he renounces his right of appeal against the decision.

A declaration of acceptance may not be revoked. If the alien has appealed against the order before making a declaration of acceptance, his appeal shall be deemed withdrawn by reason of the declaration.

## **SWITZERLAND**

### **Reservation to the Convention of 28 November 1974, withdrawn on 29 August 2000 – Or. Fr.**

The rule contained in Article 6, paragraph 1, of the Convention that hearings shall be in public shall not apply to proceedings relating to the determination of civil rights and obligations or of any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority.

The rule that judgment must be pronounced publicly shall not affect the operation of cantonal legislation on civil or criminal procedure providing that judgment shall not be delivered in public but notified to the parties in writing.

### **Interpretative declarations concerning the Convention of 28 November 1974, withdrawn on 29 August 2000 – Or. Fr.**

The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1, of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.<sup>8</sup>

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

The Swiss Federal Council declares that it interprets the guarantee of free legal assistance and the free assistance of an interpreter, in Article 6, paragraph 3, c and e of the Convention, as not permanently absolving the beneficiary from payment of the resulting costs.

### **Reservations to Protocol no. 7 of 24 February 1988 – Or. Fr.**

#### Article 1

When expulsion takes place in pursuance of a decision of the Federal Council taken in accordance with Article 70 of the Constitution on the grounds of a threat to the internal or external security of Switzerland, the person concerned does not enjoy the rights listed in paragraph 1 even after the execution of the expulsion.

#### Article 5

Following the entry into force of the revised provisions of the Swiss Civil Code of 5 October 1984, the provisions of Article 5 of Protocol No. 7 shall apply subject to, on the one hand, the provisions of Federal law concerning the family name (Article 160 CC and 8a final section CC) and, on the other hand, to the provisions concerning the acquisition of the right of citizenship (Articles 161, 134,

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<sup>8</sup> According to the Government, the declaration on the interpretation of Article 6, paragraph 1, contained in the instrument of ratification deposited by Switzerland on 28 November 1974 has been considered invalid in the context of a case concerning the determination of a criminal charge; further to the judgment delivered by the European Court of Human Rights on 29 April 1988 in the Belilos case (20/1986/118/167) the scope of the declaration is limited solely to the determination of civil rights and obligations, under the said provision.

paragraph 1, 149, paragraph 1, CC and 8b final section CC). Furthermore, the present reservation also concerns certain provisions of transitional law on marriage settlement (Articles 9, 9a, 9c, 9d, 9e, 10 and 10a final section CC).

## **THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

### **Reservation to Protocol no. 1 of 10 April 1997 – Or. Engl.**

In accordance with Article 57 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Republic of Macedonia makes the following reservation with regard to the right guaranteed by Article 2 of the Protocol to the above-mentioned Convention:

Pursuant to Article 45 of the Constitution of the Republic of Macedonia, the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions cannot be realised through primary private education, in the Republic of Macedonia.

Article 45 of the Constitution reads as follows:

*Citizens have a right to establish private schools at all levels of education, with the exception of primary education, under conditions determined by law.*

## **TURKEY**

### **Communication under article 15 § 3 of 6 August 1990 – Or. Engl.**

Derogations to articles 5, 6, 8, 10, 11 and 13 of the Convention, limited to article 5 as from 5 May 1992, withdrawn on 29 January 2002.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

### **Reservations to Protocol no. 1 of 18 May 1954 – Or. Fr**

Having seen and examined the Convention and the Protocol [No. 1], we have approved the same with the reservation set out in respect of Article 2 of the Protocol by reason of the provisions of Law No. 6366 voted by the National Grand Assembly of Turkey dated 10 March 1954.

Article 3 of the said Law No. 6366 reads:

*Article 2 of the Protocol shall not affect the provisions of Law No. 430 of 3 March 1924 relating to the unification of education.*

## **UKRAINE**

### **Reservations to the Convention of 11 September 1997 – Or. Ukr./Engl**

1. The provisions of Article 5, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply insofar as it does not conflict with paragraph 13 of Chapter XV of the Transitional provisions of the Constitution of Ukraine and Articles 106 and 157 of the Criminal Procedure Code of Ukraine concerning the detention of a person and the arrest warrant issued by the public prosecutor.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

2. The provisions of Article 5, paragraph 3, of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply insofar as it does not conflict with paragraph 48, 49, 50 and 51, of the Interim Disciplinary Statute of the Armed Forces of Ukraine approved by the Decree No. 431 of the President of Ukraine dated 7 October 1993, concerning the imposition of arrest as a disciplinary sanction.<sup>9</sup>

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

3. Ukraine fully recognises on its territory the validity of Article 6, paragraph 3.d, of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in regard to the defendant's right to obtain the attendance and examination of witnesses (Articles 263 and 303 of the Criminal Procedure Code of Ukraine) and as regards the rights of the suspect and persons charged in pre-trial proceedings to submit petitions for the attendance and examination of witnesses and the confrontation with them in accordance with Articles 43, 431 and 142 of the above-mentioned Code.

4. The provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply insofar as it does not conflict with paragraph 13 of Chapter XV "Transitional Provisions" of the Constitution of Ukraine and Articles 177 and 190 of the Code of Criminal Procedure of Ukraine concerning warrants for arrest and search warrants issued by the public prosecutor.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

The reservations under numbers 1, 3 and 4 are invalid as of 28 June 2001.

#### **Communication concerning Protocol no. 6 of 29 June 2000 – Or. Engl.**

On 29 December 1999, the Constitutional Court of Ukraine ruled that the provisions of the Criminal Code of Ukraine which provided for death penalty were unconstitutional. According to the Law of Ukraine of 22 February 2000 "On the Introduction of Amendments to the Criminal, Criminal Procedure and Correctional Labour Codes of Ukraine", the Criminal Code of Ukraine has been brought into conformity with the above-mentioned ruling of the Constitutional Court of Ukraine.

The death penalty was replaced by life imprisonment (Article 25 of Criminal Code of Ukraine). The Law of Ukraine "On the ratification of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the Death Penalty, of 1983" envisages retaining of application of the death penalty for the offences committed in time of war by means of introduction of appropriate amendments to the legislation in force.

Pursuant to Article 2 of the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Ukraine will notify the Secretary General of the Council of Europe in case of introduction of these amendments.

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<sup>9</sup> The initial reservation of 11 September 1997 was amended on 3 July 2000, following the renumbering of the relevant provisions of the Statute.

## **UNITED KINGDOM**

### **Reservations to Protocol no. 1 of 20 March 1952 – Or. Engl**

At the time of signing the present Protocol [No. 1], I declare that, in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

### **Territorial extension of the application of Protocol no. 1 of 25 February 1988 and 9 October 2001 – Or. Engl.**

The reservation to article 2 of Protocol no. 1 was extended to certain territories for whose international relations the United Kingdom is responsible (25 February 1988) and to the Isle of Man (9 October 2001).<sup>10</sup>

### **Declaration concerning Protocol no. 6 of 20 May 1999 – Or. Engl**

The United Kingdom accepts the said Convention for the United Kingdom of Great Britain and Northern Ireland, the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man, being territories for whose international relations the United Kingdom is responsible.

*To consult the full text click [here](#), select a state, the appropriate ETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

### **Derogation under article 15 § 3 of the Convention of 18 December 2001 – Or. Engl.**

... to article 5 § 3 of the Convention with regard to the duration of detention authorised for persons suspected of terrorism.

### **Derogation under article 15 § 3 of the Convention of 13 November 1988, withdrawn on 19 February 2001 – Or. Engl.**

... to article 5 § 1.f with regard to the powers of detention of persons suspected of involvement in international terrorism with a view to their deportation/in order to deport them.

### **Declaration concerning Protocol no. 13 of 10 October 2003 – Or. Engl.**

In accordance with Article 4 of the Protocol, the United Kingdom will initially apply the Protocol to the metropolitan area of Great Britain and Northern Ireland.

### **Declaration concerning the Convention of 31 March 2004 – Or. Engl.**

The Government of the United Kingdom declares that it extends the Convention to the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, being a territory for whose international relations the United Kingdom is responsible.

The Government of the United Kingdom declares on behalf of the above territory that the Government accepts the competence of the Court to receive applications as provided by Article 34 of the Convention.

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<sup>10</sup> The history of the declarations made by the United Kingdom in accordance with former article 63 (article 56 at present) of the Convention can be found on the website. *To consult the full text of the click [here](#), select a state, the appropriate CETS number OR 'Human Rights' as subject matter, refine to 'complete chronology', and enter.*

**Declaration concerning Protocol no. 13 of 31 March 2004 (date of effect 1 August 2004) – Or. Engl.**

The Government of the United Kingdom declares that it extends the application of Protocol 13 to the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, being a territory for whose international relations the United Kingdom is responsible.

**Declaration concerning Protocol no. 13 of 13 April 2004 (date of effect 1 August 2004) – Or. Engl.**

The Government of the United Kingdom declares that it extends the application of Protocol 13 to the Isle of Man, the Bailiwick of Guernsey and the Bailiwick of Jersey.

OMCT



## **Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention**

(CETS No. 194)

Français

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### **Explanatory Report**

#### **Introduction**

1. Since its adoption in 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") has been amended and supplemented several times: the High Contracting Parties have used amending or additional protocols to adapt it to changing needs and to developments in European society. In particular, the control mechanism established by the Convention was radically reformed in 1994 with the adoption of Protocol No. 11 which entered into force on 1 November 1998.

2. Ten years later, at a time when nearly all of Europe's countries have become party to the Convention, <sup>(1)</sup> the urgent need has arisen to adjust this mechanism, and particularly to guarantee the long-term effectiveness of the European Court of Human Rights (hereinafter referred to as "the Court"), so that it can continue to play its pre-eminent role in protecting human rights in Europe.

#### **I. Need to increase the effectiveness of the control system established by the Convention**

##### *Protocol No. 11*

3. Protocol No. 11 substituted a full-time single Court for the old system established by the 1950 Convention, namely, a Commission, a Court and the Committee of Ministers which played a certain "judicial" role.

4. Protocol No. 11, which was opened for signature on 11 May 1994 and came into force on 1 November 1998, was intended, firstly, to simplify the system so as to reduce the length of proceedings, and, secondly, to reinforce their judicial character. This protocol made the system entirely judicial (abolition of the Committee of Ministers' quasi-judicial role, deletion of the optional clauses concerning the right of individual application and the compulsory jurisdiction of the Court) and created a single full-time Court.

5. In this way Protocol No. 11 contributed to enhancing the effectiveness of the system, notably by improving the accessibility and visibility of the Court and by simplifying the procedure in order to cope with the influx of applications generated by the constant increase in the number of states. Whereas the Commission and Court had given a total of 38 389 decisions and judgments in the forty-four years up to 1998 (the year in which Protocol No. 11 took effect), the single Court has given 61 633 in five years.<sup>(2)</sup> None the less, the reformed system, which originated in proposals first made in the 1980s, proved

inadequate to cope with the new situation. Indeed, since 1990, there has been a considerable and continuous rise in the number of individual applications as a result, amongst other things, of the enlargement of the Council of Europe. Thus the number of applications increased from 5 279 in 1990 to 10 335 in 1994 (+96%), 18 164 in 1998 (+76%) and 34 546 in 2002 (+90%). Whilst streamlining measures taken by the Court enabled no less than 1 500 applications to be disposed of per month in 2003, this remains far below the nearly 2 300 applications allocated to a decision body every month.

6. This increase is due not only to the accession of new States Parties (between the opening of Protocol No. 11 for signature in May 1994 and the adoption of Protocol No. 14, thirteen new States Parties ratified the Convention, extending the protection of its provisions to over 240 million additional individuals) and to the rapidity of the enlargement process, but also to a general increase in the number of applications brought against states which were party to the Convention in 1993. In 2004, the Convention system was open to no fewer than 800 million people. As a result of the massive influx of individual applications, the effectiveness of the system, and thus the credibility and authority of the Court, were seriously endangered.

#### *The problem of the Court's excessive caseload*

7. It is generally recognised that the Court's excessive caseload (during 2003, some 39 000 new applications were lodged and at the end of that year, approximately 65 000 applications were pending before it) manifests itself in two areas in particular: i. processing the very numerous individual applications which are terminated without a ruling on the merits, usually because they are declared inadmissible (more than 90% of all applications), and ii. processing individual applications which derive from the same structural cause as an earlier application which has led to a judgment finding a breach of the Convention (repetitive cases following a so-called "pilot judgment"). A few figures will illustrate this. In 2003, there were some 17 270 applications declared inadmissible (or struck out of the list of cases), and 753 applications declared admissible. Thus, the great majority of cases are terminated by inadmissibility or strike-out decisions (96% of cases disposed of in 2003). In the remaining cases, the Court gave 703 judgments in 2003, and some 60% of these concerned repetitive cases.

8. Such an increase in the caseload has an impact both on the registry and on the work of the judges and is leading to a rapid accumulation of pending cases not only before committees (see paragraph 5 *in fine* above) but also before Chambers. In fact, as is the case with committees, the output of Chambers is far from being sufficient to keep pace with the influx of cases brought before them. A mere 8% of all cases terminated by the Court in 2003 were Chamber cases. This stands in stark contrast with the fact that no less than 20% of all new cases assigned to a decision-making body in the same year were assigned to a Chamber. This difference between input and output has led to the situation that, in 2003, 40% of all cases pending before a decision-making body were cases before a Chamber. In absolute terms, this accumulation of cases pending before a Chamber is reflected by the fact that, on 1 January 2004, approximately 16 500 cases were pending before Chambers. It is clear that the considerable amount of time spent on filtering work has a negative effect on the capacity of judges and the registry to process Chamber cases.

9. The prospect of a continuing increase in the workload of the Court and the Committee of Ministers (supervising execution of judgments) in the next few years is such that a set of concrete and coherent measures – including reform of the control system itself – was considered necessary to preserve the system in the future.

10. At the same time – and this was one of the major challenges in preparing the present protocol – it was vital that reform should in no way affect what are rightly considered the principal and unique features of the Convention system. These are the



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judicial character of European supervision, and the principle that any person claiming to be the victim of a breach of the rights and freedoms protected by the Convention may refer the matter to the Court (right of individual application).

11. Indeed, the Convention's control system is unique: the Parties agree to subject themselves to international judicial supervision of their obligation to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. This control is exercised by the Court, which gives judgments on individual applications brought under Article 34 of the Convention and on state applications – which are extremely rare <sup>(3)</sup> – brought under Article 33. The Court's judgments are binding on respondent Parties and their execution is supervised by the Committee of Ministers of the Council of Europe.

12. The principle of subsidiarity underlies all the measures taken to increase the effectiveness of the Convention's control system. Under Article 1 of the Convention, it is with the High Contracting Parties that the obligation lies "to secure to everyone within their jurisdiction the rights and freedoms" guaranteed by the Convention, whereas the role of the Court, under Article 19, is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention". In other words, securing rights and freedoms is primarily the responsibility of the Parties; the Court's role is subsidiary.

13. Forecasts from the current figures by the registry show that the Court's caseload would continue to rise sharply if no action were taken. Moreover, the estimates are conservative ones. Indeed, the cumulative effects of greater awareness of the Convention in particular in new States Parties, and of the entry into force of Protocol No. 12, the ratification of other additional protocols by states which are not party to them, the Court's evolving and extensive interpretation of rights guaranteed by the Convention and the prospect of the European Union's accession to the Convention, suggest that the annual number of applications to the Court could in the future far exceed the figure for 2003.

14. Measures required to ensure the long-term effectiveness of the control system established by the Convention in the broad sense are not restricted to Protocol No. 14. Measures must also be taken to prevent violations at national level and improve domestic remedies, and also to enhance and expedite execution of the Court's judgments.<sup>(4)</sup> Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload.

#### *Measures to be taken at national level*

15. In accordance with the principle of subsidiarity, the rights and freedoms enshrined in the Convention must be protected first and foremost at national level. Indeed this is where such protection is most effective. The responsibility of national authorities in this area must be reaffirmed and the capacity of national legal systems to prevent and redress violations must be reinforced. States have a duty to monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court's case-law. In order to achieve this, they may have the assistance of outside bodies. If fully applied, these measures will relieve the pressure on the Court in several ways: they should not only help to reduce the number of well-founded individual applications by ensuring that national laws are compatible with the Convention, or by making findings of violations or remedying them at national level, they will also alleviate the Court's work in that well-reasoned judgments already given on cases at national level make adjudication by the Court easier. It goes without saying, however, that these effects will be felt only in the medium term.

#### *Measures to be taken concerning execution of judgments*

16. Execution of the Court's judgments is an integral part of the Convention system. The measures that follow are designed to improve and accelerate the execution process. The Court's authority and the system's credibility both depend to a large extent on the effectiveness of this process. Rapid and adequate execution has, of course, an effect on the influx of new cases: the more rapidly general measures are taken by States Parties to execute judgments which point to a structural problem, the fewer repetitive applications there will be. In this regard, it would be desirable for states, over and above their obligations under Article 46, paragraph 1, of the Convention, to give retroactive effect to such measures and remedies. Several measures advocated in the above-mentioned recommendations and resolutions (see footnote 4) pursue this aim. In addition, it would be useful if the Court and, as regards the supervision of the execution of judgments, the Committee of Ministers, adopted a special procedure so as to give priority treatment to judgments that identify a structural problem capable of generating a significant number of repetitive applications, with a view to securing speedy execution of the judgment. The most important Convention amendment in the context of execution of judgments of the Court involves empowering the Committee of Ministers to bring infringement proceedings in the Court against any state which refuses to comply with a judgment.

17. The measures referred to in the previous paragraph are also designed to increase the effectiveness of the Convention system as a whole. While the supervision of the execution of judgments generally functions satisfactorily, the process needs to be improved to maintain the system's effectiveness.

#### *Effectiveness of filtering and of subsequent processing of applications by the Court*

18. Filtering and subsequent processing of applications by the Court are the main areas in which Protocol No. 14 makes concrete improvements. These measures are outlined in Chapter III below, and described in greater detail in Chapter IV, which comments on each of the provisions in the protocol.

19. During the preparatory work on Protocol No. 14, there was wide agreement as to the importance of several other issues linked to the functioning of the control system of the Convention which, however, did not require an amendment of the Convention. These are the need to strengthen the registry of the Court to enable it to deal with the influx of cases whilst maintaining the quality of the judgments, the need to encourage more frequent third party interventions by other states in cases pending before the Court which raise important general issues, and, in the area of supervision of execution, the need to strengthen the department for the execution of judgments of the General Secretariat of the Council of Europe and to make optimum use of other existing Council of Europe institutions, mechanisms and activities as a support for promoting rapid execution of judgments.

## **II. Principal stages in the preparation of Protocol No. 14**

20. The European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the Convention, found that "the effectiveness of the Convention system [...] is now at issue" because of "the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications" (Resolution I on *institutional and functional arrangements for the protection of human rights at national and European level*).<sup>(5)</sup> It accordingly called on the Committee of Ministers to "initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation".<sup>(6)</sup> The conference also thought it "indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation".<sup>(7)</sup>

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21. As a follow-up to the ministerial conference, the Ministers' Deputies set up, in February 2001, an Evaluation group to consider ways of guaranteeing the effectiveness of the Court. The group submitted its report to the Committee of Ministers on 27 September 2001.<sup>(8)</sup>

22. Concurrently, the Steering Committee for Human Rights (CDDH) set up its own Reflection Group on the Reinforcement of the Human Rights Protection Mechanism. Its activity report was sent to the Evaluation group in June 2001, so that the latter could take it into account in its work.<sup>(9)</sup>

23. To give effect to the conclusions of the Evaluation group's report, the Committee of Ministers agreed in principle to additional budgetary appropriations for the period from 2003 to 2005, to allow the Court to recruit a significant number of extra lawyers, as well as administrative and auxiliary staff. It took similar action to reinforce the Council of Europe Secretariat departments involved in execution of the Court's judgments.

24. The Court also took account of the Evaluation group's conclusions and those of its Working party on working methods.<sup>(10)</sup> On this basis it adopted a number of measures concerning its own working methods and those of the registry. It also amended its Rules of Court in October 2002 and again in November 2003.

25. At its 109th session (8 November 2001) the Committee of Ministers adopted its declaration on "*The protection of Human Rights in Europe - Guaranteeing the long-term effectiveness of the European Court of Human Rights*".<sup>(11)</sup> In this text it welcomed the Evaluation group's report and, with a view to giving it effect, instructed the CDDH to:

- carry out a feasibility study on the most appropriate way to conduct the preliminary examination of applications, particularly by reinforcing the filtering of applications;
- examine and, if appropriate, submit proposals for amendments to the Convention, notably on the basis of the recommendations in the report of the Evaluation group.

26. In the light of the work done, particularly by its Reflection Group on the Reinforcement of the Human Rights Protection Mechanism (CDDH-GDR) and its Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), the CDDH reported on progress in these two areas in an interim report, adopted in October 2002 (document CM(2002)146). It focused on three main issues: preventing violations at national level and improving domestic remedies, optimising the effectiveness of filtering and subsequent processing of applications, and improving and accelerating the execution of the Court's judgments.

27. In the light of this interim report, and following the declaration, "*The Court of Human Rights for Europe*", which it adopted at its 111th session (6-7 November 2002),<sup>(12)</sup> the Committee of Ministers decided that it wished to examine a set of concrete and coherent proposals at its ministerial session in May 2003. In April 2003, the CDDH accordingly submitted a final report, detailing its proposals in these three areas (document CM(2003)55). These served as a basis for preparation of the Committee of Ministers' recommendations to the member states and for the amendments made to the Convention.

28. In its declaration, "*Guaranteeing the long-term effectiveness of the European Court of Human Rights*", adopted at its 112th session (14-15 May 2003), the Committee of Ministers welcomed this report and endorsed the CDDH's approach. It instructed the Ministers' Deputies to implement the CDDH's proposals, so that it could examine texts for adoption at its 114th session in 2004, taking account of certain issues referred to in

the declaration. It also asked them to take account of other questions raised in the report, such as the possible accession of the European Union to the Convention, the term of office of judges of the Court, and the need to ensure that future amendments to the Convention were given effect as rapidly as possible.

29. The CDDH was accordingly instructed to prepare, with a view to their adoption by the Committee of Ministers, not only a draft amending protocol to the Convention with an explanatory report, but also a draft declaration, three draft recommendations and a draft resolution. Work on the elaboration of Protocol No. 14 and its explanatory report was carried out within the CDDH-GDR (renamed Drafting Group on the Reinforcement of the Human Rights Protection Mechanism), while work concerning the other texts was undertaken by the DH-PR.

30. The Committee of Ministers also encouraged the CDDH to consult civil society, the Court and the Parliamentary Assembly. With this in view, the CDDH carefully examined the opinions and proposals submitted by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, the Court, the Council of Europe Commissioner for Human Rights and certain member states, as well as non-governmental organisations (NGOs) and national institutions for the promotion and protection of human rights. The CDDH-GDR and CDDH have benefited greatly from the contributions of representatives of the Parliamentary Assembly, the Court's registry and the Commissioner's office, who played an active part in its work. The reports and draft texts adopted by the CDDH and the CDDH-GDR were public documents available on the Internet, and copies were sent directly to the Court, Parliamentary Assembly, Commissioner for Human Rights and NGOs. The CDDH-GDR also organised two valuable consultations with NGOs and the CDDH benefited from the contribution of the NGOs accredited to it. The Ministers' Deputies were closely involved throughout the process. Protocol No. 14 is thus the fruit of a collective reflection, carried out in a very transparent manner.

31. After an interim activity report in November 2003 (document CM(2003)165, Addendum I), the CDDH sent the Committee of Ministers its final activity report (document CM(2004)65) in April 2004. This contained the draft amending protocol to the Convention. The Parliamentary Assembly adopted an opinion on the draft protocol (Opinion No. 251 (2004) of 28 April 2004).

32. As well as adopting the amending protocol at the 114th ministerial session, held on 12 and 13 May 2004, the Committee of Ministers adopted the declaration "*Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*". In that declaration, the member states recognised the urgency of the reform, and committed themselves to ratifying Protocol No. 14 within two years.

33. The text of the amending protocol was opened for signature by Council of Europe member states, signatory to the European Convention on Human Rights on 13 May 2004.

### **III. Overview of the changes made by Protocol No. 14 to the control system of the European Convention on Human Rights**

34. During the initial reflection stage on the reform of the Convention's control system, which started immediately after the European Ministerial Conference on Human Rights in 2000, a wide range of possible changes to the system were examined, both in the Evaluation group and the CDDH's Reflection group. Several proposals were retained and are taken up in this protocol. Others, including some proposals for radical change of the control system, were for various reasons rejected during the reflection stage.<sup>(13)</sup> Some of these should be mentioned here. For example, the idea of setting up, within the framework of the Convention, "regional courts of first instance" was rejected because, on the one hand, of the risk it would create of diverging case-law and, on the other

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hand, the high cost of setting them up. Proposals to empower the Court to give preliminary rulings at the request of national courts or to expand the Court's competence to give advisory opinions (Articles 47-49 of the Convention) were likewise rejected. Such innovations might interfere with the contentious jurisdiction of the Court and they would, certainly in the short term, result in additional, not less, work for the Court. Two other proposals were rejected because they would have restricted the right of individual application. These were the proposal that the Court should be given discretion to decide whether or not to take up a case for examination (system comparable to the *certiorari* procedure of the United States Supreme Court) and that it should be made compulsory for applicants to be represented by a lawyer or other legal expert from the moment of introduction of the application (see however Rule 36, paragraph 2, of the Rules of Court). It was felt that the principle according to which anyone had the right to apply to the Court should be firmly upheld. The proposal to create a separate filtering body, composed of persons other than the judges of the Court, was also rejected. In this connection, the protocol is based on two fundamental premises: filtering work must be carried out within the judicial framework of the Court and there should not be different categories of judges within the same body. Finally, in the light of Opinion No. 251 (2004) of the Parliamentary Assembly, it was decided not to make provision for permitting an increase of the number of judges without any new amendment to the Convention.

35. Unlike Protocol No. 11, Protocol No. 14 makes no radical changes to the control system established by the Convention. The changes it does make relate more to the functioning than to the structure of the system. Their main purpose is to improve it, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination.

36. To achieve this, amendments are introduced in three main areas:

- reinforcement of the Court's filtering capacity in respect of the mass of unmeritorious applications;
- a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage; the new criterion contains two safeguard clauses;
- measures for dealing with repetitive cases.

37. Together, these elements of the reform seek to reduce the time spent by the Court on clearly inadmissible applications and repetitive applications so as to enable the Court to concentrate on those cases that raise important human rights issues.

38. The filtering capacity is increased by making a single judge competent to declare inadmissible or strike out an individual application. This new mechanism retains the judicial character of the decision-making on admissibility. The single judges will be assisted by non-judicial rapporteurs, who will be part of the registry.

39. A new admissibility requirement is inserted in Article 35 of the Convention. The new requirement provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits, by empowering it to declare inadmissible applications where the applicant has not suffered a significant disadvantage and which, in terms of respect for human rights, do not otherwise require an examination on the merits by the Court. Furthermore, the new requirement contains an explicit condition to ensure that it does not lead to rejection of cases which have not been duly considered by a domestic tribunal. It should be stressed that the new requirement does not restrict the right of individuals to apply to the Court or alter the principle that all individual applications are examined on their admissibility. While the



Court alone is competent to interpret the new admissibility requirement and decide on its application, its terms should ensure that rejection of cases requiring an examination on the merits is avoided. The latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law.

40. The competence of the committees of three judges is extended to cover repetitive cases. They are empowered to rule, in a simplified procedure, not only on the admissibility but also on the merits of an application, if the underlying question in the case is already the subject of well-established case-law of the Court.

41. As for the other changes made by the protocol, it should be noted, first of all, that the Court is given more latitude to rule simultaneously on the admissibility and merits of individual applications. In fact, joint decisions on admissibility and merits of individual cases are not only encouraged but become the norm. However, the Court will be free to choose, on a case by case basis, to take separate decisions on admissibility.

42. Furthermore, the Committee of Ministers may decide, by a two-thirds majority of the representatives entitled to sit on the Committee, to bring proceedings before the Grand Chamber of the Court against any High Contracting Party which refuses to comply with the Court's final judgment in a case to which it is party, after having given it notice to do so. The purpose of such proceedings would be to obtain a ruling from the Court as to whether that Party has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention.

43. The Committee of Ministers will in certain circumstances also be able to request the Court to give an interpretation of a judgment.

44. Friendly settlements are encouraged at any stage of the proceedings. Provision is made for supervision by the Committee of Ministers of the execution of decisions of the Court endorsing the terms of friendly settlements.

45. It should also be noted that judges are now elected for a single nine-year term. Transitional provisions are included to avoid the simultaneous departure of large numbers of judges.

46. Finally, an amendment has been introduced with a view to possible accession of the European Union to the Convention.

47. For all these, as well as the further amendments introduced by the protocol, reference is made to the explanations in Chapter IV below.

#### **IV. Comments on the provisions of the Protocol <sup>(14)</sup>**

##### **Article 1 of the amending protocol**

###### *Article 22 – Election of judges*

48. The second paragraph of Article 22 has been deleted since it no longer served any useful purpose in view of the changes made to Article 23. Indeed, there will be no more "casual vacancies" in the sense that every judge elected to the Court will be elected for a single term of nine years, including where that judge's predecessor has not completed a full term (see also paragraph 51 below). In other words, the rule contained in the amended Article 22 (which is identical to paragraph 1 of former Article 22) will apply to every situation where there is a need to proceed to the election of a judge.

49. It was decided not to amend the first paragraph of Article 22 to prescribe that the

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lists of three candidates nominated by the High Contracting Parties should contain candidates of both sexes, since that might have interfered with the primary consideration to be given to the merits of potential candidates. However, Parties should do everything possible to ensure that their lists contain both male and female candidates.

### **Article 2 of the amending protocol**

#### *Article 23 – Terms of office and dismissal*

50. The judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004).

51. In order to ensure that the introduction of a non-renewable term of office does not threaten the continuity of the Court, the system whereby large groups of judges were renewed at three-year intervals has been abolished. This has been brought about by the new wording of paragraph 1 and the deletion of paragraphs 2 to 4 of former Article 23. In addition, paragraph 5 of former Article 23 has been deleted so that it will no longer be possible, in the event of a casual vacancy, for a judge to be elected to hold office for the remainder of his or her predecessor's term. In the past this has led to undesirable situations where judges were elected for very short terms of office, a situation perhaps understandable in a system of renewable terms of office, but which is unacceptable in the new system. Under the new Article 23, all judges will be elected for a non-renewable term of nine years. This should make it possible, over time, to obtain a regular renewal of the Court's composition, and may be expected to lead to a situation in which each judge will have a different starting date for his or her term of office.

52. Paragraphs 6 and 7 of the former Article 23 remain, and become paragraphs 2 and 3 of the new Article 23.

53. In respect of paragraph 2 (the age limit of 70 years), it was decided not to fix an additional age limit for candidates. Paragraphs 1 and 2, read together, may not be understood as excluding candidates who, on the date of election, would be older than 61. That would be tantamount to unnecessarily depriving the Court of the possibility of benefiting from experienced persons, if elected. At the same time, it is generally recommended that High Contracting Parties avoid proposing candidates who, in view of their age, would not be able to hold office for at least half the nine-year term before reaching the age of 70.

54. In cases where the departure of a judge can be foreseen, in particular for reasons of age, it is understood that the High Contracting Party concerned should ensure that the list of three candidates (see Article 22) is submitted in good time so as to avoid the need for application of paragraph 3 of the new Article 23. As a rule, the list should be submitted at least six months before the expiry of the term of office. This practice should make it possible to meet the concerns expressed by the Parliamentary Assembly in its Recommendation 1649 (2004), paragraph 14.

55. Transitional provisions are set out in Article 21 of the protocol.

56. For technical reasons (to avoid renumbering a large number of Convention provisions as a result of the insertion of a new Article 27), the text of former Article 24 (Dismissal) has been inserted in Article 23 as a new fourth paragraph. The title of Article 23 has been amended accordingly.

### **Article 3 of the amending protocol**

57. For the reason set out in the preceding paragraph, former Article 24 has been deleted; the provision it contained has been inserted in a new paragraph 4 of Article 23.

#### **Article 4 of the amending protocol**

##### *Article 24 – Registry and rapporteurs*

58. Former Article 25 has been renumbered as Article 24; it is amended in two respects. First of all, the second sentence of former Article 25 has been deleted since the legal secretaries, created by Protocol No. 11, have in practice never had an existence of their own, independent from the registry, as is the case at the Court of Justice of the European Communities. Secondly, a new paragraph 2 is added so as to introduce the function of rapporteur as a means of assisting the new single-judge formation provided for in the new Article 27. While it is not strictly necessary from a legal point of view to mention rapporteurs in the Convention text, it was none the less considered important to do so because of the novelty of rapporteur work being carried out by persons other than judges and because it will be indispensable to create these rapporteur functions in order to achieve the significant potential increase in filtering capacity which the institution of single-judge formations aims at. The members of the registry exercising rapporteur functions will assist the new single-judge formations. In principle, the single judge should be assisted by a rapporteur with knowledge of the language and the legal system of the respondent Party. The function of rapporteur will never be carried out by a judge in this context.

59. It will be for the Court to implement the new paragraph 2 by deciding, in particular, the number of rapporteurs needed and the manner and duration of appointment. On this point, it should be stressed that it would be advisable to diversify the recruitment channels for registry lawyers and rapporteurs. Without prejudice to the possibility to entrust existing registry lawyers with the rapporteur function, it would be desirable to reinforce the registry, for fixed periods, with lawyers having an appropriate practical experience in the functioning of their respective domestic legal systems. Since rapporteurs will form part of the Court's registry, the usual appointment procedures and relevant staff regulations will apply. This would make it possible to increase the work capacity of the registry while allowing it to benefit from the domestic experience of these lawyers. Moreover, it is understood that the new function of rapporteur should be conferred on persons with a solid legal experience, expertise in the Convention and its case-law and a very good knowledge of at least one of the two official languages of the Council of Europe and who, like the other staff of the registry, meet the requirements of independence and impartiality.

#### **Article 5 of the amending protocol**

##### *Article 25 – Plenary Court*

60. A new paragraph f has been added to this article (formerly Article 26) in order to reflect the new function attributed to the plenary Court by this protocol. It is understood that the term "Chambers" appearing in paragraphs b and c refers to administrative entities of the Court (which in practice are referred to as "Sections" of the Court) as opposed to the judicial formations envisaged by the term "Chambers" in new Article 26, paragraph 1, first sentence. It was not considered necessary to amend the Convention in order to clarify this distinction.

#### **Article 6 of the amending protocol**

##### *Article 26 – Single-judge formation, committees, Chambers and Grand Chamber*

61. The text of Article 26 (formerly Article 27) has been amended in several respects. Firstly, a single-judge formation is introduced in paragraph 1 in the list of judicial



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formations of the Court and a new rule is inserted in a new paragraph 3 to the effect that a judge shall not sit as a single judge in cases concerning the High Contracting Party in respect of which he or she has been elected. The competence of single judges is defined in the new Article 27. In the latter respect, reference is made to the explanations in paragraph 67 below.

62. Adequate assistance to single judges requires additional resources. The establishment of this system will thus lead to a significant increase in the Court's filtering capacity, on the one hand, on account of the reduction, compared to the old committee practice, of the number of actors involved in the preparation and adoption of decisions (one judge instead of three; the new rapporteurs who could combine the functions of case-lawyer and rapporteur), and, on the other hand, because judges will be relieved of their rapporteur role when sitting in a single-judge formation and, finally, as a result of the multiplication of filtering formations operating simultaneously.

63. Secondly, some flexibility as regards the size of the Court's Chambers has been introduced by a new paragraph 2. Application of this paragraph will reduce, for a fixed period, the size of Chambers generally; it should not allow, however, for the setting up of a system of Chambers of different sizes which would operate simultaneously for different types of cases.

64. Finally, paragraph 2 of former Article 27 has been amended to make provision for a new system of appointment of *ad hoc* judges. Under the new rule, contained in paragraph 4 of the new Article 26, each High Contracting Party is required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall choose someone when the need arises to appoint an *ad hoc* judge. This new system is a response to criticism of the old system, which allowed a High Contracting Party to choose an *ad hoc* judge after the beginning of proceedings. Concerns about this had also been expressed by the Parliamentary Assembly. It is understood that the list of potential *ad hoc* judges may include names of judges elected in respect of other High Contracting Parties. More detailed rules on the implementation of this new system may be included in the Rules of Court.

65. The text of paragraph 5 is virtually identical to that of paragraph 3 of former Article 27.

#### **Article 7 of the amending protocol**

##### *Article 27 – Competence of single judges*

66. Article 27 contains new provisions defining the competence of the new single-judge formation.

67. The new article sets out the competence of the single-judge formations created by the amended Article 26, paragraph 1. It is specified that the competence of the single judge is limited to taking decisions of inadmissibility or decisions to strike the case out of the list "where such a decision can be taken without further examination". This means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset. The latter point is particularly important with regard to the new admissibility criterion introduced in Article 35 (see paragraphs 77 to 85 below), in respect of which the Court's Chambers and Grand Chamber will have to develop case-law first (see, in this connection, the transitional rule contained in Article 20, paragraph 2, second sentence, of this protocol, according to which the application of the new admissibility criterion is reserved to Chambers and the Grand Chamber in the two years following the entry into force of this protocol). Besides, it is recalled that, as was explained in paragraph 58 above, single-judge formations will be assisted by rapporteurs. The decision itself remains the sole responsibility of the judge. In case of doubt as to the admissibility, the judge will refer the application to a committee or a

Chamber.

### **Article 8 of the amending protocol**

#### *Article 28 – Competence of committees*

68. Paragraphs 1 and 2 of the amended Article 28 extend the powers of three-judge committees. Hitherto, these committees could, unanimously, declare applications inadmissible. Under the new paragraph 1.b of Article 28, they may now also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. "Well-established case-law" normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute "well-established case-law", particularly when the Grand Chamber has rendered it. This applies, in particular, to repetitive cases, which account for a significant proportion of the Court's judgments (in 2003, approximately 60%). Parties may, of course, contest the "well-established" character of case-law before the committee.

69. The new procedure is both simplified and accelerated, although it preserves the adversarial character of proceedings and the principle of judicial and collegiate decision-making on the merits. Compared to the ordinary adversarial proceedings before a Chamber, it will be a simplified and accelerated procedure in that the Court will simply bring the case (possibly a group of similar cases) to the respondent Party's attention, pointing out that it concerns an issue which is already the subject of well-established case-law. Should the respondent Party agree with the Court's position, the latter will be able to give its judgment very rapidly. The respondent Party may contest the application of Article 28, paragraph 1.b, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from the applications which have resulted in the well-established case-law. However, it may never veto the use of this procedure which lies within the committee's sole competence. The committee rules on all aspects of the case (admissibility, merits, just satisfaction) in a single judgment or decision. This procedure requires unanimity on each aspect. Failure to reach a unanimous decision counts as no decision, in which event the Chamber procedure applies (Article 29). It will then fall to the Chamber to decide whether all aspects of the case should be covered in a single judgment. Even when the committee initially intends to apply the procedure provided for in Article 28, paragraph 1.b, it may declare an application inadmissible under Article 28, paragraph 1.a. This may happen, for example, if the respondent Party has persuaded the committee that domestic remedies have not been exhausted.

70. The implementation of the new procedure will increase substantially the Court's decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a Chamber.

71. Even when a three-judge committee gives a judgment on the merits, the judge elected in respect of the High Contracting Party concerned will not be an *ex officio* member of the decision-making body, in contrast with the situation with regard to judgments on the merits under the Convention as it stands. The presence of this judge would not appear necessary, since committees will deal with cases on which well-established case-law exists. However, a committee may invite the judge elected in respect of the High Contracting Party concerned to replace one of its members as, in some cases, the presence of this judge may prove useful. For example, it may be felt that this judge, who is familiar with the legal system of the respondent Party, should join in taking the decision, particularly when such questions as exhaustion of domestic remedies need to be clarified. One of the factors which a committee may consider, in deciding whether to invite the judge elected in respect of the respondent Party to join it,

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is whether that Party has contested the applicability of paragraph 1.b. The reason why this factor has been explicitly mentioned in paragraph 3 is that it was considered important to have at least some reference in the Convention itself to the possibility for respondent Parties to contest the application of the simplified procedure (see paragraph 69 above). For example, a respondent Party may contest the new procedure on the basis that the case in question differs in some material respect from the established case-law cited. It is likely that the expertise of the "national judge" in domestic law and practice will be relevant to this issue and therefore helpful to the committee. Should this judge be absent or unable to sit, the procedure provided for in the new Article 26, paragraph 4 *in fine* applies.

72. It is for the Court, in its rules, to settle practical questions relating to the composition of three-judge committees and, more generally, to plan its working methods in a way that optimises the new procedure's effectiveness.

#### **Article 9 of the amending protocol**

##### *Article 29 – Decisions by Chambers on admissibility and merits*

73. Apart from a technical change to take into account the new provisions in Articles 27 and 28, paragraph 1 of the amended Article 29 encourages and establishes the principle of the taking of joint decisions by Chambers on the admissibility and merits of individual applications. This article merely endorses the practice which has already developed within the Court. While separate decisions on admissibility were previously the norm, joint decisions are now commonly taken on the admissibility and merits of individual applications, which allows the registry and judges to process cases faster whilst respecting fully the principle of adversarial proceedings. However, the Court may always decide that it prefers to take a separate decision on the admissibility of a particular application.

74. This change does not apply to interstate cases. On the contrary, the rule of former Article 29, paragraph 3, has been explicitly maintained in paragraph 2 of Article 29 as regards such applications. Paragraph 3 of former Article 29 has been deleted.

#### **Article 10 of the amending protocol**

##### *Article 31 – Powers of the Grand Chamber*

75. A new paragraph b has been added to this article in order to reflect the new function attributed to the Grand Chamber by this protocol, namely to decide on issues referred to the Court by the Committee of Ministers under the new Article 46, paragraph 4 (question whether a High Contracting Party has failed to fulfil its obligation to comply with a judgment).

#### **Article 11 of the amending protocol**

##### *Article 32 – Jurisdiction of the Court*

76. A reference has been inserted to the new procedures provided for in the amended Article 46.

#### **Article 12 of the amending protocol**

##### *Article 35 – Admissibility criteria*

77. A new admissibility criterion is added to the criteria laid down in Article 35. As explained in paragraph 39 above, the purpose of this amendment is to provide the Court

with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes. The new criterion therefore pursues the same aim as some other key changes introduced by this protocol and is complementary to them.

78. The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. In particular, it is necessary to give the Court some degree of flexibility in addition to that already provided by the existing admissibility criteria, whose interpretation has become established in the case-law that has developed over several decades and is therefore difficult to change. This is so because it is very likely that the numbers of individual applications to the Court will continue to increase, up to a point where the other measures set out in this protocol may well prove insufficient to prevent the Convention system from becoming totally paralysed, unable to fulfil its central mission of providing legal protection of human rights at the European level, rendering the right of individual application illusory in practice.

79. The new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it. Its main effect, however, is likely to be that it will in the longer term enable more rapid disposal of unmeritorious cases. Once the Court's Chambers have developed clear-cut jurisprudential criteria of an objective character capable of straightforward application, the new criterion will be easier for the Court to apply than some other admissibility criteria, including in cases which would at all events have to be declared inadmissible on another ground.

80. The main element contained in the new criterion is the question whether the applicant has suffered a significant disadvantage. These terms are open to interpretation (this is the additional element of flexibility introduced); the same is true of many other terms used in the Convention, including some other admissibility criteria. Like those other terms, they are legal terms capable of, and requiring, interpretation establishing objective criteria through the gradual development of the case-law of the Court.

81. The second element is a safeguard clause to the effect that, even where the applicant has not suffered a significant disadvantage, the application will not be declared inadmissible if respect for human rights as defined in the Convention or the protocols thereto requires an examination on the merits. The wording of this element is drawn from the second sentence of Article 37, paragraph 1, of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court's list of cases.

82. A second safeguard clause is added to this first one. It will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal. This clause, which reflects the principle of subsidiarity, ensures that, for the purposes of the application of the new admissibility criterion, every case will receive a judicial examination whether at the national level or at the European level.

83. The wording of the new criterion is thus designed to avoid rejection of cases warranting an examination on the merits. As was explained in paragraph 39 above, the latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law.

84. As explained in paragraph 67 above, it will take time for the Court's Chambers or Grand Chamber to establish clear case-law principles for the operation of the new criterion in concrete contexts. It is clear, having regard to the wording of Articles 27 and 28, that single-judge formations and committees will not be able to apply the new

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criterion in the absence of such guidance. In accordance with Article 20, paragraph 2, second sentence, of this protocol, single-judge formations and committees will be prevented from applying the new criterion during a period of two years following the entry into force of this protocol.

85. In accordance with the transitional rule set out in Article 20, paragraph 2, first sentence, of this protocol (see also paragraph 105 below), the new admissibility criterion may not be applied to applications declared admissible before the entry into force of this protocol.

### **Article 13 of the amending protocol**

#### *Article 36 – Third party intervention*

86. This provision originates in an express request from the Council of Europe Commissioner for Human Rights,<sup>(15)</sup> supported by the Parliamentary Assembly in its Recommendation 1640 (2004) on the 3rd Annual Report on the Activities of the Council of Europe Commissioner for Human Rights (1 January-31 December 2002), adopted on 26 January 2004.

87. It is already possible for the President of the Court, on his or her own initiative or upon request, to invite the Commissioner for Human Rights to intervene in pending cases. With a view to protecting the general interest more effectively, the third paragraph added to Article 36 for the first time mentions the Commissioner for Human Rights in the Convention text by formally providing that the Commissioner has the right to intervene as third party. The Commissioner's experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties.

88. Under the Rules of Court, the Court is required to communicate decisions declaring applications admissible to any High Contracting Party of which an applicant is a national. This rule cannot be applied to the Commissioner, since sending him or her all such decisions would entail an excessive amount of extra work for the registry. The Commissioner must therefore seek this information him- or herself. The rules on exercising this right of intervention, and particularly time limits, would not necessarily be the same for High Contracting Parties and the Commissioner. The Rules of Court will regulate practical details concerning the application of paragraph 3 of Article 36.

89. It was not considered necessary to amend Article 36 in other respects. In particular, it was decided not to provide for a possibility of third party intervention in the new committee procedure under the new Article 28, paragraph 1.b, given the straightforward nature of cases to be decided under that procedure.

### **Article 14 of the amending protocol**

#### *Article 38 – Examination of the case*

90. Article 38 incorporates the provisions of paragraph 1.a of former Article 38. The changes are intended to allow the Court to examine cases together with the Parties' representatives, and to undertake an investigation, not only when the decision on admissibility has been taken, but at any stage in the proceedings. They are a logical consequence of the changes made in Articles 28 and 29, which encourage the taking of joint decisions on the admissibility and merits of individual applications. Since this provision applies even before the decision on admissibility has been taken, High Contracting Parties are required to provide the Court with all necessary facilities prior to that decision. The Parties' obligations in this area are thus reinforced. It was not considered necessary to amend Article 38 (or Article 34, last sentence) in other respects, notably as regards possible non-compliance with these provisions. These



provisions already provide strong legal obligations for the High Contracting Parties and, in line with current practice, any problems which the Court might encounter in securing compliance can be brought to the attention of the Committee of Ministers so that the latter take any steps it deems necessary.

### **Article 15 of the amending protocol**

#### *Article 39 – Friendly settlements*

91. The provisions of Article 39 are partly taken from former Article 38, paragraphs 1.b and 2, and also from former Article 39. To make the Convention easier to read with regard to the friendly settlement procedure, it was decided to address it in a specific article.

92. As a result of the implementation of the new Articles 28 and 29, there should be fewer separate decisions on admissibility. Since under the former Article 38, paragraph 1.b, it was only after an application had been declared admissible that the Court placed itself at the disposal of the parties with a view to securing a friendly settlement, this procedure had to be modified and made more flexible. The Court is now free to place itself at the parties' disposal for this purpose at any stage in the proceedings.

93. Friendly settlements are therefore encouraged, and may prove particularly useful in repetitive cases, and other cases where questions of principle or changes in domestic law are not involved.<sup>(16)</sup> It goes without saying that these friendly settlements must be based on respect for human rights, pursuant to Article 39, paragraph 1, as amended.

94. The new Article 39 provides for supervision of the execution of friendly settlements by the Committee of Ministers. This new provision was inserted to reflect a practice which the Court had already developed. In the light of the text of former Article 46, paragraph 2, the Court used to endorse friendly settlements through *judgments* and not – as provided for in former Article 39 of the Convention – through *decisions*, whose execution was not subject to supervision by the Committee of Ministers. The practice of the Court was thus in response to the fact that only the execution of *judgments* was supervised by the Committee of Ministers (former Article 39). It was recognised, however, that adopting a judgment, instead of a decision, might have negative connotations for respondent Parties, and make it harder to secure a friendly settlement. The new procedure should make this easier and thus reduce the Court's workload. For this reason, the new Article 39 gives the Committee of Ministers authority to supervise the execution of *decisions* endorsing the terms of friendly settlements. This amendment is in no way intended to reduce the Committee's present supervisory powers, particularly concerning the strike-out decisions covered by Article 37. It would be advisable for the Committee of Ministers to distinguish more clearly, in its practice, between its supervision function by virtue of the new Article 39, paragraph 4 (friendly settlements), on the one hand and that under Article 46, paragraph 2 (execution of judgments), on the other.

### **Article 16 of the amending protocol**

#### *Article 46 – Binding force and execution of judgments*

95. The first two paragraphs of Article 46 repeat the two paragraphs of the former Article 46. Paragraphs 3, 4 and 5 are new.

96. The new Article 46, in its paragraph 3, empowers the Committee of Ministers to ask the Court to interpret a final judgment, for the purpose of facilitating the supervision of its execution. The Committee of Ministers' experience of supervising the execution of judgments shows that difficulties are sometimes encountered due to disagreement as to the interpretation of judgments. The Court's reply settles any argument concerning a

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judgment's exact meaning. The qualified majority vote required by the last sentence of paragraph 3 shows that the Committee of Ministers should use this possibility sparingly, to avoid over-burdening the Court.

97. The aim of the new paragraph 3 is to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment. No time-limit has been set for making requests for interpretation, since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment. The Court is free to decide on the manner and form in which it wishes to reply to the request. Normally, it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation. More detailed rules governing this new procedure may be included in the Rules of Court.

98. Rapid and full execution of the Court's judgments is vital. It is even more important in cases concerning structural problems, so as to ensure that the Court is not swamped with repetitive applications. For this reason, ever since the Rome ministerial conference of 3 and 4 November 2000 (Resolution I),<sup>(17)</sup> it has been considered essential to strengthen the means given in this context to the Committee of Ministers. The Parties to the Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court's final judgment in a case to which it is party.

99. Paragraphs 4 and 5 of Article 46 accordingly empower the Committee of Ministers to bring infringement proceedings in the Court (which shall sit as a Grand Chamber – see new Article 31, paragraph b), having first served the state concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.

100. The Committee of Ministers should bring infringement proceedings only in exceptional circumstances. None the less, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe. The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments. It is foreseen that the outcome of infringement proceedings would be expressed in a judgment of the Court.

#### **Article 17 of the amending protocol**

##### *Article 59 – Signature and ratification*

101. Article 59 has been amended in view of possible accession by the European Union to the Convention. A new second paragraph makes provision for this possibility, so as to

take into account the developments that have taken place within the European Union, notably in the context of the drafting of a constitutional treaty, with regard to accession to the Convention. It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view. The CDDH adopted a report identifying those issues in 2002 (document DG-II(2002)006). This report was transmitted to the Committee of Ministers, which took note of it. The CDDH accepted that those modifications could be brought about either through an amending protocol to the Convention or by means of an accession treaty to be concluded between the European Union, on the one hand, and the States Parties to the Convention, on the other. While the CDDH had expressed a preference for the latter, it was considered advisable not to refer to a possible accession treaty in the current protocol so as to keep all options open for the future.

102. At the time of drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter's possible accession to the Convention, simply because the European Union still lacked the competence to do so. This made it impossible to include in this protocol the other modifications to the Convention necessary to permit such accession. As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty.

#### **Final and transitional provisions**

##### **Article 18 of the amending protocol**

103. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. This protocol does not contain any provisions on reservations. By its very nature, this amending protocol excludes the making of reservations.

##### **Article 19 of the amending protocol**

104. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. The period of three months mentioned in it corresponds to the period which was chosen for protocols Nos 12 and 13. As the implementation of the reform is urgent, this period was chosen rather than one year, which had been the case for Protocol No. 11. For Protocol No. 11, the period of one year was necessary in order to allow for the setting up of the new Court, and in particular for the election of the judges.

##### **Article 20 of the amending protocol**

105. The first paragraph of this transitional provision confirms that, upon entry into force of this protocol, its provisions can be applied immediately to all pending applications so as not to delay the impact of the system's increased effectiveness which will result from the protocol. In view of Article 35, paragraph 4 *in fine* of the Convention it was considered necessary to provide, in the second paragraph, first sentence, of Article 20 of the amending protocol, that the new admissibility criterion inserted by Article 13 of this protocol in Article 35, paragraph 3.b, of the Convention shall not apply to applications declared admissible before the entry into force of the protocol. The second sentence of the second paragraph explicitly reserves, for a period of two years following the entry into force of this protocol, the application of the new admissibility criteria to the Chambers and the Grand Chamber of the Court. This rule recognises the need to develop case-law on the interpretation of the new criterion before the latter can be applied by single-judge formations or committees.

##### **Article 21 of the amending protocol**

106. This article contains transitional rules to accompany the introduction of the new



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provision in Article 23, paragraph 1, on the terms of office of judges (paragraphs 2 to 4 of new Article 23 are not affected by these transitional rules). The terms of office of the judges will not expire on the date of entry into force of this protocol but continue to run after that date. In addition, the terms of office shall be extended in accordance with the rule of the first or that of the second sentence of Article 21, depending on whether the judges are serving their first term of office on the date of the entry into force of this protocol or not. These rules aim at avoiding a situation where, at any particular point in time, a large number of judges would be replaced by new judges. The rules seek to mitigate the effects, after entry into force of the protocol, of the existence – for election purposes – under the former system of two main groups of judges whose terms of office expire simultaneously. As a result of these rules, the two main groups of judges will be split up into smaller groups, which in turn will lead to staggered elections of judges. Those groups are expected to disappear gradually, as a result of the amended Article 23 (see the commentary in paragraph 51 above).

107. For the purposes of the first sentence of Article 21, judges completing their predecessor's term in accordance with former Article 23, paragraph 5, shall be deemed to be serving their first term of office. The second sentence applies to the other judges, provided that their term of office has not expired on the date of entry into force of the protocol.

### **Article 22 of the amending protocol**

108. This article is one of the usual final clauses included in treaties prepared within the Council of Europe.

#### **Notes :**

(1) In early 2004, Belarus and Monaco were the only potential or actual candidates for membership still outside the Council of Europe.

(2) Unless otherwise stated, the figures given here are taken from the document "Survey of Activities 2003" produced by the European Court of Human Rights or based on more recent information provided by its registry.

(3) As at 1 January 2004, there have only been 20 interstate applications.

(4) The Committee of Ministers has adopted a series of specific instruments for this purpose:

- Recommendation No. R (2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
- Recommendation Rec(2002)13 of the Committee of Ministers on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights;
- Recommendation Rec(2004)4 of the Committee of Ministers on the European Convention on Human Rights in university education and professional training;
- Recommendation Rec(2004)5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down by the European Convention on Human Rights;
- Recommendation Rec(2004)6 of the Committee of Ministers on the improvement of domestic remedies;
- Resolution Res(2002)58 of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights;
- Resolution Res(2002)59 of the Committee of Ministers concerning the practice in respect of friendly settlements;
- Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem.

All these instruments, as well as this protocol, are referred to in the general declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels", adopted on 12 May 2004.

(5) Paragraph 16 of the resolution.

- (6) Paragraph 18 ii. of the resolution.
- (7) Declaration of the Rome Ministerial Conference on Human Rights: "The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?".
- (8) "Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights", Strasbourg, Council of Europe, 27 September 2001, published in the *Human Rights Law Journal (HRLJ)*, 22, 2001, pp. 308 ff.
- (9) The "Report of the Reflection Group on the Reinforcement of the Human Rights Protection Mechanism" is contained in Appendix III to the "Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights" (op. cit.).
- (10) "Three years' work for the future. Final report of the Working Party on Working Methods of the European Court of Human Rights", Strasbourg, Council of Europe, 2002.
- (11) Declaration published in French in the *Revue universelle des droits de l'homme (RUDH)* 2002, p. 331.
- (12) Declaration published in French in the *Revue universelle des droits de l'homme (RUDH)* 2002, p. 331.
- (13) See, for a fuller overview, the activity report of the CDDH's Reflection group (document CDDH-GDR(2001)10, especially its Appendices I and II), the report of the Evaluation group (see footnote 8 above) as well as the CDDH's interim report of October 2002 (document CM(2002)146) which contains a discussion of various suggestions made at the Seminar on Partners for the Protection of Human Rights: Reinforcing Interaction between the European Court of Human Rights and National Courts (Strasbourg, 9-10 September 2002).
- (14) Unless otherwise specified, the references to articles are to the Convention as amended by the protocol.
- (15) The Council of Europe Commissioner for Human Rights was established by Resolution (99) 50, adopted by the Committee of Ministers on 7 May 1999.
- (16) See, in this connection, Resolution Res(2002)59 concerning the practice in respect of friendly settlements (adopted by the Committee of Ministers on 18 December 2002, at the Deputies' 822nd meeting).
- (17) See paragraphs 19 to 22 of the resolution.



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

# RULES OF COURT

(July 2006)

**REGISTRY OF THE COURT**

STRASBOURG

### **Note by the Registry**

This new edition of the Rules of Court includes the amendments adopted by the plenary Court on 29 May 2006 which enter into force on 1 July 2006.

Any additional texts and updates will be made public on the Court's website ([www.echr.coe.int](http://www.echr.coe.int)).

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The European Court of Human Rights,

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto,

Makes the present Rules:

*Rule 1<sup>1</sup>*  
(Definitions)

For the purposes of these Rules unless the context otherwise requires:

(a) the term “Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;

(b) the expression “plenary Court” means the European Court of Human Rights sitting in plenary session;

(c) the expression “Grand Chamber” means the Grand Chamber of seventeen judges constituted in pursuance of Article 27 § 1 of the Convention;

(d) the term “Section” means a Chamber set up by the plenary Court for a fixed period in pursuance of Article 26 (b) of the Convention and the expression “President of the Section” means the judge elected by the plenary Court in pursuance of Article 26 (c) of the Convention as President of such a Section;

(e) the term “Chamber” means any Chamber of seven judges constituted in pursuance of Article 27 § 1 of the Convention and the expression “President of the Chamber” means the judge presiding over such a “Chamber”;

(f) the term “Committee” means a Committee of three judges set up in pursuance of Article 27 § 1 of the Convention;

(g) the term “Court” means either the plenary Court, the Grand Chamber, a Section, a Chamber, a Committee or the panel of five judges referred to in Article 43 § 2 of the Convention;

(h) the expression “*ad hoc* judge” means any person, other than an elected judge, chosen by a Contracting Party in pursuance of Article 27 § 2 of the Convention to sit as a member of the Grand Chamber or as a member of a Chamber;

(i) the terms “judge” and “judges” mean the judges elected by the Parliamentary Assembly of the Council of Europe or *ad hoc* judges;

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1. As amended by the Court on 7 July 2003.

(j) the expression “Judge Rapporteur” means a judge appointed to carry out the tasks provided for in Rules 48 and 49;

(k) the term “delegate” means a judge who has been appointed to a delegation by the Chamber and the expression “head of the delegation” means the delegate appointed by the Chamber to lead its delegation;

(l) the term “delegation” means a body composed of delegates, Registry members and any other person appointed by the Chamber to assist the delegation;

(m) the term “Registrar” denotes the Registrar of the Court or the Registrar of a Section according to the context;

(n) the terms “party” and “parties” mean

- the applicant or respondent Contracting Parties;
- the applicant (the person, non-governmental organisation or group of individuals) that lodged a complaint under Article 34 of the Convention;

(o) the expression “third party” means any Contracting Party or any person concerned who, as provided for in Article 36 §§ 1 and 2 of the Convention, has exercised its right or been invited to submit written comments or take part in a hearing;

(p) the terms “hearing” and “hearings” mean oral proceedings held on the admissibility and/or merits of an application or held in connection with a request for revision, interpretation or an advisory opinion;

(q) the expression “Committee of Ministers” means the Committee of Ministers of the Council of Europe;

(r) the terms “former Court” and “Commission” mean respectively the European Court and European Commission of Human Rights set up under former Article 19 of the Convention.

## TITLE I

**ORGANISATION AND WORKING OF THE COURT**

## Chapter I

**Judges***Rule 2*

## (Calculation of term of office)

1. The duration of the term of office of an elected judge shall be calculated as from the date of election. However, when a judge is re-elected on the expiry of the term of office or is elected to replace a judge whose term of office has expired or is about to expire, the duration of the term of office shall, in either case, be calculated as from the date of such expiry.
2. In accordance with Article 23 § 5 of the Convention, a judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. In accordance with Article 23 § 7 of the Convention, an elected judge shall hold office until a successor has taken the oath or made the declaration provided for in Rule 3.

*Rule 3*

## (Oath or solemn declaration)

1. Before taking up office, each elected judge shall, at the first sitting of the plenary Court at which the judge is present or, in case of need, before the President of the Court, take the following oath or make the following solemn declaration:

“I swear” – or “I solemnly declare” – “that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations.”

2. This act shall be recorded in minutes.

*Rule 4*

## (Incompatible activities)

In accordance with Article 21 § 3 of the Convention, the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court.

*Rule 5*  
(Precedence)

1. Elected judges shall take precedence after the President and Vice-Presidents of the Court and the Presidents of the Sections, according to the date of their election; in the event of re-election, even if it is not an immediate re-election, the length of time during which the judge concerned previously held office as a judge shall be taken into account.
2. Vice-Presidents of the Court elected to office on the same date shall take precedence according to the length of time they have served as judges. If the length of time they have served as judges is the same, they shall take precedence according to age. The same rule shall apply to Presidents of Sections.
3. Judges who have served the same length of time as judges shall take precedence according to age.
4. *Ad hoc* judges shall take precedence after the elected judges according to age.

*Rule 6*  
(Resignation)

Resignation of a judge shall be notified to the President of the Court, who shall transmit it to the Secretary General of the Council of Europe. Subject to the provisions of Rules 24 § 4 in fine and 26 § 3, resignation shall constitute vacation of office.

*Rule 7*  
(Dismissal from office)

No judge may be dismissed from his or her office unless the other judges, meeting in plenary session, decide by a majority of two-thirds of the elected judges in office that he or she has ceased to fulfil the required conditions. He or she must first be heard by the plenary Court. Any judge may set in motion the procedure for dismissal from office.

## Chapter II<sup>1</sup>

### **Presidency of the Court and the role of the Bureau**

#### *Rule 8<sup>2</sup>*

(Election of the President and Vice-Presidents of the Court and the Presidents and Vice-Presidents of the Sections)

1. The plenary Court shall elect its President, two Vice-Presidents and the Presidents of the Sections for a period of three years, provided that such period shall not exceed the duration of their terms of office as judges.
2. Each Section shall likewise elect for a period of three years a Vice-President, who shall replace the President of the Section if the latter is unable to carry out his or her duties.
3. A judge elected in accordance with paragraphs 1 or 2 above may be re-elected but only once to the same level of office. This limitation on the number of terms of office shall not prevent a judge holding an office as described above on the date of the entry into force<sup>3</sup> of the present amendment to Rule 8 from being re-elected once to the same level of office.
4. The Presidents and Vice-Presidents shall continue to hold office until the election of their successors.
5. The elections referred to in this Rule shall be by secret ballot. Only the elected judges who are present shall take part. If no candidate receives an absolute majority of the elected judges present, an additional round or rounds shall take place until one candidate has achieved an absolute majority. At each round the candidate who has received the least number of votes shall be eliminated. If more than one candidate has received the least number of votes, only the candidate who is lowest in the order of precedence in accordance with Rule 5 shall be eliminated. In the event of a tie between two candidates in the final round, preference shall be given to the judge having precedence in accordance with Rule 5.

#### *Rule 9*

(Functions of the President of the Court)

1. The President of the Court shall direct the work and administration of the Court. The President shall represent the Court and, in particular, be responsible for its relations with the authorities of the Council of Europe.
2. The President shall preside at plenary meetings of the Court, meetings of the Grand Chamber and meetings of the panel of five judges.
3. The President shall not take part in the consideration of cases being heard by Chambers except where he or she is the judge elected in respect of a Contracting Party concerned.

---

1. As amended by the Court on 7 July 2003.

2. As amended by the Court on 7 November 2005.

3. 1 December 2005

*Rule 9A<sup>1</sup>*  
(Role of the Bureau)

1. (a) The Court shall have a Bureau, composed of the President of the Court, the Vice-Presidents of the Court and the Section Presidents. Where a Vice-President or a Section President is unable to attend a Bureau meeting, he/she shall be replaced by the Section Vice-President or, failing that, by the next most senior member of the Section according to the order of precedence established in Rule 5.

(b) The Bureau may request the attendance of any other member of the Court or any other person whose presence it considers necessary.

2. The Bureau shall be assisted by the Registrar and the Deputy Registrars.

3. The Bureau's task shall be to assist the President in carrying out his/her function in directing the work and administration of the Court. To this end the President may submit to the Bureau any administrative or extra-judicial matter which falls within his/her competence.

4. The Bureau shall also facilitate co-ordination between the Court's Sections.

5. The President may consult the Bureau before issuing practice directions under Rule 32 and before approving general instructions drawn up by the Registrar under Rule 17 § 4.

6. The Bureau may report on any matter to the Plenary. It may also make proposals to the Plenary.

7. A record shall be kept of the Bureau's meetings and distributed to the Judges in both the Court's official languages. The secretary to the Bureau shall be designated by the Registrar in agreement with the President.

*Rule 10*  
(Functions of the Vice-Presidents of the Court)

The Vice-Presidents of the Court shall assist the President of the Court. They shall take the place of the President if the latter is unable to carry out his or her duties or the office of President is vacant, or at the request of the President. They shall also act as Presidents of Sections.

*Rule 11*  
(Replacement of the President and the Vice-Presidents of the Court)

If the President and the Vice-Presidents of the Court are at the same time unable to carry out their duties or if their offices are at the same time vacant, the office of President of the Court shall be assumed by a President of a Section or, if none is available, by another elected judge, in accordance with the order of precedence provided for in Rule 5.

---

1. Inserted by the Court on 7 July 2003.

*Rule 12<sup>1</sup>*  
(Presidency of Sections and Chambers)

The Presidents of the Sections shall preside at the sittings of the Section and Chambers of which they are members and shall direct the Sections' work. The Vice-Presidents of the Sections shall take their place if they are unable to carry out their duties or if the office of President of the Section concerned is vacant, or at the request of the President of the Section. Failing that, the judges of the Section and the Chambers shall take their place, in the order of precedence provided for in Rule 5.

*Rule 13<sup>2</sup>*  
(Inability to preside)

Judges of the Court may not preside in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party, or in cases where they sit as a judge appointed by virtue of Rule 29 § 1(a) or Rule 30 § 1 of these Rules.

*Rule 14*  
(Balanced representation of the sexes)

In relation to the making of appointments governed by this and the following chapter of the present Rules, the Court shall pursue a policy aimed at securing a balanced representation of the sexes.

---

1. As amended by the Court on 17 June and 8 July 2002.  
2. As amended by the Court on 4 July 2005.

### Chapter III

#### **The Registry**

##### *Rule 15*

##### (Election of the Registrar)

1. The plenary Court shall elect its Registrar. The candidates shall be of high moral character and must possess the legal, managerial and linguistic knowledge and experience necessary to carry out the functions attaching to the post.
2. The Registrar shall be elected for a term of five years and may be re-elected. The Registrar may not be dismissed from office, unless the judges, meeting in plenary session, decide by a majority of two-thirds of the elected judges in office that the person concerned has ceased to fulfil the required conditions. He or she must first be heard by the plenary Court. Any judge may set in motion the procedure for dismissal from office.
3. The elections referred to in this Rule shall be by secret ballot; only the elected judges who are present shall take part. If no candidate receives an absolute majority of the elected judges present, a ballot shall take place between the two candidates who have received most votes. In the event of a tie, preference shall be given, firstly, to the female candidate, if any, and, secondly, to the older candidate.
4. Before taking up office, the Registrar shall take the following oath or make the following solemn declaration before the plenary Court or, if need be, before the President of the Court:

“I swear” – or “I solemnly declare” – “that I will exercise loyally, discreetly and conscientiously the functions conferred upon me as Registrar of the European Court of Human Rights.”

This act shall be recorded in minutes.

##### *Rule 16*

##### (Election of the Deputy Registrars)

1. The plenary Court shall also elect two Deputy Registrars on the conditions and in the manner and for the term prescribed in the preceding Rule. The procedure for dismissal from office provided for in respect of the Registrar shall likewise apply. The Court shall first consult the Registrar in both these matters.
2. Before taking up office, a Deputy Registrar shall take an oath or make a solemn declaration before the plenary Court or, if need be, before the President of the Court, in terms similar to those prescribed in respect of the Registrar. This act shall be recorded in minutes.



*Rule 17*  
(Functions of the Registrar)

1. The Registrar shall assist the Court in the performance of its functions and shall be responsible for the organisation and activities of the Registry under the authority of the President of the Court.
2. The Registrar shall have the custody of the archives of the Court and shall be the channel for all communications and notifications made by, or addressed to, the Court in connection with the cases brought or to be brought before it.
3. The Registrar shall, subject to the duty of discretion attaching to this office, reply to requests for information concerning the work of the Court, in particular to enquiries from the press.
4. General instructions drawn up by the Registrar, and approved by the President of the Court, shall regulate the working of the Registry.

*Rule 18*  
(Organisation of the Registry)

1. The Registry shall consist of Section Registries equal to the number of Sections set up by the Court and of the departments necessary to provide the legal and administrative services required by the Court.
2. The Section Registrar shall assist the Section in the performance of its functions and may be assisted by a Deputy Section Registrar.
3. The officials of the Registry, including the legal secretaries but not the Registrar and the Deputy Registrars, shall be appointed by the Secretary General of the Council of Europe with the agreement of the President of the Court or of the Registrar acting on the President's instructions.

## Chapter IV

### **The Working of the Court**

#### *Rule 19*

##### (Seat of the Court)

1. The seat of the Court shall be at the seat of the Council of Europe at Strasbourg. The Court may, however, if it considers it expedient, perform its functions elsewhere in the territories of the member States of the Council of Europe.
2. The Court may decide, at any stage of the examination of an application, that it is necessary that an investigation or any other function be carried out elsewhere by it or one or more of its members.

#### *Rule 20*

##### (Sessions of the plenary Court)

1. The plenary sessions of the Court shall be convened by the President of the Court whenever the performance of its functions under the Convention and under these Rules so requires. The President of the Court shall convene a plenary session if at least one-third of the members of the Court so request, and in any event once a year to consider administrative matters.
2. The quorum of the plenary Court shall be two-thirds of the elected judges in office.
3. If there is no quorum, the President shall adjourn the sitting.

#### *Rule 21*

##### (Other sessions of the Court)

1. The Grand Chamber, the Chambers and the Committees shall sit full time. On a proposal by the President, however, the Court shall fix session periods each year.
2. Outside those periods the Grand Chamber and the Chambers shall be convened by their Presidents in cases of urgency.

#### *Rule 22*

##### (Deliberations)

1. The Court shall deliberate in private. Its deliberations shall remain secret.
2. Only the judges shall take part in the deliberations. The Registrar or the designated substitute, as well as such other officials of the Registry and interpreters whose assistance is deemed necessary, shall be present. No other person may be admitted except by special decision of the Court.

3. Before a vote is taken on any matter in the Court, the President may request the judges to state their opinions on it.

*Rule 23*  
(Votes)

1. The decisions of the Court shall be taken by a majority of the judges present. In the event of a tie, a fresh vote shall be taken and, if there is still a tie, the President shall have a casting vote. This paragraph shall apply unless otherwise provided for in these Rules.

2. The decisions and judgments of the Grand Chamber and the Chambers shall be adopted by a majority of the sitting judges. Abstentions shall not be allowed in final votes on the admissibility and merits of cases.

3. As a general rule, votes shall be taken by a show of hands. The President may take a roll-call vote, in reverse order of precedence.

4. Any matter that is to be voted upon shall be formulated in precise terms.

*Rule 23A<sup>1</sup>*  
Decision by tacit agreement

Where it is necessary for the Court to decide a point of procedure or any other question other than at a scheduled meeting of the Court, the President may direct that a draft decision be circulated to the judges and that a deadline be set for their comments on the draft. In the absence of any objection from a judge, the proposal shall be deemed to have been adopted at the expiry of the deadline.

---

1. Inserted by the Court on 13 December 2004.

## Chapter V

**The Composition of the Court***Rule 24<sup>1</sup>*

## (Composition of the Grand Chamber)

1. The Grand Chamber shall be composed of seventeen judges and at least three substitute judges.

2. (a) The Grand Chamber shall include the President and the Vice-Presidents of the Court and the Presidents of the Sections. Any Vice-President of the Court or President of a Section who is unable to sit as a member of the Grand Chamber shall be replaced by the Vice-President of the relevant Section.

(b) The judge elected in respect of the Contracting Party concerned or, where appropriate, the judge designated by virtue of Rule 29 or Rule 30 shall sit as an *ex officio* member of the Grand Chamber in accordance with Article 27 §§ 2 and 3 of the Convention.

(c) In cases referred to the Grand Chamber under Article 30 of the Convention, the Grand Chamber shall also include the members of the Chamber which relinquished jurisdiction.

(d) In cases referred to it under Article 43 of the Convention, the Grand Chamber shall not include any judge who sat in the Chamber which rendered the judgment in the case so referred, with the exception of the President of that Chamber and the judge who sat in respect of the State Party concerned, or any judge who sat in the Chamber or Chambers which ruled on the admissibility of the application.

(e) The judges and substitute judges who are to complete the Grand Chamber in each case referred to it shall be designated from among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar. The modalities for the drawing of lots shall be laid down by the Plenary Court, having due regard to the need for a geographically balanced composition reflecting the different legal systems among the Contracting Parties.

(f) In examining a request for an advisory opinion under Article 47 of the Convention, the Grand Chamber shall be constituted in accordance with the provisions of § 2 (a) and (e) of this Rule

3. If any judges are prevented from sitting, they shall be replaced by the substitute judges in the order in which the latter were selected under paragraph 2(e) of this Rule.

4. The judges and substitute judges designated in accordance with the above provisions shall continue to sit in the Grand Chamber for the consideration of the case until the proceedings have been completed. Even after the end of their terms of office, they shall continue to deal with the case if they have participated in the consideration of the merits. These provisions shall also apply to proceedings relating to advisory opinions.

---

1. As amended by the Court on 8 December 2000, 13 December 2004, 4 July 2005, 7 November 2005 and 29 May 2006.

5. (a) The panel of five judges of the Grand Chamber called upon to consider a request submitted under Article 43 of the Convention shall be composed of

- the President of the Court. If the President of the Court is prevented from sitting, he shall be replaced by the Vice-President of the Court taking precedence;
- two Presidents of Sections designated by rotation. If the Presidents of the Sections so designated are prevented from sitting, they shall be replaced by the Vice-Presidents of their Sections;
- two judges designated by rotation from among the judges elected by the remaining Sections to sit on the panel for a period of six months;
- at least two substitute judges designated in rotation from among the judges elected by the Sections to serve on the panel for a period of six months.

(b) When considering a referral request, the panel shall not include any judge who took part in the consideration of the admissibility or merits of the case in question.

(c) No judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request may be a member of the panel when it examines that request. An elected judge appointed by the Contracting Party concerned pursuant to Rules 29 or 30 shall likewise be excluded from consideration of any such request.

(d) Any member of the panel unable to sit, for the reasons set out in (b) or (c) shall be replaced by a substitute judge designated in rotation from among the judges elected by the Sections to serve on the panel for a period of six months.

*Rule 25*  
(Setting up of Sections)

1. The Chambers provided for in Article 26 (b) of the Convention (referred to in these Rules as “Sections”) shall be set up by the plenary Court, on a proposal by its President, for a period of three years with effect from the election of the presidential office-holders of the Court under Rule 8. There shall be at least four Sections.

2. Each judge shall be a member of a Section. The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties.

3. Where a judge ceases to be a member of the Court before the expiry of the period for which the Section has been constituted, the judge’s place in the Section shall be taken by his or her successor as a member of the Court.

4. The President of the Court may exceptionally make modifications to the composition of the Sections if circumstances so require.

5. On a proposal by the President, the plenary Court may constitute an additional Section.

*Rule 26<sup>1</sup>*  
(Constitution of Chambers)

1. The Chambers of seven judges provided for in Article 27 § 1 of the Convention for the consideration of cases brought before the Court shall be constituted from the Sections as follows.

(a) Subject to paragraph 2 of this Rule and to Rule 28 § 4, last sentence, the Chamber shall in each case include the President of the Section and the judge elected in respect of any Contracting Party concerned. If the latter judge is not a member of the Section to which the application has been assigned under Rule 51 or 52, he or she shall sit as an *ex officio* member of the Chamber in accordance with Article 27 § 2 of the Convention. Rule 29 shall apply if that judge is unable to sit or withdraws.

(b) The other members of the Chamber shall be designated by the President of the Section in rotation from among the members of the relevant Section.

(c) The members of the Section who are not so designated shall sit in the case as substitute judges.

2. The judge elected in respect of any Contracting Party concerned or, where appropriate, another elected judge or *ad hoc* judge appointed in accordance with Rules 29 and 30 may be dispensed by the President of the Chamber from attending meetings devoted to preparatory or procedural matters. For the purposes of such meetings the Contracting Party concerned shall be deemed to have appointed in place of that judge the first substitute judge, in accordance with Rule 29 § 1.

3. Even after the end of their terms of office judges shall continue to deal with cases in which they have participated in the consideration of the merits.

*Rule 27*  
(Committees)

1. Committees composed of three judges belonging to the same Section shall be set up under Article 27 § 1 of the Convention. After consulting the Presidents of the Sections, the President of the Court shall decide on the number of Committees to be set up.

2. The Committees shall be constituted for a period of twelve months by rotation among the members of each Section, excepting the President of the Section.

3. The judges of the Section who are not members of a Committee may be called upon to take the place of members who are unable to sit.

4. Each Committee shall be chaired by the member having precedence in the Section.

---

1. As amended by the Court on 17 June and 8 July 2002.

*Rule 28<sup>1</sup>*  
(Inability to sit, withdrawal or exemption)

1. Any judge who is prevented from taking part in sittings which he or she has been called upon to attend shall, as soon as possible, give notice to the President of the Chamber.
2. A judge may not take part in the consideration of any case if
  - (a) he or she has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;
  - (b) he or she has previously acted in the case, whether as the Agent, advocate or adviser of a party or of a person having an interest in the case, or as a member of another national or international tribunal or commission of inquiry, or in any other capacity;
  - (c) he or she, being an ad hoc judge or a former elected judge continuing to sit by virtue of Rule 26 § 3, engages in any political or administrative activity or any professional activity which is incompatible with his or her independence or impartiality;
  - (d) he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality;
  - (e) for any other reason, his or her independence or impartiality may legitimately be called into doubt.
3. If a judge withdraws for one of the said reasons he or she shall notify the President of the Chamber, who shall exempt the judge from sitting.
4. In the event of any doubt on the part of the judge concerned or the President as to the existence of one of the grounds referred to in paragraph 2 of this Rule, that issue shall be decided by the Chamber. After hearing the views of the judge concerned, the Chamber shall deliberate and vote, without that judge being present. For the purposes of the Chamber's deliberations and vote on this issue, he or she shall be replaced by the first substitute judge in the Chamber. The same shall apply if the judge sits in respect of any Contracting Party concerned. In that event, the Contracting Party concerned shall be deemed to have appointed the first substitute judge to sit in his or her stead, in accordance with Rule 29 § 1.
5. The provisions above shall apply also to a judge's participation in a Committee, save that the notice required under paragraph 1 or 3 shall be given to the President of the Section.

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1. As amended by the Court on 17 June and 8 July 2002 and 13 December 2004.

*Rule 29<sup>1</sup>*  
(*Ad hoc* judges)

1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall invite that Party to indicate within thirty days whether it wishes to appoint to sit as judge either another elected judge or an *ad hoc* judge and, if so, to state at the same time the name of the person appointed.

(b) The same rule shall apply if the person so appointed is unable to sit or withdraws.

(c) An *ad hoc* judge shall possess the qualifications required by Article 21 § 1 of the Convention, must not be unable to sit in the case on any of the grounds referred to in Rule 28 of these Rules, and must be in a position to meet the demands of availability and attendance provided for in paragraph 5 of this Rule.

2. The Contracting Party concerned shall be presumed to have waived its right of appointment if it does not reply within thirty days or by the end of any extension of that time granted by the President of the Chamber. The Contracting Party concerned shall also be presumed to have waived its right of appointment if it twice appoints as *ad hoc* judge persons who the Chamber finds do not satisfy the conditions laid down in paragraph 1 (c) of this Rule.

3. The President of the Chamber may decide not to invite the Contracting Party concerned to make an appointment under paragraph 1 (a) of this Rule until notice of the application is given to it under Rule 54 § 2 of these Rules. In that event, pending any appointment by it, the Contracting Party concerned shall be deemed to have appointed the first substitute judge to sit in place of the elected judge.

4. An *ad hoc* judge shall, at the beginning of the first sitting held to consider the case after the judge has been appointed, take the oath or make the solemn declaration provided for in Rule 3. This act shall be recorded in minutes.

5. *Ad hoc* judges are required to make themselves available to the Court and, subject to Rule 26 § 2, to attend the meetings of the Chamber.

*Rule 30<sup>2</sup>*  
(Common interest)

1. If two or more applicant or respondent Contracting Parties have a common interest, the President of the Chamber may invite them to agree to appoint a single judge elected in respect of one of the Contracting Parties concerned as common-interest judge who will be called upon to sit *ex officio*. If the Parties are unable to agree, the President shall choose the common-interest judge by lot from the judges proposed by the Parties.

---

1. As amended by the Court on 17 June and 8 July 2002.  
2. As amended by the Court on 7 July 2003.



2. The President of the Chamber may decide not to invite the Contracting Parties concerned to make an appointment under paragraph 1 of this Rule until notice of the application has been given under Rule 54 § 2 of these Rules.

3. In the event of a dispute as to the existence of a common interest or as to any related matter, the Chamber shall decide, if necessary after obtaining written submissions from the Contracting Parties concerned.

## TITLE II

**PROCEDURE**

## Chapter I

**General Rules***Rule 31*

(Possibility of particular derogations)

The provisions of this Title shall not prevent the Court from derogating from them for the consideration of a particular case after having consulted the parties where appropriate.

*Rule 32*

(Practice directions)

The President of the Court may issue practice directions, notably in relation to such matters as appearance at hearings and the filing of pleadings and other documents.

*Rule 33<sup>1</sup>*

(Public character of documents)

1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except those deposited within the framework of friendly-settlement negotiations as provided for in Rule 62, shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise, either of his or her own motion or at the request of a party or any other person concerned.
2. Public access to a document or to any part of it may be restricted 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 President in special circumstances where publicity would prejudice the interests of justice.
3. Any request for confidentiality made under paragraph 1 of this Rule must include reasons and specify whether it is requested that all or part of the documents be inaccessible to the public.
4. Decisions and judgments given by a Chamber shall be accessible to the public. The Court shall periodically make accessible to the public general information about decisions taken by Committees under Rule 53 § 2.

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1. As amended by the Court on 17 June and 8 July 2002, 7 July 2003 and 4 July 2005.

*Rule 34<sup>1</sup>*  
(Use of languages)

1. The official languages of the Court shall be English and French.
2. In connection with applications lodged under Article 34 of the Convention, and for as long as no Contracting Party has been given notice of such an application in accordance with these Rules, all communications with and oral and written submissions by applicants or their representatives, if not in one of the Court's official languages, shall be in one of the official languages of the Contracting Parties. If a Contracting Party is informed or given notice of an application in accordance with these Rules, the application and any accompanying documents shall be communicated to that State in the language in which they were lodged with the Registry by the applicant.
3.
  - (a) All communications with and oral and written submissions by applicants or their representatives in respect of a hearing, or after notice of an application has been given to a Contracting Party, shall be in one of the Court's official languages, unless the President of the Chamber grants leave for the continued use of the official language of a Contracting Party.
  - (b) If such leave is granted, the Registrar shall make the necessary arrangements for the interpretation and translation into English or French of the applicant's oral and written submissions respectively, in full or in part, where the President of the Chamber considers it to be in the interests of the proper conduct of the proceedings.
  - (c) Exceptionally the President of the Chamber may make the grant of leave subject to the condition that the applicant bear all or part of the costs of making such arrangements.
  - (d) Unless the President of the Chamber decides otherwise, any decision made under the foregoing provisions of this paragraph shall remain valid in all subsequent proceedings in the case, including those in respect of requests for referral of the case to the Grand Chamber and requests for interpretation or revision of a judgment under Rules 73, 79 and 80 respectively.
4.
  - (a) All communications with and oral and written submissions by a Contracting Party which is a party to the case shall be in one of the Court's official languages. The President of the Chamber may grant the Contracting Party concerned leave to use one of its official languages for its oral and written submissions.
  - (b) If such leave is granted, it shall be the responsibility of the requesting Party
    - (i) to file a translation of its written submissions into one of the official languages of the Court within a time-limit to be fixed by the President of the Chamber. Should that Party not file the translation within that time-limit, the Registrar may make the necessary arrangements for such translation, the expenses to be charged to the requesting Party;

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1. As amended by the Court on 13 December 2004.

(ii) to bear the expenses of interpreting its oral submissions into English or French. The Registrar shall be responsible for making the necessary arrangements for such interpretation.

(c) The President of the Chamber may direct that a Contracting Party which is a party to the case shall, within a specified time, provide a translation into, or a summary in, English or French of all or certain annexes to its written submissions or of any other relevant document, or of extracts therefrom.

(d) The preceding sub-paragraphs of this paragraph shall also apply, *mutatis mutandis*, to third-party intervention under Rule 44 of these Rules and to the use of a non-official language by a third party.

5. The President of the Chamber may invite the respondent Contracting Party to provide a translation of its written submissions in the or an official language of that Party in order to facilitate the applicant's understanding of those submissions.

6. Any witness, expert or other person appearing before the Court may use his or her own language if he or she does not have sufficient knowledge of either of the two official languages. In that event the Registrar shall make the necessary arrangements for interpreting or translation.

#### *Rule 35*

#### (Representation of Contracting Parties)

The Contracting Parties shall be represented by Agents, who may have the assistance of advocates or advisers.

#### *Rule 36<sup>1</sup>*

#### (Representation of applicants)

1. Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention themselves or through a representative.

2. Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise.

3. The applicant must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative.

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1. As amended by the Court on 7 July 2003.

4. (a) The representative acting on behalf of the applicant pursuant to paragraphs 2 and 3 of this Rule shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber.

(b) In exceptional circumstances and at any stage of the procedure, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed under the preceding sub-paragraph so warrant, direct that the latter may no longer represent or assist the applicant and that the applicant should seek alternative representation.

5. (a) The advocate or other approved representative, or the applicant in person who seeks leave to present his or her own case, must even if leave is granted under the following sub-paragraph, have an adequate understanding of one of the Court's official languages.

(b) If he or she does not have sufficient proficiency to express himself or herself in one of the Court's official languages, leave to use one of the official languages of the Contracting Parties may be given by the President of the Chamber under Rule 34 § 3.

#### *Rule 37<sup>1</sup>*

(Communications, notifications and summonses)

1. Communications or notifications addressed to the Agents or advocates of the parties shall be deemed to have been addressed to the parties.

2. If, for any communication, notification or summons addressed to persons other than the Agents or advocates of the parties, the Court considers it necessary to have the assistance of the Government of the State on whose territory such communication, notification or summons is to have effect, the President of the Court shall apply directly to that Government in order to obtain the necessary facilities.

#### *Rule 38*

(Written pleadings)

1. No written observations or other documents may be filed after the time-limit set by the President of the Chamber or the Judge Rapporteur, as the case may be, in accordance with these Rules. No written observations or other documents filed outside that time-limit or contrary to any practice direction issued under Rule 32 shall be included in the case file unless the President of the Chamber decides otherwise.

2. For the purposes of observing the time-limit referred to in paragraph 1 of this Rule, the material date is the certified date of dispatch of the document or, if there is none, the actual date of receipt at the Registry.

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1. As amended by the Court on 7 July 2003.

*Rule 38A<sup>1</sup>*  
(Examination of matters of procedure)

Questions of procedure requiring a decision by the Chamber shall be considered simultaneously with the examination of the case, unless the President of the Chamber decides otherwise.

*Rule 39*  
(Interim measures)

1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

*Rule 40*  
(Urgent notification of an application)

In any case of urgency the Registrar, with the authorisation of the President of the Chamber, may, without prejudice to the taking of any other procedural steps and by any available means, inform a Contracting Party concerned in an application of the introduction of the application and of a summary of its objects.

*Rule 41<sup>2</sup>*  
(Case priority)

Applications shall be dealt with in the order in which they become ready for examination. The Chamber or its President may, however, decide to give priority to a particular application.

*Rule 42 (former 43)*  
(Joinder and simultaneous examination of applications)

1. The Chamber may, either at the request of the parties or of its own motion, order the joinder of two or more applications.
2. The President of the Chamber may, after consulting the parties, order that the proceedings in applications assigned to the same Chamber be conducted simultaneously, without prejudice to the decision of the Chamber on the joinder of the applications.

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1. Inserted by the Court on 17 June and 8 July 2002.  
2. As amended by the Court on 17 June and 8 July 2002.

*Rule 43<sup>1</sup> (former 44)*  
(Striking out and restoration to the list)

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases in accordance with Article 37 of the Convention.
2. When an applicant Contracting Party notifies the Registrar of its intention not to proceed with the case, the Chamber may strike the application out of the Court's list under Article 37 of the Convention if the other Contracting Party or Parties concerned in the case agree to such discontinuance.
3. The decision to strike out an application which has been declared admissible shall be given in the form of a judgment. The President of the Chamber shall forward that judgment, once it has become final, to the Committee of Ministers in order to allow the latter to supervise, in accordance with Article 46 § 2 of the Convention, the execution of any undertakings which may have been attached to the discontinuance, friendly settlement or solution of the matter.
4. When an application has been struck out, the costs shall be at the discretion of the Court. If an award of costs is made in a decision striking out an application which has not been declared admissible, the President of the Chamber shall forward the decision to the Committee of Ministers.
5. The Court may restore an application to its list if it considers that exceptional circumstances justify such a course.

*Rule 44<sup>2</sup>*  
(Third-party intervention)

1. (a) When notice of an application lodged under Article 34 of the Convention is given to the respondent Contracting Party under Rule 54 § 2 (b), a copy of the application shall at the same time be transmitted by the Registrar to any other Contracting Party one of whose nationals is an applicant in the case. The Registrar shall similarly notify any such Contracting Party of a decision to hold an oral hearing in the case.  
  
(b) If a Contracting Party wishes to exercise its right under Article 36 § 1 of the Convention to submit written comments or to take part in a hearing, it shall so advise the Registrar in writing not later than twelve weeks after the transmission or notification referred to in the preceding sub-paragraph. Another time limit may be fixed by the President of the Chamber for exceptional reasons.
2. (a) Once notice of an application has been given to the respondent Contracting Party under Rule 51 § 1 or Rule 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.

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1. As amended by the Court on 17 June and 8 July 2002 and on 7 July 2003.  
2. As amended by the Court on 7 July 2003.

(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time limit may be fixed by the President of the Chamber for exceptional reasons.

3. (a) In cases to be considered by the Grand Chamber the periods of time prescribed in the preceding paragraphs shall run from the notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.

(b) The time-limits laid down in this Rule may exceptionally be extended by the President of the Chamber if sufficient cause is shown.

4. Any invitation or grant of leave referred to in paragraph 2 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.

5. Written comments submitted under this Rule shall be drafted in one of the official languages as provided in Rule 34 § 4. They shall be forwarded by the Registrar to the parties to the case, who shall be entitled, subject to any conditions, including time-limits, set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

*Rule 44A<sup>1</sup>*

(Duty to cooperate with the Court)

The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting State not party to the proceedings where such cooperation is necessary.

*Rule 44B<sup>1</sup>*

(Failure to comply with an order of the Court)

Where a party fails to comply with an order of the Court concerning the conduct of the proceedings, the President of the Chamber may take any steps which he or she considers appropriate.

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1. Inserted by the Court on 13 December 2004.



*Rule 44C<sup>1</sup>*  
(Failure to participate effectively)

1. Where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.
2. Failure or refusal by a respondent Contracting Party to participate effectively in the proceedings shall not, in itself, be a reason for the Chamber to discontinue the examination of the application.

*Rule 44D<sup>1</sup>*  
(Inappropriate submissions by a party)

If the representative of a party makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may exclude that representative from the proceedings, refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention.

*Rule 44E<sup>1</sup>*  
(Failure to pursue an application)

In accordance with Article 37 § 1 (a) of the Convention, if an applicant Contracting Party or an individual applicant fails to pursue the application, the Chamber may strike the application out of the Court's list under Rule 43 of these Rules.

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1. Inserted by the Court on 13 December 2004.

## Chapter II

### **Institution of Proceedings**

#### *Rule 45* (Signatures)

1. Any application made under Articles 33 or 34 of the Convention shall be submitted in writing and shall be signed by the applicant or by the applicant's representative.
2. Where an application is made by a non-governmental organisation or by a group of individuals, it shall be signed by those persons competent to represent that organisation or group. The Chamber or Committee concerned shall determine any question as to whether the persons who have signed an application are competent to do so.
3. Where applicants are represented in accordance with Rule 36, a power of attorney or written authority to act shall be supplied by their representative or representatives.

#### *Rule 46* (Contents of an inter-State application)

Any Contracting Party or Parties intending to bring a case before the Court under Article 33 of the Convention shall file with the Registry an application setting out

- (a) the name of the Contracting Party against which the application is made;
- (b) a statement of the facts;
- (c) a statement of the alleged violation(s) of the Convention and the relevant arguments;
- (d) a statement on compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention;
- (e) the object of the application and a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or parties; and
- (f) the name and address of the person(s) appointed as Agent;

and accompanied by

- (g) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

*Rule 47<sup>1</sup>*  
(Contents of an individual application)

1. Any application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the President of the Section concerned decides otherwise. It shall set out

- (a) the name, date of birth, nationality, sex, occupation and address of the applicant;
- (b) the name, occupation and address of the representative, if any;
- (c) the name of the Contracting Party or Parties against which the application is made;
- (d) a succinct statement of the facts;
- (e) a succinct statement of the alleged violation(s) of the Convention and the relevant arguments;
- (f) a succinct statement on the applicant's compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention; and
- (g) the object of the application;

and be accompanied by

- (h) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

2. Applicants shall furthermore

- (a) provide information, notably the documents and decisions referred to in paragraph 1 (h) of this Rule, enabling it to be shown that the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention have been satisfied; and

- (b) indicate whether they have submitted their complaints to any other procedure of international investigation or settlement.

3. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The President of the Chamber may authorise anonymity in exceptional and duly justified cases.

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1. As amended by the Court on 17 June and 8 July 2002.

4. Failure to comply with the requirements set out in paragraphs 1 and 2 of this Rule may result in the application not being examined by the Court.

5. The date of introduction of the application shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application. The Court may for good cause nevertheless decide that a different date shall be considered to be the date of introduction.

6. Applicants shall keep the Court informed of any change of address and of all circumstances relevant to the application.

### Chapter III

#### **Judge Rapporteurs**

*Rule 48<sup>1</sup>*  
(Inter-State applications)

1. Where an application is made under Article 33 of the Convention, the Chamber constituted to consider the case shall designate one or more of its judges as Judge Rapporteur(s), who shall submit a report on admissibility when the written observations of the Contracting Parties concerned have been received.
2. The Judge Rapporteur(s) shall submit such reports, drafts and other documents as may assist the Chamber and its President in carrying out their functions.

*Rule 49<sup>2</sup>*  
(Individual applications)

1. Where the material submitted by the applicant is on its own sufficient to disclose that the application is inadmissible or should be struck out of the list, the application shall be considered by a Committee unless there is some special reason to the contrary.
2. Where an application is made under Article 34 of the Convention and its examination by a Chamber seems justified, the President of the Section to which the case has been assigned shall designate a judge as Judge Rapporteur, who shall examine the application.
3. In their examination of applications Judge Rapporteurs
  - (a) may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant;
  - (b) shall, subject to the President of the Section directing that the case be considered by a Chamber, decide whether the application is to be considered by a Committee or by a Chamber;
  - (c) shall submit such reports, drafts and other documents as may assist the Chamber or its President in carrying out their functions.

*Rule 50*  
(Grand Chamber proceedings)

Where a case has been submitted to the Grand Chamber either under Article 30 or under Article 43 of the Convention, the President of the Grand Chamber shall designate as Judge Rapporteur(s) one or, in the case of an inter-State application, one or more of its members.

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1. As amended by the Court on 17 June and 8 July 2002.  
2. As amended by the Court on 4 July 2005.

## Chapter IV

### Proceedings on Admissibility

#### Inter-State applications

##### *Rule 51<sup>1</sup>*

(Assignment of applications and subsequent procedure)

1. When an application is made under Article 33 of the Convention, the President of the Court shall immediately give notice of the application to the respondent Contracting Party and shall assign the application to one of the Sections.
2. In accordance with Rule 26 § 1 (a), the judges elected in respect of the applicant and respondent Contracting Parties shall sit as *ex officio* members of the Chamber constituted to consider the case. Rule 30 shall apply if the application has been brought by several Contracting Parties or if applications with the same object brought by several Contracting Parties are being examined jointly under Rule 42.
3. On assignment of the case to a Section, the President of the Section shall constitute the Chamber in accordance with Rule 26 § 1 and shall invite the respondent Contracting Party to submit its observations in writing on the admissibility of the application. The observations so obtained shall be communicated by the Registrar to the applicant Contracting Party, which may submit written observations in reply.
4. Before the ruling on the admissibility of the application is given, the Chamber or its President may decide to invite the Parties to submit further observations in writing.
5. A hearing on the admissibility shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion.
6. Before fixing the written and, where appropriate, oral procedure, the President of the Chamber shall consult the Parties.

#### Individual applications

##### *Rule 52<sup>1</sup>*

(Assignment of applications to the Sections)

1. Any application made under Article 34 of the Convention shall be assigned to a Section by the President of the Court, who in so doing shall endeavour to ensure a fair distribution of cases between the Sections.

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1. As amended by the Court on 17 June and 8 July 2002.

2. The Chamber of seven judges provided for in Article 27 § 1 of the Convention shall be constituted by the President of the Section concerned in accordance with Rule 26 § 1.
3. Pending the constitution of a Chamber in accordance with paragraph 2 of this Rule, the President of the Section shall exercise any powers conferred on the President of the Chamber by these Rules.

*Rule 53<sup>1</sup>*  
(Procedure before a Committee)

1. The judge elected in respect of a respondent Contracting Party, if not a member of the Committee, may be invited to attend the deliberations of the Committee.
2. In accordance with Article 28 of the Convention, the Committee may, by a unanimous vote, declare inadmissible an application or strike it out of the Court's list of cases where such a decision can be taken without further examination. This decision shall be final. The applicant shall be informed of the Committee's decision by letter.
3. If no decision pursuant to paragraph 2 of this Rule is taken, the application shall be forwarded to the Chamber constituted under Rule 52 § 2 to examine the case.

*Rule 54<sup>2</sup>*  
(Procedure before a Chamber)

1. The Chamber may at once declare the application inadmissible or strike it out of the Court's list of cases.
2. Alternatively, the Chamber or its President may decide to
  - (a) request the parties to submit any factual information, documents or other material considered by the Chamber or its President to be relevant;
  - (b) give notice of the application to the respondent Contracting Party and invite that Party to submit written observations on the application and, upon receipt thereof, invite the applicant to submit observations in reply;
  - (c) invite the parties to submit further observations in writing.
3. Before taking its decision on the admissibility, the Chamber may decide, either at the request of a party or of its own motion, to hold a hearing if it considers that the discharge of its functions under the Convention so requires. In that event, unless the Chamber shall exceptionally decide otherwise, the parties shall also be invited to address the issues arising in relation to the merits of the application.

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1. As amended by the Court on 17 June and 8 July 2002 and 4 July 2005.  
2. As amended by the Court on 17 June and 8 July 2002.

*Rule 54A<sup>1</sup>*

(Joint examination of admissibility and merits)

1. When deciding to give notice of the application to the responding Contracting Party pursuant to Rule 54 § 2 (b), the Chamber may also decide to examine the admissibility and merits at the same time in accordance with Article 29 § 3 of the Convention. In such cases the parties shall be invited to include in their observations any submissions concerning just satisfaction and any proposals for a friendly settlement. The conditions laid down in Rules 60 and 62 shall apply *mutatis mutandis*.
2. If no friendly settlement or other solution is reached and the Chamber is satisfied, in the light of the parties' arguments, that the case is admissible and ready for a determination on the merits, it shall immediately adopt a judgment including the Chamber's decision on admissibility.
3. Where the Chamber considers it appropriate, it may, after informing the parties, proceed to the immediate adoption of a judgment incorporating the decision on admissibility without having previously applied the procedure referred to in § 1 above.

**Inter-State and individual applications***Rule 55*

(Pleas of inadmissibility)

Any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application submitted as provided in Rule 51 or 54, as the case may be.

*Rule 56<sup>2</sup>*

(Decision of a Chamber)

1. The decision of the Chamber shall state whether it was taken unanimously or by a majority and shall be accompanied or followed by reasons.
2. The decision of the Chamber shall be communicated by the Registrar to the applicant. It shall also be communicated to the Contracting Party or Parties concerned and to any third party where these have previously been informed of the application in accordance with the present Rules.

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1. Inserted by the Court on 17 June and 8 July 2002 and amended on 13 December 2004.  
2. As amended by the Court on 17 June and 8 July 2002.



*Rule 57<sup>1</sup>*  
(Language of the decision)

1. Unless the Court decides that a decision shall be given in both official languages, all decisions of Chambers shall be given either in English or in French.
2. Publication of such decisions in the official reports of the Court, as provided for in Rule 78, shall be in both official languages of the Court.

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1. As amended by the Court on 17 June and 8 July 2002.

## Chapter V

**Proceedings after the Admission of an Application***Rule 58<sup>1</sup>*  
(Inter-State applications)

1. Once the Chamber has decided to admit an application made under Article 33 of the Convention, the President of the Chamber shall, after consulting the Contracting Parties concerned, lay down the time-limits for the filing of written observations on the merits and for the production of any further evidence. The President may however, with the agreement of the Contracting Parties concerned, direct that a written procedure is to be dispensed with.
2. A hearing on the merits shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion. The President of the Chamber shall fix the oral procedure.

*Rule 59<sup>1</sup>*  
(Individual applications)

1. Once an application made under Article 34 of the Convention has been declared admissible, the Chamber or its President may invite the parties to submit further evidence and written observations.
2. Unless decided otherwise, the parties shall be allowed the same time for submission of their observations.
3. The Chamber may decide, either at the request of a party or of its own motion, to hold a hearing on the merits if it considers that the discharge of its functions under the Convention so requires.
4. The President of the Chamber shall, where appropriate, fix the written and oral procedure.

*Rule 60<sup>2</sup>*  
(Claims for just satisfaction)

1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.

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1. As amended by the Court on 17 June and 8 July 2002.  
2. As amended by the Court on 13 December 2004.

3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
4. The applicant's claims shall be transmitted to the respondent Government for comment.

*Rule 61 deleted*

*Rule 62<sup>1</sup>*  
(Friendly settlement)

1. Once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, shall enter into contact with the parties with a view to securing a friendly settlement of the matter in accordance with Article 38 § 1 (b) of the Convention. The Chamber shall take any steps that appear appropriate to facilitate such a settlement.
2. In accordance with Article 38 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.
3. If the Chamber is informed by the Registrar that the parties have agreed to a friendly settlement, it shall, after verifying that the settlement has been reached on the basis of respect for human rights as defined in the Convention and the Protocols thereto, strike the case out of the Court's list in accordance with Rule 43 § 3.
4. Paragraphs 2 and 3 apply *mutatis mutandis* to the procedure under Rule 54A.

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1. As amended by the Court on 17 June and 8 July 2002.

## Chapter VI

### Hearings

#### *Rule 63<sup>1</sup>*

(Public character of hearings)

1. Hearings shall be public unless, in accordance with paragraph 2 of this Rule, the Chamber in exceptional circumstances decides otherwise, either of its own motion or at the request of a party or any other person concerned.
2. The press and the public may be excluded from all or part of a hearing 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 Chamber in special circumstances where publicity would prejudice the interests of justice.
3. Any request for a hearing to be held in camera made under paragraph 1 of this Rule must include reasons and specify whether it concerns all or only part of the hearing.

#### *Rule 64<sup>1</sup>*

(Conduct of hearings)

1. The President of the Chamber shall organise and direct hearings and shall prescribe the order in which those appearing before the Chamber shall be called upon to speak.
2. Any Judge may put questions to any person appearing before the Chamber.

#### *Rule 65<sup>1</sup>*

(Failure to appear)

Where a party or any other person due to appear fails or declines to do so, the Chamber may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless proceed with the hearing.

*Rules 66 to 69 deleted*

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1. As amended by the Court on 7 July 2003.

*Rule 70<sup>1</sup>*  
(Verbatim record of a hearing)

1. If the President of the Chamber so directs, the Registrar shall be responsible for the making of a verbatim record of the hearing. Any such record shall include:
  - (a) the composition of the Chamber;
  - (b) a list of those appearing before the Chamber;
  - (c) the text of the submissions made, questions put and replies given;
  - (d) the text of any ruling delivered during the hearing;
2. If all or part of the verbatim record is in a non-official language, the Registrar shall arrange for its translation into one of the official languages.
3. The representatives of the parties shall receive a copy of the verbatim record in order that they may, subject to the control of the Registrar or the President of the Chamber, make corrections, but in no case may such corrections affect the sense and bearing of what was said. The Registrar shall lay down, in accordance with the instructions of the President of the Chamber, the time-limits granted for this purpose.
4. The verbatim record, once so corrected, shall be signed by the President of the Chamber and the Registrar and shall then constitute certified matters of record.

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1. As amended by the Court on 17 June and 8 July 2002.

## Chapter VII

**Proceedings before the Grand Chamber***Rule 71<sup>1</sup>*

(Applicability of procedural provisions)

1. Any provisions governing proceedings before the Chambers shall apply, *mutatis mutandis*, to proceedings before the Grand Chamber.
2. The powers conferred on a Chamber by Rules 54 § 3 and 59 § 3 in relation to the holding of a hearing may, in proceedings before the Grand Chamber, also be exercised by the President of the Grand Chamber.

*Rule 72*(Relinquishment of jurisdiction by a Chamber  
in favour of the Grand Chamber)

1. In accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this Rule. Reasons need not be given for the decision to relinquish.
2. The Registrar shall notify the parties of the Chamber's intention to relinquish jurisdiction. The parties shall have one month from the date of that notification within which to file at the Registry a duly reasoned objection. An objection which does not fulfil these conditions shall be considered invalid by the Chamber.

*Rule 73*

(Request by a party for referral of a case to the Grand Chamber)

1. In accordance with Article 43 of the Convention, any party to a case may exceptionally, within a period of three months from the date of delivery of the judgment of a Chamber, file in writing at the Registry a request that the case be referred to the Grand Chamber. The party shall specify in its request the serious question affecting the interpretation or application of the Convention or the Protocols thereto, or the serious issue of general importance, which in its view warrants consideration by the Grand Chamber.

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1. As amended by the Court on 17 June and 8 July 2002.

2. A panel of five judges of the Grand Chamber constituted in accordance with Rule 24 § 5 shall examine the request solely on the basis of the existing case file. It shall accept the request only if it considers that the case does raise such a question or issue. Reasons need not be given for a refusal of the request.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

## Chapter VIII

### Judgments

#### *Rule 74*

##### (Contents of the judgment)

1. A judgment as referred to in Articles 42 and 44 of the Convention shall contain
  - (a) the names of the President and the other judges constituting the Chamber concerned, and the name of the Registrar or the Deputy Registrar;
  - (b) the dates on which it was adopted and delivered;
  - (c) a description of the parties;
  - (d) the names of the Agents, advocates or advisers of the parties;
  - (e) an account of the procedure followed;
  - (f) the facts of the case;
  - (g) a summary of the submissions of the parties;
  - (h) the reasons in point of law;
  - (i) the operative provisions;
  - (j) the decision, if any, in respect of costs;
  - (k) the number of judges constituting the majority;
  - (l) where appropriate, a statement as to which text is authentic.
2. Any judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.

#### *Rule 75<sup>1</sup>*

##### (Ruling on just satisfaction)

1. Where the Chamber finds that there has been a violation of the Convention or the Protocols thereto, it shall give in the same judgment a ruling on the application of Article 41 of the Convention if a specific claim has been submitted in accordance with Rule 60 and the question is ready for decision; if the question is not ready for decision, the Chamber shall reserve it in whole or in part and shall fix the further procedure.

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1. As amended by the Court on 13 December 2004.



2. For the purposes of ruling on the application of Article 41 of the Convention, the Chamber shall, as far as possible, be composed of those judges who sat to consider the merits of the case. Where it is not possible to constitute the original Chamber, the President of the Court shall complete or compose the Chamber by drawing lots.

3. The Chamber may, when affording just satisfaction under Article 41 of the Convention, direct that if settlement is not made within a specified time, interest is to be payable on any sums awarded.

4. If the Court is informed that an agreement has been reached between the injured party and the Contracting Party liable, it shall verify the equitable nature of the agreement and, where it finds the agreement to be equitable, strike the case out of the list in accordance with Rule 43 § 3.

#### *Rule 76<sup>1</sup>*

(Language of the judgment)

1. Unless the Court decides that a judgment shall be given in both official languages, all judgments shall be given either in English or in French.

2. Publication of such judgments in the official reports of the Court, as provided for in Rule 78, shall be in both official languages of the Court.

#### *Rule 77*

(Signature, delivery and notification of the judgment)

1. Judgments shall be signed by the President of the Chamber and the Registrar.

2. The judgment may be read out at a public hearing by the President of the Chamber or by another judge delegated by him or her. The Agents and representatives of the parties shall be informed in due time of the date of the hearing. Otherwise the notification provided for in paragraph 3 of this Rule shall constitute delivery of the judgment.

3. The judgment shall be transmitted to the Committee of Ministers. The Registrar shall send certified copies to the parties, to the Secretary General of the Council of Europe, to any third party and to any other person directly concerned. The original copy, duly signed and sealed, shall be placed in the archives of the Court.

#### *Rule 78*

(Publication of judgments and other documents)

In accordance with Article 44 § 3 of the Convention, final judgments of the Court shall be published, under the responsibility of the Registrar, in an appropriate form. The Registrar shall in addition be responsible for the publication of official reports of selected judgments and decisions and of any document which the President of the Court considers it useful to publish.

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1. As amended by the Court on 17 June and 8 July 2002.

*Rule 79*

## (Request for interpretation of a judgment)

1. A party may request the interpretation of a judgment within a period of one year following the delivery of that judgment.
2. The request shall be filed with the Registry. It shall state precisely the point or points in the operative provisions of the judgment on which interpretation is required.
3. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber, the President of the Court shall complete or compose the Chamber by drawing lots.
4. If the Chamber does not refuse the request, the Registrar shall communicate it to the other party or parties and shall invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber shall also fix the date of the hearing should the Chamber decide to hold one. The Chamber shall decide by means of a judgment.

*Rule 80*

## (Request for revision of a judgment)

1. A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.
2. The request shall mention the judgment of which revision is requested and shall contain the information necessary to show that the conditions laid down in paragraph 1 of this Rule have been complied with. It shall be accompanied by a copy of all supporting documents. The request and supporting documents shall be filed with the Registry.
3. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber, the President of the Court shall complete or compose the Chamber by drawing lots.
4. If the Chamber does not refuse the request, the Registrar shall communicate it to the other party or parties and shall invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber shall also fix the date of the hearing should the Chamber decide to hold one. The Chamber shall decide by means of a judgment.

*Rule 81*  
(Rectification of errors in decisions and judgments)

Without prejudice to the provisions on revision of judgments and on restoration to the list of applications, the Court may, of its own motion or at the request of a party made within one month of the delivery of a decision or a judgment, rectify clerical errors, errors in calculation or obvious mistakes.

## Chapter IX

**Advisory Opinions***Rule 82*

In proceedings relating to advisory opinions the Court shall apply, in addition to the provisions of Articles 47, 48 and 49 of the Convention, the provisions which follow. It shall also apply the other provisions of these Rules to the extent to which it considers this to be appropriate.

*Rule 83<sup>1</sup>*

The request for an advisory opinion shall be filed with the Registrar. It shall state fully and precisely the question on which the opinion of the Court is sought, and also

(a) the date on which the Committee of Ministers adopted the decision referred to in Article 47 § 3 of the Convention;

(b) the names and addresses of the person or persons appointed by the Committee of Ministers to give the Court any explanations which it may require.

The request shall be accompanied by all documents likely to elucidate the question.

*Rule 84<sup>1</sup>*

1. On receipt of a request, the Registrar shall transmit a copy of it and of the accompanying documents to all members of the Court.

2. The Registrar shall inform the Contracting Parties that they may submit written comments on the request.

*Rule 85<sup>1</sup>*

1. The President of the Court shall lay down the time-limits for filing written comments or other documents.

2. Written comments or other documents shall be filed with the Registrar. The Registrar shall transmit copies of them to all the members of the Court, to the Committee of Ministers and to each of the Contracting Parties.

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1. As amended by the Court on 4 July 2005.

*Rule 86*

After the close of the written procedure, the President of the Court shall decide whether the Contracting Parties which have submitted written comments are to be given an opportunity to develop them at an oral hearing held for the purpose.

*Rule 87<sup>1</sup>*

1. A Grand Chamber shall be constituted to consider the request for an advisory opinion.
2. If the Grand Chamber considers that the request is not within its competence as defined in Article 47 of the Convention, it shall so declare in a reasoned decision.

*Rule 88<sup>1</sup>*

1. Reasoned decisions and advisory opinions shall be given by a majority vote of the Grand Chamber. They shall mention the number of judges constituting the majority.
2. Any judge may, if he or she so desires, attach to the reasoned decision or advisory opinion of the Court either a separate opinion, concurring with or dissenting from reasoned decision or advisory opinion, or a bare statement of dissent.

*Rule 89<sup>1</sup>*

The reasoned decision or advisory opinion may be read out in one of the two official languages by the President of the Grand Chamber, or by another judge delegated by the President, at a public hearing, prior notice having been given to the Committee of Ministers and to each of the Contracting Parties. Otherwise the notification provided for in Rule 90 shall constitute delivery of the opinion or reasoned decision.

*Rule 90<sup>1</sup>*

The advisory opinion or reasoned decision shall be signed by the President of the Grand Chamber and by the Registrar. The original copy, duly signed and sealed, shall be placed in the archives of the Court. The Registrar shall send certified copies to the Committee of Ministers, to the Contracting Parties and to the Secretary General of the Council of Europe.

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1. As amended by the Court on 4 July 2005.

## Chapter X

### Legal Aid

#### *Rule 91*

1. The President of the Chamber may, either at the request of an applicant having lodged an application under Article 34 of the Convention or of his or her own motion, grant free legal aid to the applicant in connection with the presentation of the case from the moment when observations in writing on the admissibility of that application are received from the respondent Contracting Party in accordance with Rule 54 § 2 (b), or where the time-limit for their submission has expired.

2. Subject to Rule 96, where the applicant has been granted legal aid in connection with the presentation of his or her case before the Chamber, that grant shall continue in force for the purposes of his or her representation before the Grand Chamber.

#### *Rule 92*

Legal aid shall be granted only where the President of the Chamber is satisfied

- (a) that it is necessary for the proper conduct of the case before the Chamber;
- (b) that the applicant has insufficient means to meet all or part of the costs entailed.

#### *Rule 93<sup>1</sup>*

1. In order to determine whether or not applicants have sufficient means to meet all or part of the costs entailed, they shall be required to complete a form of declaration stating their income, capital assets and any financial commitments in respect of dependants, or any other financial obligations. The declaration shall be certified by the appropriate domestic authority or authorities.

2. The President of the Chamber may invite the Contracting Party concerned to submit its comments in writing.

3. After receiving the information mentioned in paragraph 1 of this Rule, the President of the Chamber shall decide whether or not to grant legal aid. The Registrar shall inform the parties accordingly.

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<sup>1</sup> As amended by the Court on 29 May 2006.

*Rule 94*

1. Fees shall be payable to the advocates or other persons appointed in accordance with Rule 36 § 4. Fees may, where appropriate, be paid to more than one such representative.
2. Legal aid may be granted to cover not only representatives' fees but also travelling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative.

*Rule 95*

On a decision to grant legal aid, the Registrar shall fix

- (a) the rate of fees to be paid in accordance with the legal-aid scales in force;
- (b) the level of expenses to be paid.

*Rule 96*

The President of the Chamber may, if satisfied that the conditions stated in Rule 92 are no longer fulfilled, revoke or vary a grant of legal aid at any time.

## TITLE III

**TRANSITIONAL RULES**

*Rules 97 and 98 deleted*

*Rule 99*

(Relations between the Court and the Commission)

1. In cases brought before the Court under Article 5 §§ 4 and 5 of Protocol No. 11 to the Convention the Court may invite the Commission to delegate one or more of its members to take part in the consideration of the case before the Court.
2. In cases referred to in paragraph 1 of this Rule the Court shall take into consideration the report of the Commission adopted pursuant to former Article 31 of the Convention.
3. Unless the President of the Chamber decides otherwise, the said report shall be made available to the public through the Registrar as soon as possible after the case has been brought before the Court.
4. The remainder of the case file of the Commission, including all pleadings, in cases brought before the Court under Article 5 §§ 2 to 5 of Protocol No. 11 shall remain confidential unless the President of the Chamber decides otherwise.
5. In cases where the Commission has taken evidence but has been unable to adopt a report in accordance with former Article 31 of the Convention, the Court shall take into consideration the verbatim records, documentation and opinion of the Commission's delegations arising from such investigations.

*Rule 100*

(Chamber and Grand Chamber proceedings)

1. In cases referred to the Court under Article 5 § 4 of Protocol No. 11 to the Convention, a panel of the Grand Chamber constituted in accordance with Rule 24 § 6<sup>1</sup> shall determine, solely on the basis of the existing case file, whether a Chamber or the Grand Chamber is to decide the case.
2. If the case is decided by a Chamber, the judgment of the Chamber shall, in accordance with Article 5 § 4 of Protocol No. 11, be final and Rule 73 shall be inapplicable.
3. Cases transmitted to the Court under Article 5 § 5 of Protocol No. 11 shall be forwarded by the President of the Court to the Grand Chamber.
4. For each case transmitted to the Grand Chamber under Article 5 § 5 of Protocol No. 11, the Grand Chamber shall be completed by judges designated by rotation within one of the groups mentioned in Rule 24 § 3<sup>2</sup>, the cases being allocated to the groups on an alternate basis.

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1. Former version, before 8 December 2000.

2. As amended by the Court on 12 December 2004.



*Rule 101*  
(Grant of legal aid)

Subject to Rule 96, in cases brought before the Court under Article 5 §§ 2 to 5 of Protocol No. 11 to the Convention, a grant of legal aid made to an applicant in the proceedings before the Commission or the former Court shall continue in force for the purposes of his or her representation before the Court.

*Rule 102<sup>1</sup>*  
(Request for revision of a judgment)

1. Where a party requests revision of a judgment delivered by the former Court, the President of the Court shall assign the request to one of the Sections in accordance with the conditions laid down in Rule 51 or 52, as the case may be.

2. The President of the relevant Section shall, notwithstanding Rule 80 § 3, constitute a new Chamber to consider the request.

3. The Chamber to be constituted shall include as *ex officio* members

(a) the President of the Section;

and, whether or not they are members of the relevant Section,

(b) the judge elected in respect of any Contracting Party concerned or, if he or she is unable to sit, any judge appointed under Rule 29;

(c) any judge of the Court who was a member of the original Chamber that delivered the judgment in the former Court.

4. (a) The other members of the Chamber shall be designated by the President of the Section by means of a drawing of lots from among the members of the relevant Section.

(b) The members of the Section who are not so designated shall sit in the case as substitute judges.

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1. As amended by the Court on 13 December 2004.

## TITLE IV

**FINAL CLAUSES***Rule 103*

(Amendment or suspension of a Rule)

1. Any Rule may be amended upon a motion made after notice where such a motion is carried at the next session of the plenary Court by a majority of all the members of the Court. Notice of such a motion shall be delivered in writing to the Registrar at least one month before the session at which it is to be discussed. On receipt of such a notice of motion, the Registrar shall inform all members of the Court at the earliest possible moment.

2. A Rule relating to the internal working of the Court may be suspended upon a motion made without notice, provided that this decision is taken unanimously by the Chamber concerned. The suspension of a Rule shall in this case be limited in its operation to the particular purpose for which it was sought.

*Rule 104<sup>1</sup>*

(Entry into force of the Rules)

The present Rules shall enter into force on 1 November 1998.

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1. The amendments adopted on 8 December 2000 entered into force immediately. The amendments adopted on 17 June 2002 and 8 July 2002 entered into force on 1 October 2002. The amendments adopted on 7 July 2003 entered into force on 1 November 2003. The amendments adopted on 13 December 2004 entered into force on 1 March 2005. The amendments adopted on 4 July 2005 entered into force on 3 October 2005. The amendments adopted on 7 November 2005 entered into force on 1 December 2005.

## ANNEX TO THE RULES<sup>1</sup>

### (concerning investigations)

#### *Rule A1*

##### (Investigative measures)

1. The Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.
2. The Chamber may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case.
3. After a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its members or of the other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. The Chamber may also appoint any person or institution of its choice to assist the delegation in such manner as it sees fit.
4. The provisions of this Chapter concerning investigative measures by a delegation shall apply, *mutatis mutandis*, to any such proceedings conducted by the Chamber itself.
5. Proceedings forming part of any investigation by a Chamber or its delegation shall be held in camera, save in so far as the President of the Chamber or the head of the delegation decides otherwise.
6. The President of the Chamber may, as he or she considers appropriate, invite, or grant leave to, any third party to participate in an investigative measure. The President shall lay down the conditions of any such participation and may limit that participation if those conditions are not complied with.

#### *Rule A2*

##### (Obligations of the parties as regards investigative measures)

1. The applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures.
2. The Contracting Party on whose territory on-site proceedings before a delegation take place shall extend to the delegation the facilities and co-operation necessary for the proper conduct of the proceedings. These shall include, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. It shall be the responsibility of the Contracting Party concerned to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation.

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1. Inserted by the Court on 7 July 2003.

*Rule A3*  
(Failure to appear before a delegation)

Where a party or any other person due to appear fails or declines to do so, the delegation may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless continue with the proceedings.

*Rule A4*  
(Conduct of proceedings before a delegation)

1. The delegates shall exercise any relevant power conferred on the Chamber by the Convention or these Rules and shall have control of the proceedings before them.
2. The head of the delegation may decide to hold a preparatory meeting with the parties or their representatives prior to any proceedings taking place before the delegation.

*Rule A5*  
(Convocation of witnesses, experts and of other persons  
to proceedings before a delegation)

1. Witnesses, experts and other persons to be heard by the delegation shall be summoned by the Registrar.
2. The summons shall indicate
  - (a) the case in connection with which it has been issued;
  - (b) the object of the inquiry, expert opinion or other investigative measure ordered by the Chamber or the President of the Chamber;
  - (c) any provisions for the payment of sums due to the person summoned.
3. The parties shall provide, in so far as possible, sufficient information to establish the identity and addresses of witnesses, experts or other persons to be summoned.
4. In accordance with Rule 37 § 2, the Contracting Party in whose territory the witness resides shall be responsible for servicing any summons sent to it by the Chamber for service. In the event of such service not being possible, the Contracting Party shall give reasons in writing. The Contracting Party shall further take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control.
5. The head of the delegation may request the attendance of witnesses, experts and other persons during on-site proceedings before a delegation. The Contracting Party on whose territory such proceedings are held shall, if so requested, take all reasonable steps to facilitate that attendance.

6. Where a witness, expert or other person is summoned at the request or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise. The costs of the appearance of any such person who is in detention in the Contracting Party on whose territory on-site proceedings before a delegation take place shall be borne by that Party unless the Chamber decides otherwise. In all other cases, the Chamber shall decide whether such costs are to be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears. In all cases, such costs shall be taxed by the President of the Chamber.

*Rule A6*

(Oath or solemn declaration by witnesses and experts  
heard by a delegation)

1. After the establishment of the identity of a witness and before testifying, each witness shall take the oath or make the following solemn declaration:

“I swear” – or “I solemnly declare upon my honour and conscience” – “that I shall speak the truth, the whole truth and nothing but the truth.”

This act shall be recorded in minutes.

2. After the establishment of the identity of the expert and before carrying out his or her task for the delegation, every expert shall take the oath or make the following solemn declaration:

“I swear” – or “I solemnly declare” – “that I will discharge my duty as an expert honourably and conscientiously.”

This act shall be recorded in minutes.

*Rule A7*

(Hearing of witnesses, experts and other persons by a delegation)

1. Any delegate may put questions to the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts, and to any other persons appearing before the delegation.

2. Witnesses, experts and other persons appearing before the delegation may, subject to the control of the head of the delegation, be examined by the Agents and advocates or advisers of the parties. In the event of an objection to a question put, the head of the delegation shall decide.

3. Save in exceptional circumstances and with the consent of the head of the delegation, witnesses, experts and other persons to be heard by a delegation will not be admitted to the hearing room before they give evidence.

4. The head of the delegation may make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where that is required for the proper administration of justice.

5. The head of the delegation shall decide in the event of any dispute arising from an objection to a witness or expert. The delegation may hear for information purposes a person who is not qualified to be heard as a witness or expert.

*Rule A8*

(Verbatim record of proceedings before a delegation)

1. A verbatim record shall be prepared by the Registrar of any proceedings concerning an investigative measure by a delegation. The verbatim record shall include:

(a) the composition of the delegation;

(b) a list of those appearing before the delegation, that is to say Agents, advocates and advisers of the parties taking part;

(c) the surname, forenames, description and address of each witness, expert or other person heard;

(d) the text of statements made, questions put and replies given;

(e) the text of any ruling delivered during the proceedings before the delegation or by the head of the delegation.

2. If all or part of the verbatim record is in a non-official language, the Registrar shall arrange for its translation into one of the official languages.

3. The representatives of the parties shall receive a copy of the verbatim record in order that they may, subject to the control of the Registrar or the head of the delegation, make corrections, but in no case may such corrections affect the sense and bearing of what was said. The Registrar shall lay down, in accordance with the instructions of the head of the delegation, the time-limits granted for this purpose.

4. The verbatim record, once so corrected, shall be signed by the head of the delegation and the Registrar and shall then constitute certified matters of record.

## PRACTICE DIRECTION<sup>1</sup>

### REQUESTS FOR INTERIM MEASURES

(Rule 39 of the Rules of Court)

Applicants or their legal representatives<sup>2</sup> 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.

Failure to do so may mean that the Court will not be in a position to examine such requests properly and in good time.

#### **I. Requests to be made by facsimile, e-mail or courier**

Requests for interim measures under Rule 39 in urgent cases, particularly in extradition or deportation cases, should be sent by facsimile or e-mail<sup>3</sup> or by courier. The request should, where possible, be in one of the official languages of the Contracting Parties. All requests should bear the following title which should be written in bold on the face of the request:

***“Rule 39 – Urgent/Article 39 – Urgent”***

Requests by facsimile or e-mail should be sent during working hours<sup>4</sup> unless this is absolutely unavoidable. If sent by e-mail, a hard copy of the request should also be sent at the same time. Such requests should not be sent by ordinary post since there is a risk that they will not arrive at the Court in time to permit a proper examination.

If the Court has not responded to an urgent request under Rule 39 within the anticipated period of time, applicants or their representatives should follow up with a telephone call to the Registry during working hours.

#### **II. Making requests in good time**

Requests for interim measures should normally be received as soon as possible after the final domestic decision has been taken to enable the Court and its Registry to have sufficient time to examine the matter.

However, in extradition or deportation cases, where immediate steps may be taken to enforce removal soon after the final domestic decision has been given, it is advisable to make submissions and submit any relevant material concerning the request before the final decision is given.

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003.

2. Full contact details should be provided.

3. To the e-mail address of a member of the Registry after having first made contact with that person by telephone. Telephone and facsimile numbers can be found on the Court’s website ([www.echr.coe.int](http://www.echr.coe.int)).

4. Working hours are 8am – 6pm, Monday -Friday. French time is one hour ahead of GMT.

Applicants and their representatives should be aware that it may not be possible to examine in a timely and proper manner requests which are sent at the last moment.

### **III. Accompanying information**

It is essential that requests be accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions together with any other material which is considered to substantiate the applicant's allegations.

Where the case is already pending before the Court, reference should be made to the application number allocated to it.

In cases concerning extradition or deportation, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official case-reference number.



PRACTICE DIRECTION<sup>1</sup>

**INSTITUTION OF PROCEEDINGS<sup>2</sup>**

(individual applications under Article 34 of the Convention)

**I. General**

1. An application under Article 34 of the Convention must be submitted in writing. No application may be made by phone.
2. An application must be sent to the following address:  
  
The Registrar  
European Court of Human Rights  
Council of Europe  
F – 67075 STRASBOURG CEDEX.
3. An application should normally be made on the form<sup>3</sup> referred to in Rule 47 § 1 of the Rules of Court. However, an applicant may introduce his complaints in a letter.
4. If an application has not been submitted on the official form or an introductory letter does not contain all the information referred to in Rule 47, the Registry may ask the applicant to fill in the form. It should as a rule be returned within 6 weeks from the date of the Registry's letter.
5. Applicants may file an application by sending it by facsimile ("fax")<sup>4</sup>. However, they must send the signed original copy by post within 5 days following the dispatch by fax.
6. The date on which an application is received at the Court's Registry will be recorded by a receipt stamp.
7. An applicant should be aware that the date of the first communication setting out the subject-matter of the application is considered relevant for the purposes of compliance with the six-month rule in Article 35 § 1 of the Convention.
8. On receipt of the first communication setting out the subject-matter of the case, the Registry will open a file, whose number must be mentioned in all subsequent correspondence. Applicants will be informed thereof by letter. They may also be asked for further information or documents.

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003.

2. This practice direction supplements Rules 45 and 47 of the Rules of Court.

3. The relevant form can be downloaded from the Court's website ([www.echr.coe.int](http://www.echr.coe.int)).

4. Fax no. +00 33 (0)3 88 41 27 30; other facsimile numbers can be found on the Court's website.

9. (a) An applicant should be diligent in conducting correspondence with the Court's Registry.

(b) A delay in replying or failure to reply may be regarded as a sign that the applicant is no longer interested in pursuing his application.

10. Failure to satisfy the requirements laid down in Rule 47 §§ 1 and 2 and to provide further information at the Registry's request (see paragraph 8) may result in the application not being examined by the Court.

11. Where, within a year, an applicant has not returned an application form or has not answered any letter sent to him by the Registry, the file will be destroyed.

## **II. Form and contents**

12. An application must contain all information required under Rule 47 and be accompanied by the documents referred to in paragraph 1 (h) of that Rule.

13. An application should be written legibly and, preferably, typed.

14. Where, exceptionally, an application exceeds 10 pages (excluding annexes listing documents), an applicant must also file a short summary.

15. Where applicants produce documents in support of the application, they should not submit original copies. The documents should be listed in order by date, numbered consecutively and given a concise description (e.g. letter, order, judgment, appeal, etc.).

16. An applicant who already has an application pending before the Court must inform the Registry accordingly, stating the application number.

17. (a) Where an applicant does not wish to have his or her identity disclosed, he or she should state the reasons for his or her request in writing, pursuant to Rule 47 § 3.

(b) The applicant should also state whether, in the event of anonymity being authorised by the President of the Chamber, he or she wishes to be designated by his or her initials or by a single letter (e.g. "X", "Y", "Z", etc.).

## PRACTICE DIRECTION<sup>1</sup>

### WRITTEN PLEADINGS

#### I. Filing of pleadings

##### General

1. A pleading must be filed with the Registry within the time-limit fixed in accordance with Rule 38 and in the manner described in paragraph 2 of that Rule.
2. The date on which a pleading or other document is received at the Court's Registry will be recorded on that document by a receipt stamp.
3. All pleadings, as well as all documents annexed thereto, should be submitted to the Court's Registry in 3 copies sent by post with 1 copy sent, if possible, by fax.
4. Secret documents should be filed by registered post.
5. Unsolicited pleadings shall not be admitted to the case file unless the President of the Chamber decides otherwise (see Rule 38 § 1).

##### Filing by facsimile

6. A party may file pleadings or other documents with the Court by sending them by facsimile ("fax")<sup>2</sup>.
7. The name of the person signing a pleading must also be printed on it so that he or she can be identified.

#### II. Form and contents

##### Form

8. A pleading should include:
  - (a) the application number and the name of the case;
  - (b) a title indicating the nature of the content (e.g. observations on admissibility [and the merits]; reply to the Government's/the applicant's observations on admissibility [and the merits]; observations on the merits; additional observations on admissibility [and the merits]; memorial etc.).

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1. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003.

2. Fax no. +00 33 (0)3 88 41 27 30; other facsimile numbers can be found on the Court's website ([www.echr.coe.int](http://www.echr.coe.int)).

9. A pleading should normally in addition
- (a) be on A4 paper having a margin of not less than 3.5 cm wide;
  - (b) be wholly legible and, preferably, typed;
  - (c) have all numbers expressed as figures;
  - (d) have pages numbered consecutively;
  - (e) be divided into numbered paragraphs;
  - (f) be divided into chapters and/or headings corresponding to the form and style of the Court's decisions and judgments ("Facts" / "Domestic law [and practice]" / "Complaints" / "Law"; the latter chapter should be followed by headings entitled "Preliminary objection on ..."; "Alleged violation of Article ...", as the case may be);
  - (g) place any answer to a question by the Court or to the other party's arguments under a separate heading;
  - (h) give a reference to every document or piece of evidence mentioned in the pleading and annexed thereto.
10. If a pleading exceeds 30 pages, a short summary should also be filed with it.
11. Where a party produces documents and/or other exhibits together with a pleading, every piece of evidence should be listed in a separate annex.

#### **Contents**

12. The parties' pleadings following communication of the application should include:
- (a) any comments they wish to make on the facts of the case; however,
    - (i) if a party does not contest the facts as set out in the statement of facts prepared by the Registry, it should limit its observations to a brief statement to that effect;
    - (ii) if a party contests only part of the facts as set out by the Registry, or wishes to supplement them, it should limit its observations to those specific points;
    - (iii) if a party objects to the facts or part of the facts as presented by the other party, it should state clearly which facts are uncontested and limit its observations to the points in dispute;

(b) legal arguments relating first to admissibility and, secondly, to the merits of the case; however,

(i) if specific questions on a factual or legal point were put to a party, it should, without prejudice to Rule 55, limit its arguments to such questions;

(ii) if a pleading replies to arguments of the other party, submissions should refer to the specific arguments in the order prescribed above.

13. (a) The parties' pleadings following the admission of the application should include:

(i) a short statement confirming a party's position on the facts of the case as established in the decision on admissibility;

(ii) legal arguments relating to the merits of the case;

(iii) a reply to any specific questions on a factual or legal point put by the Court.

(b) An applicant party submitting claims for just satisfaction at the same time should do so in the manner described in the practice direction on filing just satisfaction claims.<sup>1</sup>

14. In view of the confidentiality of friendly-settlement proceedings (see Article 38 § 2 of the Convention and Rule 62 § 2), all submissions and documents filed within the framework of the attempt to secure a friendly settlement should be submitted separately from the written pleadings.

15. No reference to offers, concessions or other statements submitted in connection with the friendly settlement may be made in the pleadings filed in the contentious proceedings.

### **III. Time-limits**

#### **General**

16. It is the responsibility of each party to ensure that pleadings and any accompanying documents or evidence are delivered to the Court's Registry in time.

#### **Extension of time-limits**

17. A time-limit set under Rule 38 may be extended on request from a party.

18. A party seeking an extension of the time allowed for submission of a pleading must make a request as soon as it has become aware of the circumstances justifying such an extension and, in any event, before the expiry of the time-limit. It should state the reason for the delay.

19. If an extension is granted, it shall apply to all parties for which the relevant time-limit is running, including those which have not asked for it.

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1. Not yet issued, for the time being see Rule 60.

#### **IV. Failure to comply with requirements for pleadings**

20. Where a pleading has not been filed in accordance with the requirements set out in paragraphs 8-15 of this practice direction, the President of the Chamber may request the party concerned to resubmit the pleading in compliance with those requirements.

21. A failure to satisfy the conditions listed above may result in the pleading being considered not to have been properly lodged (see Rule 38 § 1 of the Rules of Court).

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