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Cour Européenne des Droits de l'Homme

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ARTICLE 1

RESPONSIBILITY OF STATES
Dispute falling entirely within internal legal system of an international organisation endowed with its own legal personality separate from that of its members: *inadmissible.*

BOIVIN - France, Belgium and 32 member States of the Council of Europe (N° 73250/01)
Decision 9.9.2008 [Section V]

The applicant was appointed chief accountant of a body operating under the authority of the European Organisation for the Safety of Air Navigation (Eurocontrol), of which Belgium and France are member States. However, his appointment was cancelled several times. He was eventually dismissed and, after lodging a number of administrative complaints, he appealed to the International Labour Organisation's Administrative Tribunal (ILOAT), which has sole authority to settle disputes between Eurocontrol and its staff. The ILOAT upheld the decisions cancelling the appointment and partially allowed the applicant's claim for compensation.

Inadmissible as to the application against 32 States: Initially the application had been lodged against Belgium and France. Then the applicant had extended it to 32 other High Contracting Parties. However, the final decision in the case was the ILOAT judgment, of which the applicant had been notified almost four years before he lodged his application: *six-month rule.*

Inadmissible as to the application against France and Belgium: The application fell to be examined in the light of the principles laid down in cases where the Court had been called upon to determine whether the responsibility of States Parties to the Convention could be engaged under the Convention because of actions or omissions linked to their membership of an international organisation (see, for example, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi "Bosphorus Airways" – Ireland*, [GC], no. 45036/98, CEDH 2005-VI, Information Note no. 76). The applicant's complaints were directed essentially against the judgment delivered by an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that lay entirely within the internal legal system of an international organisation endowed with its own legal personality separate from that of its member States. At no time had France or Belgium intervened directly or indirectly in the dispute, and no action or omission of those States or their authorities could be considered to engage their responsibility under the Convention. In that respect the instant case was to be distinguished from cases where the international responsibility of the respondent States had been in issue. Unlike in those cases, in all of which the State or States concerned had been involved directly or indirectly**,** in this case the applicant could not be said to have been under the jurisdiction of the respondent States for the purposes of Article 1 of the Convention. The alleged violations could therefore not be attributed to France and Belgium. As regards the possible responsibility of Eurocontrol, the organisation was not a party to the Convention and could therefore not be held responsible under the provisions thereof: *incompatible* ratione personae.

ARTICLE 5

Article 5 § 1

LAWFUL ARREST OR DETENTION
Pre-trial detention following the quashing of a presidential amnesty: *violation*.

LEXA - Slovakia (N° 54334/00)
Judgment 23.9.2008 [Section IV]

Facts: In August 1995 the Slovakian President's son was forcibly taken from Slovakia to Austria, allegedly by members of the Slovakian intelligence service. Inquiries by the Slovakian police led them to conclude that a number of offences had been committed. However, by two decisions of 3 March and 7 July 1998 the Prime Minister, to whom certain presidential powers had been delegated, issued an amnesty in respect of the incident and on 18 September 1998 the police investigator decided not to pursue the case. On 8 December 1998 a newly appointed Prime Minister purported to revoke the amnesty in his capacity as Acting President. The criminal investigation was reopened and the applicant, who had been the director of the Slovakian intelligence service from 1995 to 1998, was remanded in custody in April 1999 on suspicion of various offences in connection with the abduction. In June 1999 the Constitutional Court issued a ruling on the scope of the President's powers at the request of 37 members of parliament who considered the amnesty issued in the applicant's case to have been an abuse of power. They had argued that it had to be possible to amend or quash a decision on amnesty in exceptional cases where it was contrary to the Constitution and its underlying principles. The Constitutional Court found, however, that the President had no power to amend a decision on amnesty that had been duly published. The applicant was released from custody in July 1999 and in 2001 a district court discontinued the criminal proceedings against him on the basis of the amnesty. That decision was upheld on appeal.

Law: The Code of Criminal Procedure allowed detention on remand only where the person concerned was accused of an offence. Accordingly, the principal issue before the Court was whether, in the light of the various decisions on amnesty, the criminal proceedings against the applicant had been permissible. The Court found no basis for questioning the interpretation given by the Constitutional Court and by the criminal courts at three levels, which ultimately found that the offences for which the applicant had been prosecuted were covered by the amnesty decisions of 3 March and 7 July 1998. It therefore went on to consider whether the Acting President's decision of 8 December 1998 to quash the amnesty provided a legal basis for the applicant's prosecution and detention on remand. In that connection, the Court noted that the Constitution did not expressly permit a presidential decision on amnesty to be quashed, and it was generally accepted by the courts and by legal theory in Slovakia that such decisions could not be modified to the accused's detriment. The Court saw no reason to doubt that interpretation and further noted that the quashing of unconditional measures of clemency was generally not accepted by the law, practice and prevailing legal opinion in other Contracting States to the Convention either. Accordingly, since a final decision to discontinue the criminal proceedings had been taken on 18 September 1998 the applicant's subsequent prosecution for the offences was not permissible under domestic law and his detention could not be regarded as "in accordance with a procedure prescribed by law" or "lawful".
Conclusion: violation (unanimously).

Article 41 – Finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage.

LAWFUL ARREST OR DETENTION
DEPRIVATION OF LIBERTY
Applicant's continued placement in preventive detention beyond the maximum period authorised at the time of his placement: *admissible*.

M. - Germany (N° 19359/04)
Decision 1.7.2008 [Section V]

In 1986 the applicant was convicted of attempted murder and aggravated robbery and sentenced to five years' imprisonment. In addition to giving him a prison sentence, the trial court ordered his placement in preventive detention. This measure was considered necessary in view of the fact that the applicant was strongly inclined to commit offences which seriously damaged his victims' physical integrity. He had already been convicted and imprisoned on numerous occasions, notably for attempted murder, theft, assault and blackmail. In the court's opinion, he was liable to commit spontaneous acts of violence and was a danger to the public. The applicant finished serving his prison sentence in August 1991 and has been in preventive detention since that date. In April 2001 the competent court refused to release him on licence, but it ordered that he be kept in preventive detention beyond 8 September 2001, the date the maximum ten-year period previously authorised for such detention expired. In doing so, it applied the Criminal Code as amended by a law which had entered into force in January 1998. It stated that the amended provision was applicable also to prisoners placed in preventive detention prior to its entry into force. The court added that, on account of the gravity of the applicant's criminal record and the likelihood of his committing further offences, his continued placement in preventive detention was not disproportionate. The Court of Appeal confirmed that the applicant's dangerousness necessitated his continued preventive detention and stated it was not contrary to the prohibition of retrospective provisions in the criminal law. The applicant lodged an unsuccessful constitutional complaint. The Federal Constitutional Court held, in particular, that the abolition of the maximum period of detention, and the application of this measure to criminals who had been placed in preventive detention prior to the entry into force of the new provision and had not yet finished serving their sentences, were compatible with the Constitution. It also considered that the retrospective application of the amended provision of the Criminal Code was not disproportionate.
Admissible under Article 5 § 1 and Article 7 of the Convention.

ARTICLE 6

Article 6 § 1 [civil]

APPLICABILITY
Civil nature of the right to pursue university studies: *violation*.

ĖMINE ARAÇ - Turkey (N° 9907/02)
Judgment 23.9.2008 [Section II]

Facts: The Turkish Constitution guarantees the right to education and instruction, the content of which is defined and regulated by law. The applicant's application to enrol in a faculty of theology was rejected because she did not supply an identity photograph of herself not wearing a veil, as required by the Higher Education Board rules in force at the time. Appeals she lodged against this decision were dismissed by the administrative court and ultimately by the Supreme Administrative Court. Her complaint before the Strasbourg Court concerned the alleged unfairness of the proceedings before the Supreme Administrative Court, in particular because the principal public prosecutor had submitted an opinion recommending that her appeal be rejected.

Law – Admissibility: Contesting the civil nature of the rights and obligations at the heart of the dispute submitted to the administrative courts, the Government submitted that Article 6 § 1 was not applicable.

The Court noted, having regard to the Turkish Constitution, that the applicant could arguably claim that Turkish law recognised her right to enrol in a faculty of theology if she fulfilled the requisite legal conditions. However, her application had been rejected not because she failed to meet any such condition but because she had not complied with a formality required by the regulations adopted by the Higher Education Board. For the Court, even assuming that the power to regulate admission to higher education establishments fell within the scope of public law, that did not suffice to exclude the right concerned from the category of civil rights within the meaning of Article 6 § 1. According to the applicant what was at issue here was not her relations with the public authorities as such, with their discretionary powers, but her personal life as a simple user of a public service. She was accordingly challenging the regulations in force, which she considered prejudicial to her right to attend a higher education establishment. In its recent case-law the Court had always examined the conformity of proceedings concerning regulations on higher education with reference to the requirements of Article 6 § 1. That being so, in view of the importance of the applicant's right to pursue higher education, the Court had no doubt that the limitation laid down by the regulations affected the applicant's personal rights and was therefore of a civil nature. It followed that Article 6 § 1 was applicable.

Merits: The Court had already found a violation of Article 6 § 1 in a similar case for an infringement of the right to adversarial proceedings before the Supreme Administrative Court, bearing in mind the nature of the principal public prosecutor's observations and the fact that it had not been possible for the applicant to reply in writing. The Government had adduced no convincing argument that might lead to a different finding in the instant case.
Conclusion: violation (unanimously).

Article 41 – The finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage.

APPLICABILITY
Decision to transfer a priest to another parish: *no violation*.

AHTINEN - Finland (N°48907/00)
Judgment 23.9.2008 [Section IV]

Facts: The applicant was a parish priest employed with the Evangelical Lutheran Church. In 1998 the Cathedral Chapter decided to transfer the applicant to another parish situated more than 100 kilometres from his home. The applicant, who had not consented to the transfer, lodged an extraordinary appeal with the Supreme Administrative Court against that decision claiming that the Cathedral Chapter was not impartial and that he had not been able to make representations prior to the adoption of the decision. The Supreme Administrative Court upheld the Cathedral Chapter's decision without examining the merits of the case after finding that the applicant had been properly heard during the proceedings and that the competent authority disclosed no appearance of bias.

Law: Under domestic law the transfer of a priest to another parish may take place with or without his consent. Furthermore, no appeal lay against such a decision since the legislator had not intended to provide for any judicial determination of the merits of grievances filed by clergymen wishing to contest a change in their place of service. Consequently, the appointment and transfer of priests lay exclusively within the discretion of the Cathedral Chapter and, when accepting ecclesiastical employment, parish priests were aware of the possibility that they could later be transferred to another post. In conclusion, the Court found nothing in the domestic law or in its case-law to justify holding that the applicant had had a "right" within the meaning of Article 6.
Conclusion: no violation (unanimously).

Article 6 § 1 [criminal]

FAIR HEARING
Partial shifting of burden of proof onto defendant for purposes of calculating amount of confiscation order in drug-trafficking cases: *no violation.*

GRAYSON and BARNHAM - United Kingdom (N^{os} 19955/05 and 15085/06)
Judgment 23.9.2008 [Section IV]

Facts: Both applicants were convicted of drug-trafficking offences and given custodial sentences. In accordance with the Drug Trafficking Act 1994, at the first stage of the confiscation procedure the onus was on the prosecution to establish, on the balance of probabilities, that the defendant had spent or received specific sums of money during the six years preceding the trigger offence. The Act empowered a court to assume that all property held by a person convicted of a drug-trafficking offence within the preceding six years represented the proceeds of drug trafficking. The burden then passed to the defendant to show, again on the balance of probabilities, that the money had instead come from a legitimate source. At the second stage of the procedure, the burden shifted to the defendant to establish that his realisable assets were less than the amount of benefit he was assessed to have received from drug-trafficking. Since the applicants had failed to prove that their realisable property was less than the amount of their assessed benefit, the confiscation orders were made equal to that amount. The applicants were liable to additional terms of imprisonment if they did not pay the sums within the time-limit. They appealed unsuccessfully.

Law: In *Phillips v. the United Kingdom* (no. 41087/98, ECHR 2001-VII ; in Information Note no. 32), the Court had held that the reversal of the burden of proof in confiscation proceedings following a conviction for a drug trafficking offence was compatible with Article 6. In the instant cases, the Court's task was to determine whether the way in which the statutory assumptions had been applied in the confiscation proceedings had offended the basic principles of a fair procedure inherent in Article 6 § 1. Throughout the confiscation proceedings the rights of the defence had been protected by the safeguards built into the system. Thus, in each case the assessment had been carried out by a court through a judicial procedure that included a public hearing, advance disclosure of the prosecution case and the opportunity for the applicants to adduce documentary and oral evidence. Each applicant had been represented by counsel of his choice. Before the Court, neither applicant had seriously complained about the fairness of the first stage of the confiscation procedure in which the benefit from drug trafficking was calculated. It was not incompatible, in principle or practice, with the concept of a fair trial under Article 6 to place the onus on the applicants, once they had been convicted of a major offence of drug dealing, to establish that the source of money or assets which they had been shown to have possessed in the years preceding the offence was legitimate. Given the existence of the safeguards referred to above, the burden on them had not exceeded reasonable limits. Furthermore, the judges had a discretion not to apply the impugned assumption if, in their opinion, it would give rise to a serious risk of injustice. As regards the second stage of the confiscation procedure, the applicants had chosen to give oral evidence relating to their realisable assets. They were legally represented and had been informed, through the judges' detailed rulings, exactly how the benefit figure had been calculated. They had been given the opportunity to explain their financial situation and to describe what had happened to the assets which the judge had taken into account in setting the benefit figure. The first applicant, who had been found to have had large sums of unexplained money passing through his bank accounts, had failed to give any credible explanation for these anomalies. The second applicant had not even attempted to explain what had happened to the various consignments of cannabis he had been found to have purchased. In each case the judge found the applicant's evidence to have been entirely dishonest and lacking in credibility. It was not for the European Court to substitute its own assessment of the evidence for that of the national courts. Moreover, since the applicants had been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect them to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money. Such matters fell within the applicants'

particular knowledge and the burden on them would not have been difficult to meet if their accounts of their financial affairs had been true.
Conclusion: no violation (unanimously).

The Court found no violation of Article 1 of Protocol No. 1.

ARTICLE 7

NULLUM CRIMEN SINE LEGE
Conviction in respect of an act which did not constitute an offence under the relevant international law at the time of its commission: *violation*.

KORBELY - Hungary (N° 9174/02)
Judgment 19.9.2008 [GC]

Facts: The applicant was a retired military officer. In 1994 he was indicted for his participation in the quelling of a riot in Tata during the 1956 revolution. He was charged with having commanded, as captain, a 15-strong squad in an assignment to regain control of a police department building which had been taken over by insurgents, and with having shot, and ordered his men to shoot, at civilians. Several people died or were injured in the incident, which according to the findings of the domestic courts, was triggered when one of the insurgents removed a pistol from a coat pocket after being told to hand over the weapon. The trial court initially discontinued the criminal proceedings on the grounds that the offences with which the applicant was charged constituted homicide and incitement to homicide, rather than crimes against humanity, so that their prosecution was statute-barred. Ultimately, however, the applicant was convicted under Article 3(1) of the Geneva Convention of 1949 of a crime against humanity through multiple homicide and sentenced to five years' imprisonment. He served part of his sentence before being conditionally released. Before the European Court, he complained that he had been convicted in respect of an act which did not constitute a criminal offence at the time of its commission.

Law: The Court had to determine whether, at the time of its commission, the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law. The applicant was convicted of multiple homicide, which the Hungarian courts regarded as a crime against humanity punishable under the Geneva Conventions. The conviction was thus based exclusively on international law. Since the Geneva Conventions satisfied the accessibility test, the Court turned to the issue of foreseeability. In deciding that issue, it examined, firstly, whether the applicant's act was capable of amounting to a crime against humanity as that concept was understood in 1956 and, secondly, whether it could reasonably be said that the victim of the alleged offence was "taking no active part in the hostilities".

(a) *Whether the applicant's act was capable of amounting to a crime against humanity*: Although murder within the meaning of common Article 3 could have provided a basis for a conviction for crimes against humanity committed in 1956, other elements also needed to be present. These derived not from common Article 3 but from the international-law elements inherent in the notion of crime against humanity at the time. Certain of these appeared relevant, notably the requirement that the crime in question should not be an isolated or sporadic act but should form part of "State action or policy" or of a widespread and systematic attack on the civilian population. The domestic courts, however, had confined their examination to the question whether the insurgents came under the protection of common Article 3 and did not examine the further question whether the killing had met the additional criteria necessary to constitute a crime against humanity, in particular, whether it was to be seen as forming part of a widespread and systematic attack on the civilian population. Although the Supreme Court had found that the central authorities had effectively waged war on the civil population, it had not addressed the question whether the applicant's act was to be regarded as forming part of that State policy. It was thus open to

question whether the constituent elements of a crime against humanity had been satisfied in the applicant's case.

(b) *Whether the victim could reasonably be said to have taken no active part in the hostilities*: The applicant's conviction was based on the finding that one of the victims was a non-combatant for the purposes of common Article 3. That provision extended protection to persons taking no active part in hostilities, including members of armed forces who had laid down their arms. The deceased had clearly taken an active part in the hostilities as he was the leader of an armed group of insurgents who had engaged in acts of violence, taken control of the police building and seized the officers' weapons. The question was, therefore, whether he had laid down his arms. The domestic courts found as a fact that he had secretly been carrying a handgun and had not clearly and unequivocally signalled an intention to surrender. Instead, he had embarked on an animated quarrel with the applicant before drawing his gun with unknown intentions. It was precisely in the course of that act that he had been shot. Accordingly, In the light of the commonly accepted international-law standards applicable at the time, the Court was not satisfied that the deceased could be said to have laid down his arms within the meaning of common Article 3 or that he fell within any of the other categories of non-combatant.
Accordingly, it had not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law.
Conclusion: violation (eleven votes to six).

NULLUM CRIMEN SINE LEGE
Conviction for sale of adulterated product, which had been notified to the Belgian authorities, containing an additive prohibited by Community regulations incorporated into French law: *inadmissible.*

OOMS - France (N° 38126/06)
Decision 25.9.2008 [Section V]

The applicant was manager of a French company which sold food supplements, including effervescent tablets. According to the applicant, the same tablets had previously been sold as food supplements in Belgium, with the proper authorisation, after verification of their conformity with Community law on such products. In support of that argument he submitted a document issued by the General Food Inspectorate acknowledging receipt of a notification file and assigning a number to the product. The advertising for the tablets in France attracted the attention of the French fair trade, consumer protection and anti-fraud authority, whose investigations revealed the presence of sodium benzoate in the tablets, in violation of Community directive 95/2/CE, which authorised the substance only in liquid food supplements. The French authorities contacted the person who had succeeded the applicant as manager of the company; they also contacted the Belgian Food Inspectorate, which saw to it that the necessary action was taken in Belgium. In France criminal proceedings were brought against the applicant, the new manager and the company, for misleading advertising and for displaying, proposing for sale and selling foods for human consumption which they knew to be adulterated, toxic or otherwise unfit for consumption. The criminal court found them guilty as charged. The Court of Appeal upheld the judgment and the Court of Cassation rejected the defendants' appeal on points of law.

Inadmissible under Article 7 § 1 – The Court pointed out that the law must clearly define offences and the corresponding penalties, which it had clearly done in the instant case. Community directive 95/2/CE, as incorporated into French law, stipulated the authorised uses of sodium benzoate. The applicant, who did not dispute that under French positive law a product could be adulterated by the addition of an illegal substance to it, could have foreseen that by selling a product containing a prohibited additive he risked being prosecuted and sentenced under Article L. 213-3 of the Consumer Code for selling an adulterated food product. In any event, the applicant's submissions were unfounded as he could not claim to have had a sales permit issued by the Belgian authorities, or any document issued by them certifying the conformity of the product with the legislation in force: *manifestly ill-founded*.

HEAVIER PENALTY
Retrospective extension of preventive detention from a maximum of ten years to an unlimited period of time: *admissible*.

M. - Germany (N° 19359/04)
Decision 1.7.2008 [Section V]

(see Article 5 § 1 above).

ARTICLE 8

PRIVATE LIFE
Dismissal of a probation officer working with sex offenders for engaging in sadomasochistic performances in a nightclub and on the Internet: *inadmissible*.

PAY - United Kingdom (N°32792/05)
Decision 16.9.2008 [Section IV]

Since 1983 the applicant had been employed as a probation officer involved in the treatment of sex offenders. In 2000 his employer received an anonymous fax claiming that an organisation, of which the applicant had been president, was connected with the supply and sale of sadomasochistic products and the organisation of bondage, domination and sadomasochism (BDSM) performances. The fax included a photograph of the applicant, wearing a mask, with two semi-naked women. Following an investigation, it was established that the organisation concerned was also registered at the applicant's address and that its website included links to a number of BDSM sites, including a site advertising various events taking place at a local private members' club involving male domination. It also contained photographs of the semi-naked applicant performing such acts. The applicant was immediately suspended because his employer had grounds to believe that the above activities might be incompatible with his role as a probation officer. Following disciplinary proceedings, the applicant was dismissed from service. Despite the fact that his activities were not contrary to the criminal law, the fact that the material attesting those activities was in the public domain was incompatible with his position as a probation officer working with sex offenders. The applicant's subsequent appeals were to no avail.

Inadmissible: The Court firstly examined whether the applicant's activities with the organisation formed a part of his "private life" within the meaning of Article 8. On the one hand, the content of the applicant's acts was shown on the Internet and he himself contended that the public performance aspect thereof was a fundamental part of his sexual expression. On the other hand, it was true that his performances took place in a private members' club likely to be frequented only by like-minded people and that the published photographs were anonymised. In such circumstances, the Court assumed, without finally deciding the matter, that Article 8 was applicable to the applicant's case. It further regarded the applicant's dismissal as an interference with his rights protected by that Article. As to the proportionality of the interference, the Court reiterated that an employee owed to his employer a duty of loyalty, reserve and discretion. In view of the sensitive nature of the applicant's employment, it was important that he maintained the respect of sex offenders placed under his supervision. The national authorities had therefore not exceeded their margin of appreciation by taking a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability to effectively carry out his duties. As regards the possibility for the applicant's employer to take measures less severe than dismissal, the domestic courts had observed that the applicant was not willing to alter his connections with the impugned organisation other than to sever links from its site to the sadomasochistic websites. In such circumstances, given that the applicant had refused to curb even those aspects of his private life most likely to enter into the public domain, the measure complained of had not been disproportionate: *manifestly ill-founded*.

FAMILY LIFE
Second investigation by child welfare services into the applicant's parental abilities after an initial investigation had concluded that the children did not need to be taken into care: *no violation*.

K.T. - Norway (N°26664/03)
Judgment 25.9.2008 [Section I]

Facts: The applicant, who had been taking medication for Attention Deficit Hyperactivity Disorder, lived with his wife and two sons until 2001, when his wife moved out and went to live in Finland. Later on she filed several reports against the applicant for alleged assaults and threats, which were eventually dismissed by the police. In addition, she contacted the child care authorities alleging that the applicant was abusing intoxicating substances and that the children were at risk of violence. The authorities opened an investigation during which they made numerous unannounced visits to the applicant's home before discontinuing their inquiries. Their final report concluded that, even though the applicant's doctor had considered his consumption of medication too high, the children were not living in a situation which required their compulsory taking into public care. A few months later, following several new reports of concern by third parties alleging the applicant's frequent intoxication and inappropriate behaviour in public, the child welfare services opened a new investigation. The applicant refused to cooperate with the authorities. In July 2002 the child welfare services concluded the investigation by expressing doubts as to the applicant's capacity to care for his sons and to ensure their upbringing. They recommended support measures for a period of six months, including assistance such as a support home for the children to visit and providing the applicant with guidance on how to cope with his illness and problems related to drug taking. Meanwhile, the applicant instituted court proceedings to have the second investigation declared unlawful. The courts at first and second instance dismissed his complaint, finding that the authorities' decision to start the second investigation had not been decisive for his rights and obligations. In the final instance, the Supreme Court, having heard the parties, upheld the first-instance decision.

Law: Article 8 – The applicant complained that the second investigation constituted an unjustified interference with his right to respect for his private and family life. The Court found, however, that the investigation had a clear basis in domestic law and pursued the best interests of the children. Moreover, it fell within the range of measures envisaged in Article 19 of the UN Convention on the Rights of the Child for States to take in order to prevent abuse and neglect of children. In the present case an initial investigation had concluded that the children were "living in an insecure and unpredictable care situation" and that the applicant's medication intake was too high. The second investigation was triggered by a new report by a third person who had witnessed the applicant's intoxication in a public place. Similar incidents were reported by two other persons. A general duty on the part of the child welfare authorities to thoroughly investigate the validity of such *prima facie* credible reports could not be derived from Article 8, because it would inevitably risk delaying the investigation, deflecting attention and resources away from the real problems and reducing their effectiveness. In view of the relevant and sufficient reasons referred to above, the Court considered it reasonable that the national authorities should have initiated a second investigation into the children's situation. Moreover, there was nothing to indicate that in reaching that decision the authorities had gone beyond the wide margin of appreciation accorded to them in matters of child care. As to the modalities of the second investigation, since the applicant had refused to cooperate with the authorities, they had collected evidence from his doctor, the children's school and the police. In this way they had managed to strike a proper balance between the applicant's interests in maintaining the confidentiality of certain personal data and the best interests of the children. The Court therefore agreed with the Supreme Court that the second investigation, including the manner in which it was implemented, was necessary and proportionate.
Conclusion: no violation (unanimously).

Article 6 § 1 – The applicant also complained about the Norwegian courts' dismissal of his action challenging the second investigation. The Court noted that the domestic courts had concluded that, since the investigation had only been a preparatory measure by the child welfare authorities, the applicant had no actual and current legal interest in obtaining a declaratory judgment. Subsequently, the Supreme Court had afforded the applicant a review of the merits of his complaint, but dismissed them as groundless.

Bearing in mind that the Supreme Court was sitting as a court of full jurisdiction, that it had held an oral hearing and carried out a complete review of the questions of law and fact, the right to a court under Article 6 § 1 had been complied with.
Conclusion: no violation (six votes to one).

FAMILY LIFE
Temporary placement of a child under public care due to fears of ill-treatment by the parents: *no violation*.

R.K. and A.K. - United Kingdom (N° 38000(1)/05)
Judgment 30.9.2008 [Section IV]

Facts: The applicants, husband and wife, have a daughter M., who was born in July 1998. Two months after her birth, M. was admitted to hospital with a fracture of the midshaft of the femur. A consultant paediatrician interviewed the applicants and M.'s grandmother about the origin of the injury, but they did not speak much English and had no interpreter. Since there had been no family history of metabolic bone disease, the doctor concluded that M. had suffered a non-accidental injury. The police were informed of the incident and the applicants were again interviewed on several occasions by police officers and social workers, who proposed to call a child protection conference. Since their account of the facts had not been convincing even in the presence of an interpreter, the court issued a care order and M. was placed under the care of her aunt, who lived a few hundred yards from the applicants' house. Three months later, while in her aunt's care, M. sustained a second injury in the form of bilateral femoral fractures. Further tests showed that M. was suffering from brittle bone disease (*osteogenesis imperfecta*). In April 1999 M. was discharged from hospital and returned to live with the applicants. Two months later, the courts discharged the care order after finding that at the time of the first injury it had not been possible to make the diagnosis of a bone disease. The parents subsequently brought claims for negligence and breach of their Article 8 rights against the hospital and the paediatrician, but their claims were dismissed.

Law: Article 8 – The applicants' daughter suffered from *osteoporosis imperfecta*, a very rare condition difficult to diagnose in very small infants. Pursuant to the medical opinion given at the time of the diagnosis, no fault could have been imputed to the doctors for not reaching that conclusion at the time of the first injury. Consequently, the Court held that mistaken judgments or assessments by professionals did not *per se* render child-care measures incompatible with the requirements of Article 8. Medical and social authorities had a general duty to protect children and could not be held liable every time a genuine and reasonably-held concern about the safety of children proved wrong. Accordingly, in the present case, the authorities could not be criticised either for proceeding on the basis that M's first injury might have been inflicted by her parents. While it was true that there had been problems of communication with the applicants, even when they had been provided an interpreter, they had not been able to convincingly explain the origin of M.'s first injury. Furthermore, M. had been removed from the applicants' care for a period of some seven months, during which she was placed within her extended family and in close proximity to the applicants' home facilitating their regular visits. In sum, the Court was not called upon to retrospectively adjudicate the best medical practice or the most reliable expert opinion. It was satisfied that there had been relevant and sufficient reasons for the authorities to take protective measures which in the circumstances were proportionate to the aim of protecting M.
Conclusion: no violation (unanimously).

The Court further found a violation of Article 13 (absence of an effective remedy).

Article 41 – EUR 10,000 in respect of non-pecuniary damage.

HOME
Order for demolition of houses owing to authorities' refusal to continue to authorise the occupation of coastal public land on which they were built: *relinquishment in favour of Grand Chamber*.

DEPALLE - France (N° 34044/02)
Decision 29.4.2008 [Section V]

BROSSET TRIBOULET and BROSSET POSPISIL - France (N° 34078/02)
Decision 29.4.2008 [Section V]

(see Article 1 of Protocol No. 1 below).

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction of a journalist for offensive behaviour and defamation: *no violation.*

CUC PASCU - Romania (N° 36157/02)
Judgment 16.9.2008 [Section III]

Facts: The applicant, a journalist, was convicted at first instance of offensive behaviour and acquitted of defamation following the publication in a local newspaper of an article in which he made various offensive assertions about M.I., the Dean of the Faculty of Medicine of Oradea University and also a Member of Parliament, accusing him of fraud and plagiarism, *inter alia*. His appeal was dismissed and he was convicted of offensive behaviour and defamation and sentenced to pay a fine of EUR 640 and, jointly with the newspaper which published the article, to pay damages.

Law: The applicant's conviction amounted to interference, prescribed by the Romanian Criminal Code, which pursued the legitimate aim of "protecting the rights of others", in this case M.I.'s reputation. While the applicant effectively had a duty to alert the public to alleged misconduct by the authorities, the fact that he had directly accused M.I. obliged him to adduce sufficient factual evidence to corroborate his accusations. The applicant had failed, however, to prove the truthfulness of his assertions before the domestic courts, even though he had been given an opportunity to do so during the proceedings. In the absence of such factual evidence the applicant, as a journalist, should have shown the utmost rigour and exercised particular caution before publishing the offending article. It had been published, however, without the applicant even having verified its content, even though the information it contained had been communicated by a third party.
Concerning the allegations of criminal misconduct, M.I. had never had any criminal proceedings brought against him and the applicant had given no objective explanation for such accusations. Nor could the offensive statements the applicant had made be seen as the expression of the "measure of exaggeration" or "provocation" the press were allowed.
As regards the proportionality of the interference with the right to freedom of expression, although the sums the applicant had been sentenced to pay were not negligible, the serious nature of his accusations against the victim and the language in which they were couched had to be taken into account.
In view of the margin of appreciation left to the contracting States in such cases, the Court found that the applicant's sentence had not been disproportionate to the legitimate aim pursued and that the impugned interference had been "necessary in a democratic society".
Conclusion: no violation (unanimously).

FREEDOM OF EXPRESSION
Conviction for criminal libel towards a representative of a religious community (the director of the Grand Mosque in Lyons): *violation.*

CHALABI - France (N° 35916/04)
Judgment 18.9.2008 [Section V]

Facts: In November 2001 the magazine *Lyon Mag'* published an article entitled "Compulsory Retirement for Chief Mufti" which included an interview with the applicant, who was presented as a former member of the Board of Directors of the Grand Mosque of Lyons, in which he explained the circumstances of the departure of Mr Chirane, the imam of the Grand Mosque of Lyons. In the article the applicant criticised the conduct of Mr Kabtane, the director of the Grand Mosque of Lyons, in particular his administrative and financial management of the mosque and his religious practice.
Mr Kabtane brought proceedings against the applicant, the newspaper's publication director and *Lyon Mag'* before the domestic courts for public defamation of an individual. In 2002, the publication director of *Lyon Mag'* submitted twenty-one documents to the civil party in evidence.
The Court of Appeal, reviewing the first-instance judgment on these points, found that the proceedings had been terminated by an amnesty and that, in respect of the civil action, only one of the passages of the interview constituted the offence of public defamation of an individual. It declared the applicant and the publication director liable for the damage sustained by Mr Kabtane and ordered them jointly and severally to pay him EUR 1,500 in damages, *Lyon Mag'*, for its part, being liable under civil law for the financial penalties imposed. The applicant unsuccessfully appealed on points of law.

Law: The article was focused on the management of the Mosque and its funding. At the time this had been a matter of controversy – fuelled and revived by the imam's departure – which had been widely reported in the regional and national press. The funding and management of a place of worship, of any type, were in principle matters of public interest for the members of the religious community concerned and, more broadly, for the community as a whole.
Mr Kabtane could be considered a public figure on account of the institutional dimension and the importance of his duties. As director and manager of the Grand Mosque of Lyons, he represented the Muslim community in the Lyons region and thus exposed himself to criticism of the manner in which he carried out his duties. Given the general tenor of the interview and the context in which the offending comments had been made, the Court considered that they were to be regarded as value judgments rather than bald statements of fact.
As to whether there was a sufficient factual basis, the many documents produced in evidence showed that at the time of the article in question the offending comments had not been entirely without factual basis. Furthermore, Mr Kabtane had been under investigation for misappropriation and fraud and the judicial proceedings had still been under way at the relevant time. Even though, having regard to the presumption of innocence, a person under investigation could not be deemed guilty, the comments had not been entirely devoid of a factual basis.
With regard to the comments themselves, the Court did not discern any "manifestly insulting" terms such as to justify restricting the author's freedom of expression and considered that the language used by the applicant could not be regarded as excessive, particularly in view of the public dimension of the victim's duties.
The Court accordingly held that the applicant's conviction amounted to a disproportionate interference with his right to freedom of expression and could not be regarded as "necessary in a democratic society".
Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 14

DISCRIMINATION (Article 10)
Obligation to use French language at French Polynesian Assembly: *communicated*.

BIRK-LEVY - France (N° 39426/06)
[Section V]

The applicant is an elected member of the Assembly of French Polynesia. Her complaint concerns the annulment by the *Conseil d'Etat* of a provision of the Rules of Procedure of the Assembly of French Polynesia authorising the members of that Assembly, in plenary session, to express themselves "in French, Tahitian or one of the Polynesian languages".
Communicated under Articles 10, 11 and 14 of the Convention.

ARTICLE 35

Article 35 § 3

COMPETENCE *RATIONE PERSONAE*
Dispute falling entirely within internal legal system of an international organisation endowed with its own legal personality separate from that of its members: *inadmissible.*

BOIVIN - France, Belgium and 32 member States of the Council of Europe (N° 73250/01)
Decision 9.9.2008 [Section V]

(see Article 1 above).

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
Order for demolition of houses owing to authorities' refusal to continue to authorise the occupation of coastal public land on which they were built: *relinquishment in favour of Grand Chamber*.

DEPALLE - France (N° 34044/02)
Decision 29.4.2008 [Section V]

BROSSET TRIBOULET and BROSSET POSPISIL - France (N° 34078/02)
Decision 29.4.2008 [Section V]

The two applications concern administrative proceedings following the French authorities' refusal to authorise the applicants to continue to occupy plots of public coastland on which houses they own were built. The applicants were ordered to restore the coastland concerned to the state it had been in before the houses were built.
The applications were declared admissible under Article 8 of the Convention and Article 1 of Protocol No. 1.

RULE 43 § 4 OF THE RULES OF COURT

EXPENSES ASSESSED BY COURT AFTER STRIKING OUT OF LIST
Award of costs and expenses to the extent that they were actually and necessarily incurred and were reasonable as to quantum: *obligation on respondent State to reimburse sums concerned*.

PILATO - Italy (N° 18995/06)
Decision 2.9.2008 [Section II]

The applicant was sentenced to life imprisonment for murder and his applications for leave were refused.

Article 37 of the Convention – The Court decided to communicate the case to the Government, who filed observations. Counsel for the applicant filed observations in reply in which he mentioned a letter from his client informing him of positive developments at the prison and in the authorities' attitude towards the applicant, and expressing the wish to withdraw his application. In their further observations the Government suggested that this development enabled the Court to strike the application out of its list. The applicant no longer wished to pursue his application and there were no special circumstances in the case affecting respect for human rights as defined in the Convention or its Protocols and requiring the further examination of the application: *striking out of the list*.

Rule 43 § 4 of the Rules of Court – Unlike Article 41 of the Convention, which came into play only once the Court had found a violation of the Convention or its Protocols, Rule 43 § 4 of the Rules of Court authorised the Court to award the applicant costs only. The general principles governing costs awarded under this rule were essentially the same as those applied in respect of Article 41. In the instant case the applicant produced a detailed list of all the costs and expenses incurred. The Court considered the costs incurred in respect of this application reasonable and decided to award the full amount.

(See *Kordoghliazar v. Romania*, no. 8776/05, 20 May 2008).

Relinquishment in favour of the Grand Chamber

Article 30

DEPALLE - France (N° 34044/02)
[Section V]

BROSSET TRIBOULET and BROSSET POSPISIL - France (N° 34078/02)
[Section V]

(see Article 1 of Protocol No. 1 above).

Judgments having become final under Article 44 § 2 (c)[1]

On 29 September 2008 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

KUSHOGLU – Bulgaria (N° 48191/99)
DOUGLAS – Cyprus (N° 21929/04)
PLETEŠ – Croatia (N° 21591/06)
BOCHET – France (N° 18130/05)
RÉMY GARNIER – France (N° 38984/04)
AVDELIDIS and Others – Greece (N° 15938/06)
MILIONIS and Others – Greece (N° 41898/04)
PYRGIOTAKIS – Greece (N° 15100/06)
TERZOGLOU – Greece (N° 15280/06)
TOURKIKI ENOSI XANTHIS and Others – Greece (N° 26698/05)
PEÁK – Hungary (N° 20280/04)
CIEŚLAK – Poland (N° 32098/05)
FLOREK – Poland (N° 20334/04)
MAJCHER – Poland (N° 12193/02)
WILCZYŃSKI – Poland (N° 35760/06)
ANDĚLOVÀ – Czech Republic (N° 995/06)
HOŘENÍ – Czech Republic (N° 31806/02)
CERĂCEANU – Romania (n° 1) (N° 31250/02)
GAGA – Romania (N° 1562/02)
IOAN – Romania (N° 31005/03)
SMITH – United Kingdom (N° 64729/01)
AZIYEVY – Russia (N° 77626/01)
BRAGA, TIMOFEYEV and KIRYUSHKINA – Russia (N° 24229/03)
BUDAYEVA and Others – Russia (N^{os} 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02)
DMITRIYEVA – Russia (N° 27101/04)
FALIMONOV – Russia (N° 11549/02)
GOLOVKIN – Russia (N° 16595/02)
IVAN NOVIKOV – Russia (N° 12541/05)
MATVEYEV – Russia (N° 26601/02)
MAYAMSIN – Russia (N° 3344/04)
POPKOV – Russia (N° 32327/06)
WASSERMAN – Russia (N° 2) (N° 21071/05)
DOLHAR – Slovenia (N° 66822/01)
SIRC – Slovenia (N° 44580/98)

[1] The list of judgments having become final pursuant to Article 44(2)(b) of the Convention has been discontinued. Please refer to the Court's database HUDOC which will indicate when a given judgment has become final.

ANDIÇI – Turkey (N° 27796/03)
AYŞE GÖK and Others – Turkey (N° 60579/00)
GÜLMEZ – Turkey (N° 16330/02)
KOŞAL – Turkey (N° 23453/04)
ORHAN KUR – Turkey (N° 32577/02)
TARAK – Turkey (N° 18711/02)
YILDIRIM and Others – Turkey (Nos 16456/03 and 8136/06)
BELOCHENKO – Ukraine (N° 41803/04)
KOLESNIK v. Ukraine (N° 20824/02)
MAYDANIK – Ukraine (N° 20826/02)
PONOMARYOV – Ukraine (N° 3236/03)
REGENT COMPANY – Ukraine (N° 773/03)

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18.9.2008

Press release issued by the Registrar

European Court of Human Rights delivers its 10 000th judgment

The European Court of Human Rights has today delivered its 10 000th judgment, ***Takhayeva and Others v. Russia*** (no. 23286/04). The Court found violations of Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security) and 13 (right to an effective remedy) of the European Convention on Human Rights concerning the applicants' complaint that their relative disappeared after being abducted from their village in Chechnya by Russian servicemen (see today's grouped press release, no. 637).

Set up in 1959, the Court delivered its first judgment in 1961, ***Lawless v. Ireland***. By the time Protocol No. 11 entered into force on 1 November 1998 establishing a full-time Court and opening up direct access to the Court for 800 million Europeans, the Court had delivered 837 judgments. Seven years on at the end of 2005 the Court had delivered 5,968 judgments. Today, some three years and another 4,000 judgments later, the Court has delivered its 10 000th judgment.

Commenting today in Strasbourg, Jean-Paul Costa, the President of the European Court of Human Rights, said: "These statistics testify to what has been achieved by the Court since the restructuring of the Convention machinery in 1998. They show that the right of individual application is today both an essential part of the Convention system and a basic feature of European legal culture. This achievement has to be considered, however, against the backdrop of the mass of applications the Court is now faced with and the need to ensure its continuing effectiveness. To reduce the Court's workload, Governments, legislators and the judiciary in all the member States of the Council of Europe need to work together at national level to secure the rights and freedoms guaranteed by the Convention and its Protocols. It is for the States to offer this protection themselves, as an essential condition for the rule of law, whether it be the right to life or the prohibition against torture or the right to liberty and security and to an effective remedy, or again the right to a fair trial or the freedom of expression. Only when such protection is a reality at national level will it be possible to prevent such grave violations as were found in the Court's 10 000th judgment delivered today."

The Court currently has 94,650 applications pending before it requiring a judicial decision. In 2007, in addition to delivering 1,503 judgments the Court declared over 27,000 applications inadmissible.