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

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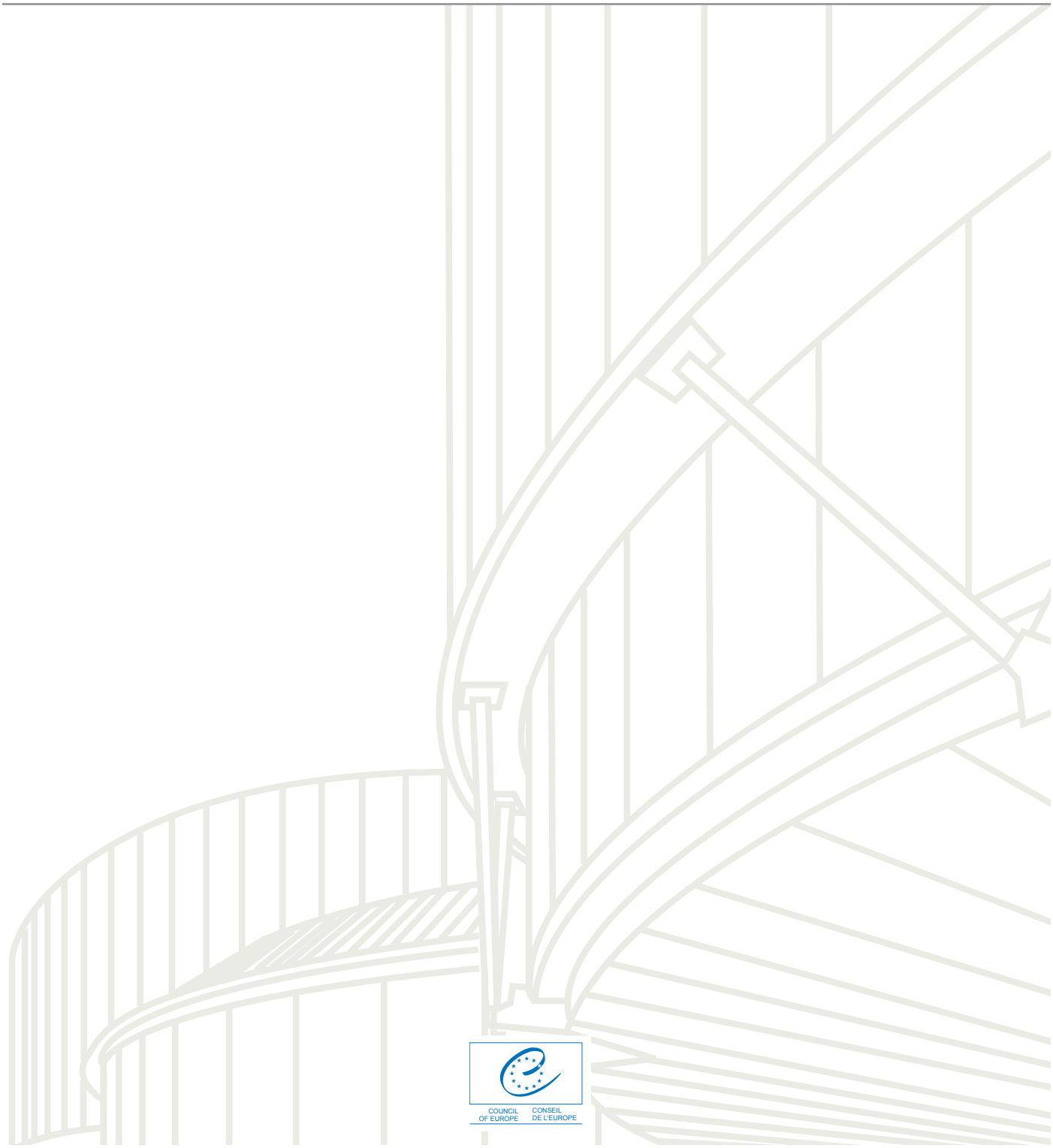

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CONTENTS

ARTICLE 5

ARTICLE 6

ARTICLE 11

ARTICLE 13

ARTICLE 14

ARTICLE 33

ARTICLE 34

Admissible

ARTICLE 35

Inadmissible

ARTICLE 1 of PROTOCOL No. 1

Judgment

Communicated

ARTICLE 3 of PROTOCOL No. 1

Judgments

ARTICLE 4 of PROTOCOL No. 7

Judgment

ARTICLE 1 of PROTOCOL No. 13

Admissible

ARTICLE 1

RESPONSIBILITY OF STATES
Territorial jurisdiction in relation to detention of Iraqi nationals by British Armed Forces in Iraq: *admissible*.

AL-SAADOON and MUFDHI - United Kingdom (N° 61498/08)
Decision 30.6.2009 [Section IV]

This case concerns a complaint by two Iraqi nationals that the British authorities in Iraq had transferred them to Iraqi custody in breach of an interim measure indicated by the European Court under Rule 39, so putting them at real risk of an unfair trial followed by execution by hanging.

(a) *Background*: On 20 March 2003 a coalition of Armed Forces (the Multi-National Force – MNF) commenced the invasion of Iraq. After major combat operations had ceased, the Coalition Provisional Authority (CPA) was created as a caretaker administration until an Iraqi government could be established. In July 2003 the Governing Council of Iraq was formed and the CPA assumed a consultative role. On 27 June 2004 the CPA issued a memorandum providing that criminal detainees were to be handed over to the Iraqi authorities as soon as reasonably practicable and an order (CPA Order No 17 (revised)) that stipulated that for the duration of the order MNF premises on Iraqi territory were to remain inviolable and subject to the exclusive control and authority of the MNF. The occupation came to an end the following day and authority was transferred from the CPA to the interim Government. Thereafter the MNF, including the British contingent, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council. The United Kingdom and Iraqi authorities subsequently entered into a Memorandum of Understanding that stipulated that the interim Iraqi Government had legal authority over all criminal suspects in the physical custody of the British contingent. The MNF's UN Mandate to remain in Iraq expired on 31 December 2008.

(b) *Applicants' case*: The applicants were arrested by British forces following the invasion of Iraq. They were initially detained in British-run detention facilities as "security detainees" on suspicion of being senior members of the Ba'ath Party under the former regime and of orchestrating violence against the coalition forces. In October 2004 the British military police, which had been investigating the deaths of two British soldiers who had been ambushed and murdered in southern Iraq on 23 March 2003, concluded that there was evidence that the applicants had been involved. In December 2005 the British authorities formally referred the murder case against the applicants to the Iraqi criminal courts. In May 2006 an arrest warrant was issued against them under the Iraqi Penal Code and an order made authorising their continued detention by the British Army in Basra. The UK authorities reclassified the applicants' status from "security detainees" to "criminal detainees". The cases were then transferred to Basra Criminal Court, which decided that the allegations against the applicants constituted war crimes triable by the Iraqi High Tribunal (IHT), which had power to impose the death penalty. The IHT made repeated requests for the applicants' transfer into its custody. The applicants sought judicial review in the English courts of the legality of the proposed transfer. The Divisional Court declared it lawful on 19 December 2008 and its decision was upheld by the Court of Appeal on 30 December 2008. While accepting that there was a real risk that the applicants would be executed, the Court of Appeal found that, even prior to the expiry of the UN Mandate on 31 December 2008, the United Kingdom had not been exercising in relation to the applicants autonomous power as a sovereign State, but had acted as an agent for the Iraqi court. It had no discretionary power of its own to hold, release or return the applicants. In essence it was detaining them only at the request and to the order of the IHT and was obliged to return them to the custody of the IHT in accordance with the arrangements between the United Kingdom and Iraq. That was *a fortiori* so with the expiry of the Mandate, as after that date the British forces would enjoy no legal power to detain any Iraqi. In any event, even if the United Kingdom was exercising jurisdiction, it nevertheless had an international-law obligation to transfer the applicants to the custody of the IHT and that obligation had to be respected

unless it would expose the applicants to a crime against humanity or torture. The death penalty by hanging did not fit into either of those categories. The Court of Appeal therefore dismissed the appeal.
Later the same day (30 December 2008) the applicants obtained an interim measure from the European Court under Rule 39 indicating to the UK Government that they should not to remove or transfer the applicants from their custody until further notice. However, the Government replied the following day that, since the UN Mandate was due to expire at midnight, exceptionally they could not comply with the measure and had transferred the applicants to Iraqi custody earlier in the day. The applicants were subsequently refused leave to appeal against the Court of Appeal's decision by the House of Lords. Their trial before the IHT commenced on 11 May 2009.

Admissible under Articles 2, 3 and 6 and Article 1 of Protocol No. 13: With regard to the preliminary issue of jurisdiction, the United Kingdom authorities had had total and exclusive control, first through the exercise of military force and then by law, over the detention facilities in which the applicants were held. During the first months of the applicants' detention, the United Kingdom was an occupying power in Iraq. The two British-run detention facilities in which the applicants were held had been established on Iraqi territory through the exercise of military force. The United Kingdom had exercised control and authority over the individuals detained in them initially solely as a result of the use or threat of military force. Subsequently, its *de facto* control over those premises had been reflected in law. In particular, on 24 June 2004, CPA Order No. 17 (Revised) had provided that all premises used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF. That provision had remained in force until midnight on 31 December 2008. Given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the applicants were within the United Kingdom's jurisdiction and had remained so until their physical transfer to the custody of the Iraqi authorities on 31 December 2008. The questions whether the United Kingdom was under a legal obligation to transfer the applicants to Iraqi custody and whether, if there was such an obligation, it modified or displaced any obligation owed to the applicants under the Convention, were not material to the preliminary issue of jurisdiction and had instead to be considered in relation to the merits of the applicants' complaints.
The issue of the admissibility of the applicants' complaints under Articles 13 and 34 was joined to the merits. Their complaints concerning conditions of detention and the risk of ill-treatment or extrajudicial killing in Iraqi custody were declared inadmissible for failure to exhaust UK domestic remedies.

See also, two recently communicated cases: *Al Skeini and Others v. the United Kingdom*, no. 55721/07, Information Note no. 114; and *Al-Jedda v. the United Kingdom*, no. 27021/08, Information Note no. 116.

RESPONSIBILITY OF STATES
Complaints of procedural unfairness in an international criminal tribunal established by UN Security Council Resolution: *inadmissible*.

GALIĆ - Netherlands (N° 22617/07)
BLAGOJEVIĆ - Netherlands (N° 49032/07)
Decisions 9.6.2009 [Section III]

(See Article 35 § 3 below)

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*.

BEYGO - 46 member States of the Council of Europe (N° 36099/06)
Decision 16.6.2009 [Section V]

(See Article 35 § 3 below)

ARTICLE 2

LIFE
POSITIVE OBLIGATIONS
Fatal injuries sustained by applicant's mother in domestic violence case in which authorities had been aware of the perpetrator's history of violence: *violation*.

OPUZ - Turkey (N° 33401/02)
Judgment 9.6.2009 [Section III]

Facts: The applicant's mother was shot and killed by the applicant's husband in 2002 as she attempted to help the applicant flee the matrimonial home. In the years preceding the shooting the husband had subjected both the applicant and her mother to a series of violent assaults, some of which had resulted in injuries which doctors had certified as life-threatening. The incidents had included beatings, an attempt to run the two women down with a car that had left the mother seriously injured and an assault in which the applicant was stabbed seven times. The incidents and the women's fears for their lives had been repeatedly brought to the authorities' attention. Although criminal proceedings had been brought against the husband for a range of offences, including death threats, serious assault and attempted murder, in at least two instances they were discontinued after the women withdrew their complaints, allegedly under pressure from the husband. However, in view of the seriousness of the injuries, the proceedings in respect of the running down and stabbing incidents continued to trial. The husband was convicted in both cases. For the first offence, he received a three-month prison sentence, which was later commuted to a fine, and for the second, a fine payable in instalments. The violence culminated in the fatal shooting of the applicant's mother, an act the husband said he carried out to protect his honour. For that offence, he was convicted of murder in 2008 and sentenced to life imprisonment. He was, however, released pending appeal and renewed his threats against the applicant, who sought the authorities' protection. It was not until seven months later, following a request for information from the European Court, that measures were taken to protect her.
The Committee of Ministers Recommendation on the Protection of Women against Violence (Rec(2002)5 of 30 April 2002) stated that member States should introduce, develop and/or improve national policies against violence where necessary. It recommended, in particular, the penalisation of serious violence against women and the introduction of measures designed to ensure that victims can initiate criminal proceedings and receive effective protection, and that prosecutors regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute.

Law: Article 2 – The Court reiterated that where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

(a) *Foreseeability of risk*: The case disclosed a pattern of escalating violence against the applicant and her mother that was sufficiently serious to have warranted preventive measures and there had been a continuing threat to their health and safety. It had been obvious that the husband had a record of domestic violence and there was therefore a significant risk of further violence. The situation was known to the authorities and, two weeks' before her death, the mother had notified the public prosecutor's office that her life was in immediate danger and requested police intervention. The possibility of a lethal attack had therefore been foreseeable.

(b) *Whether the authorities took appropriate measures*: The first issue was whether the authorities had been justified in not pursuing criminal proceedings against the husband when the applicant and her mother withdrew their complaints. The Court began by examining practice in the member States. It found that, although there was no general consensus, the practice showed that the more serious the offence or the

greater the risk of further offences, the more likely it was that the prosecution would proceed in the public interest even when the victim had withdrawn her complaint. Various factors were to be taken into account in deciding whether to pursue a prosecution. These related to the offence (its seriousness, the nature of the victim's injuries, the use of a weapon, planning), the offender (his record, the risk of his reoffending, any past history of violence), the victim and potential victims (any risk to their health and safety, any effects on the children, the existence of further threats since the attack) and the relationship between the offender and the victim (the history and current position, and the effects of pursuing a prosecution against the victim's wishes). In the applicant's case, despite the pattern of violence and use of lethal weapons, the authorities had repeatedly dropped proceedings against the husband in order to avoid interfering in what they perceived to be a "family matter" and did not appear to have considered the motives behind the withdrawal of the complaints, despite being informed of the death threats. As to the argument that the authorities had been prevented from proceeding by the statutory rule that prevented a prosecution where the complaint had been withdrawn unless the criminal acts had resulted in a minimum of ten days' sickness or unfitness for work, that legislative framework fell short of the requirements inherent in the State's positive obligations with regard to protection from domestic violence. Nor could it be argued that continuing with the prosecution would have violated the victims' rights under Article 8 of the Convention, as the seriousness of the risk to the applicant's mother had rendered such intervention necessary.
Turning to the Government's submission that there had been no tangible evidence that the mother's life was in imminent danger, the Court observed that it was not the case that the authorities had assessed the threat posed by the husband and concluded that detention was disproportionate. Rather they had failed to address the issues at all. In any event, in domestic violence cases perpetrators' rights could not supersede victims' rights to life and physical and mental integrity.
Lastly, the Court noted that the authorities could have ordered protective measures under the Family Protection Act (Law no. 4320) or issued an injunction restraining the husband from contacting, communicating with or approaching the applicant's mother or entering defined areas. In sum, they had not displayed due diligence and had therefore failed in their positive obligations to protect the applicant's mother's right to life.

(c) *Effectiveness of investigation*: The criminal proceedings arising out of the death had been going on for more than six years and an appeal was still pending. This could not be described as a prompt response by the authorities to an intentional killing where the perpetrator had already confessed.

In conclusion, the criminal-justice system, as applied in the applicant's case, had not acted as an adequate deterrent. Once the situation had been brought to the authorities' attention, they had not been entitled to rely on the victims' attitude for their failure to take adequate measures to prevent threats to physical integrity being carried out.
Conclusion: violation (unanimously).

Article 3 – The authorities' response to the husband's acts had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions had had no noticeable preventive or deterrent effect and had even disclosed a degree of tolerance, with the husband receiving a short prison sentence (commuted to a fine) for the running down incident and, even more strikingly, a small fine, payable in instalments, for stabbing the applicant seven times. Furthermore, it had not been until 1998, when Law no. 4320 came into force, that Turkish law had provided specific administrative and policing measures to protect against domestic violence, and even then, the available measures and sanctions were not effectively applied in the applicant's case. Lastly, it was a matter of grave concern that the violence against the applicant had not ended and that the authorities had continued to take no action. Despite the applicant's request for help, nothing was done until the Court requested the Government to provide information about the protective measures it had taken. In short, the authorities had failed to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her former husband.
Conclusion: violation (unanimously).

Article 14, in conjunction with Articles 2 and 3 – The Court noted that under the relevant rules and principles of international law accepted by the vast majority of States, a failure – even if unintentional – by the State to protect women against domestic violence breached their right to the equal protection of the

law. Reports by the Diyarbakır Bar Association and Amnesty International, which were not contested by the Government, indicated that the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All the victims were women, the vast majority of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. The reports also suggested that domestic violence was tolerated by the authorities and that the available remedies did not function effectively. Police officers did not investigate complaints but sought to assume the role of mediator by trying to convince victims to return home and drop their complaints. Delays in issuing and serving injunctions were frequent and the courts treated such proceedings as a form of divorce action. Perpetrators of domestic violence did not receive deterrent sentences, which were mitigated on the grounds of custom, tradition or honour.
Domestic violence thus affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother could therefore be regarded as having been gender-based and discriminatory against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as in the applicant's case, indicated an insufficient commitment on the part of the authorities to take appropriate action to address domestic violence.
Conclusion: violation (unanimously).

Article 41 – EUR 30,000 in respect of non-pecuniary damage.

LIFE
DEATH PENALTY
Transfer of suspects under control of British Armed Forces in Iraq into custody of Iraqi authorities on charges carrying death penalty: *admissible*.

AL-SAADOON and MUFDHI - United Kingdom (N° 61498/08)
Decision 30.6.2009 [Section IV]

(See Article 1 above)

ARTICLE 3

INHUMAN OR DEGRADING TREATMENT
POSITIVE OBLIGATIONS
Failure of authorities to take adequate measures to protect applicant and her family from domestic violence: *violation*.

OPUZ - Turkey (N° 33401/02)
Judgment 9.6.2009 [Section III]

(See Article 2 above)

INHUMAN OR DEGRADING TREATMENT
Sterilisation of Roma woman allegedly without her informed consent: *admissible*.

V.C. - Slovakia (N° 18968/07)
Decision 16.6.2009 [Section IV]

In 2000 the applicant, a Roma woman, was sterilised in a public hospital during the delivery of her second child by Caesarean section. The sterilisation consisted of severing and sealing her Fallopian tubes in order to prevent fertilisation. The applicant's delivery record contained a clear reference to her ethnic origin

together with a request for sterilisation along with her signature. However, the applicant claimed that she had not understood the term "sterilisation", and that she had signed the request while in labour and after being told by the hospital staff that if she fell pregnant again either she or the child might die. According to the applicant, she had been put in a so-called "Gypsy room" separate from non-Roma women and had been prevented from using the same bathrooms or toilets. She unsuccessfully sought redress in civil proceedings, arguing that her sterilisation had been in violation of national legislation and international human-rights standards and that she had not been duly informed about the procedure, its consequences or alternative solutions. The Constitutional Court dismissed her constitutional complaint because she had failed to invoke a violation of her procedural rights under Article 6 § 1 of the Convention in addition to the matters set out in her complaint.
The Government argued that, by failing to rely on appropriate provisions of the Convention, the applicant had prevented the Constitutional Court from examining the way in which the ordinary courts had assessed the facts complained of. However, reiterating that the exhaustion rule must be applied with some flexibility and without excessive formalism, the Court observed that, both in the proceedings before the ordinary courts and the Constitutional Court, the applicant had complained of a violation of the same Convention rights as those she had subsequently complained of to the Court. She had thus afforded the domestic authorities the opportunity to redress, by their own means, the violation of her Convention rights in issue. In sum, the Court considered that subjecting the constitutional review of the case to a requirement that the applicant invoke Article 6 of the Convention had amounted to excessive formalism.
Admissible under Articles 3, 8 12, 13 and 14 of the Convention.

INHUMAN OR DEGRADING TREATMENT
EXPULSION
Refusal of asylum request on grounds that applicants had not sought protection of authorities in home State from acts of private individuals: *inadmissible*.

A.M. and Others - Sweden (N° 38813/08)
Decision 16.6.2009 [Section III]

Facts: The applicants were a Russian family of four comprising a married couple and their two minor children. The first applicant was an officer in the Russian army. He left Russia and travelled to Sweden, where he applied for asylum and a residence permit in 2004 on the grounds that he had been assaulted and threatened after reporting fellow army officers to his superiors for weapons smuggling. Three months after his arrival in Sweden, he was joined by the other applicants, who also made applications for asylum and a residence permit. The second applicant said that she too had been assaulted and that she and the children had received threats. The Swedish Migration Board rejected the requests for asylum on the grounds that the family's problems emanated from individuals and that they should therefore have sought the protection of the Russian authorities. In an appeal to the Migration Court the first applicant responded that when he had reported the weapons smuggling to various military authorities, they had sought to protect one another and had threatened him with a court martial for slander. He added that he had been repeatedly summoned by the police, which suggested that people were still looking for him and that his family would not be safe in Russia. The Migration Court dismissed the appeal, notably on the grounds that the family had not reported the threats or assaults to the Russian authorities.

Inadmissible: Article 3 – No substantial grounds had been established for believing that the applicants would face a real risk of persecution or treatment contrary to Article 3 of the Convention if deported to Russia. Firstly, there were doubts about the veracity of their allegations, particularly as regards the alleged failure of the military authorities to look into the first applicant's report of weapons smuggling and as regards the authenticity and effect of the summonses he was alleged to have received. Even if genuine, the summonses gave no indication that the first applicant was wanted by the Russian authorities. Secondly, the applicants had not reported the alleged threats and assaults to the Russian authorities or requested their protection. Even if the allegation that the military authorities had failed to investigate the reported weapons smuggling was true, that did not automatically mean that the applicants would be deprived of the protection of the civil authorities against threats from other individuals. It was important to note in that

connection that the case concerned deportation to a Contracting Party to the Convention which had undertaken to secure the fundamental rights guaranteed under its provisions. Lastly, there was no impediment to the applicants' settling in another part of Russia, away from their home town, on their return: *manifestly ill founded*.

Article 8 – The applicants would be deported together so there was no question of the family being split up. There was no reason why the first and second applicants should not be able to find work in Russia. Although the family had been in Sweden for more than four years and had adapted to life there, they had known since their arrival that they might not be permitted to remain and had never held Swedish residence permits. All the applicants were Russian nationals and had spent all but four years of their lives in Russia: *manifestly ill-founded*.

INHUMAN OR DEGRADING TREATMENT
Alleged insufficiency of old-age pension to maintain adequate standard of living: *inadmissible*.

BUDINA - Russia (N° 45603/05)
Decision 18.6.2009 [Section I]

The applicant was in receipt of a disability allowance. On reaching retirement age and at her request the allowance was replaced by an old-age pension. Considering the pension inadequate for her needs, she unsuccessfully sought to have it upgraded by the courts. Subsequently, she complained to the Constitutional Court that the Law on Pensions allowed pensions below the established subsistence level, but to no avail.

Inadmissible: It could not be said that the State authorities had subjected the applicant to any direct ill-treatment. The essence of her complaint was that the State pension on which she depended for her subsistence and livelihood was not sufficient for her basic human needs. The Court could not exclude that State responsibility could arise for "treatment" where an applicant wholly dependent on State support found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity. However, even though the applicant's income was not high in absolute terms, she had failed to substantiate her allegation that the lack of funds translated itself into concrete suffering. According to her, in 2008 her pension was enough for flat maintenance, food, and hygiene items, but not enough for clothes and other items, sanitary and cultural services, health care and hospital treatment. However, it appeared that she was in fact eligible for free medical treatment. Indeed there was no indication in the materials before the Court that the level of pension and social benefits available to the applicant were insufficient to protect her from damage to her physical or mental health or from a situation of degradation incompatible with human dignity. Therefore, even though her situation was difficult, the Court was not persuaded that in the circumstances of the present case the high threshold of Article 3 had been met: *manifestly ill-founded.*

See also *Larioshina v. Russia,* no. 56869/00, and *Nitecki v. Poland,* no. 65653/01, in Information Note no. 41.

DEGRADING TREATMENT
Conditions of detention of asylum seekers in removal centres: *violation*.

S.D. - Greece (N° 53541/07)
Judgment 11.6.2009 [Section I]

Facts: The applicant, a Turkish journalist and member of an illegal political party, fled his country after spending several years in prison, where he had been subjected to violence. On the day of his arrival in Greece he was arrested by the police and remanded in custody for entering the country illegally and using forged documents. He alleged that he had immediately requested political asylum, but no such request

was registered by the authorities. He remained in the holding centre at the border post for two months without being allowed outdoors and without access to a telephone, blankets, clean sheets or hot water. The public prosecutor committed him for trial and ordered his release, but the applicant was rearrested by the police. The border post holding centre decided that the applicant should be detained with a view to his removal. The police commissioner then remanded him in custody pending the order for his deportation, which was to be issued within three days. However, no such order was issued because in the meantime the authorities had registered the applicant's asylum application. The criminal court acquitted the applicant but the police arrested him after the court hearing. An order was issued for his removal and he was placed in detention pending deportation on the ground that he was liable to abscond. An appeal by the applicant against the removal order was dismissed on the ground that he represented a danger to public order and security. His objections to his detention were rejected by the administrative court as applications for release had to be rejected if it was clear from the case file that the alien concerned did not intend or was unable to leave the country within the thirty-day time-limit laid down by law. The applicant fell into that category as he had applied for political asylum. When the processing of his asylum by the Advisory Committee on Asylum ("the Committee") was adjourned, the applicant lodged further objections with the administrative court against his continued detention. His asylum application was then refused as being too vague and he appealed against that decision. The applicant was subsequently transferred to the holding facility for aliens in order to be brought before the Committee for an opinion on his asylum application. He was not allowed to leave his cell for six days. The Committee adjourned examination of the case pending the receipt of evidence from the applicant in support of his application and the results of the examination he had undergone at the Medical Centre for the Rehabilitation of Torture Victims ("the Centre"). The administrative court eventually allowed the applicant's objections, holding that aliens who had entered Greece illegally and claimed asylum could not be expelled and removed. Observing that the examination of the applicant's asylum claim was pending, the court ordered his release. As a result, the applicant was issued with an asylum seeker's certificate valid for six months, which was renewed twice. The Centre certified that the applicant had been subjected to ill-treatment akin to torture in Turkey. The head of the Greek section of Amnesty International then issued a report on a visit to the border post holding centre stating that the applicant and another Turkish detainee had shared a relatively clean room which had a bath and hot water but no space for outdoor exercise.

Law: Article 3 – The applicant had spent approximately two months in a holding centre. He had subsequently been transferred to another holding facility for aliens, where he was detained for six days. The applicant and the Government presented differing accounts of the conditions of detention in the holding facilities. However, the applicant's allegations were corroborated by the findings of several international institutions and non-governmental organisations, which were not explicitly denied by the Government. Most of these concerned the overall situation of refugees arrested and detained in this region but some gave specific details concerning the border post holding centre. Furthermore, even assuming that the applicant had shared a relatively clean room which had hot water for the first two months of his detention, as stated by the head of the Greek section of Amnesty International following her visit, the fact remained that he had spent all that time in a prefabricated cabin without being allowed outdoors and without access to a telephone, blankets, clean sheets or sufficient toiletries. Similarly, in the holding facility for aliens the applicant had been confined to his cell for six days without being allowed outdoor exercise. The conditions of detention in that facility, as described by the European Committee for the Prevention of Torture, were unacceptable. With regard to the applicant's personal situation, he had been subjected to serious torture in Turkey which had left considerable clinical and psychological after-effects. The fact that this had not been formally certified by the Centre until after the applicant's detention had ended did nothing to alter that finding. In view of the above considerations, the conditions of the applicant's detention, as a refugee and asylum seeker, combined with the excessive length of his detention in the conditions described, amounted to degrading treatment.
Conclusion: violation (unanimously).

Article 5 § 1 – The day of his arrival in Greece the applicant had made an oral request for asylum which was not registered by the authorities. The police had then arrested the applicant and decided to detain him pending the order for his deportation which, by law, had to be issued within three days. However, no such order had been made. Counsel for the applicant had made a fresh asylum application in writing, which

was registered only at the third attempt. On the same day the Criminal Court had acquitted the applicant on charges of entering the country illegally and using forged papers and had ordered his release. Although the criminal proceedings were separate from the administrative deportation proceedings, the police had rearrested the applicant after he had been formally granted asylum-seeker status and had decided to detain and deport him on the ground of the same offences of which he had been acquitted by the Criminal Court. The applicant's appeal against that decision was dismissed on the ground that, having broken the law, he represented a danger to public order and safety. The authorities had therefore failed to take the applicant's status as an asylum seeker into account. Since the applicant could not be deported until his asylum application had been examined, his detention had had no basis in domestic law, at least once his application had been formally registered. However, the applicant had not been released until two months later, when the Administrative Court had allowed his objections and ordered his release. The Court noted the Government's argument as to the need for effective monitoring of persons who entered the country illegally and the necessity of preventing certain individuals from taking unfair advantage of the benefits conferred by refugee status. However, this did not dispense the authorities from stating, after examining each case individually, why releasing the asylum seeker concerned would pose a danger to public order or national security. In conclusion, the applicant's detention with a view to his expulsion had not been lawful for the purposes of Article 5 § 1 (f) of the Convention once his request for asylum had been registered.
Conclusion: violation (unanimously).

Article 5 § 4 – The relevant domestic law did not permit direct review of the lawfulness of the detention of aliens, bearing in mind that they could only be detained with a view to their deportation. The decision to detain an alien was inseparable from the decision to deport him or her. While a finding that the deportation order was unlawful automatically rendered the detention decision unlawful, the courts did not examine separately the lawfulness of the detention of an alien where the order for his or her deportation had been stayed. In addition, the wording of the law was ambiguous, apparently suggesting that even if the objections lodged by an alien against his or her detention were allowed by the court, the latter had to order the person concerned to leave the country within thirty days. Furthermore, lodging an application with the administrative courts to have a deportation order set aside or suspended did not result in the lifting of the detention order. This type of procedure was also lengthy and the law did not provide for legal aid in administrative court proceedings. Hence, the president of the administrative court had dismissed the applicant's initial objections against his detention on the ground that the applicant, having claimed asylum, had not left the country within the statutory time-limit of thirty days. The administrative court to which the applicant applied to have that decision set aside had not ruled on the lawfulness of his detention either; it had ordered his release after observing that he had appeared before the Committee and that the hearing had been adjourned pending the findings of the Centre for the Rehabilitation of Torture Victims, without ruling on the lawfulness of the earlier period of detention. Accordingly, the legal system had not afforded the applicant any opportunity of obtaining a decision from the domestic courts on the lawfulness of his detention.
Conclusion: violation (unanimously).

Article 41 – EUR 10,000 for non-pecuniary damage.

POSITIVE OBLIGATIONS
Inactivity of domestic authorities leading to criminal proceedings against applicant's attackers becoming time-barred: *violation*.

BEGANOVIĆ - Croatia (N° 46423/06)
Judgment 25.6.2009 [Section I]

Facts: In December 1999 the applicant, a Croatian national of Roma origin, along with two other friends, physically attacked three minors, who also belonged to the same group of friends. Some months later, on 23 April 2000, a group comprising the victims of the previous attack and four friends, confronted and physically attacked the applicant. During the fight, the applicant pulled out a knife and twice stabbed one of his assailants. Subsequently, another assailant, B.B., hit the applicant on the head with a wooden plank.

In April and June 2000 the police interviewed the applicant's assailants, who submitted that they had decided to carry out a revenge attack against the applicant. The police also interviewed the applicant and two neutral witnesses. In June 2000 the applicant lodged a criminal complaint with the State Attorney's Office against six identified individuals and a person unknown, alleging that they had assaulted him on 23 April 2000 causing him severe bodily injuries. A medical report was submitted to the police by a hospital in Zagreb where the applicant had been examined after the incident and which described his injuries as grievous – he had been diagnosed with concussion and contusions to the head and body, and had remained in hospital for five days. The police then lodged a criminal complaint against the assailants with the State Attorney's Office, which decided, in July 2001 and in September 2002 respectively, not to institute criminal proceedings against them as the applicant's injuries were not grievous and could only have given rise to private prosecution by the victim. The applicant then brought private prosecutions against his assailants. The proceedings against one of them, B.B., were later dismissed by another state attorney who found that domestic legislation required B.B., as a minor, to be prosecuted by the State after all. Criminal proceedings against B.B. were ultimately brought before a juvenile court in February 2002, only to be discontinued in December 2005 on the ground that the prosecution of the offence had become time-barred. The proceedings against the remaining assailants were ultimately discontinued in May 2006 as the court found that the prosecution of the offence had also become time-barred almost two years earlier.

Law: Article 3 – Even though the police had promptly interviewed the suspected assailants, the applicant and other witnesses, obtained a medical report and filed a criminal complaint with the competent State Attorney's Office, the further steps taken by the prosecuting authorities and the courts could hardly be considered to have satisfied the requirements of an effective criminal-law mechanism for the purposes of Article 3 of the Convention. While the choice of means to secure compliance with that provision in the sphere of relations between individuals fell within the State's margin of appreciation, the Court observed that under the relevant domestic law the prosecution of minors always had to be brought by the State. However, in the applicant's case, only B.B. had been prosecuted by the competent State Attorney's Office, and then only after it had initially refused to prosecute on the erroneous ground that the act could only be prosecuted privately. When the court did finally start criminal proceedings against B.B. – almost two years after the incident – two significant periods of inactivity then followed until the prosecution of the offence eventually become time-barred in 2004. As regards the proceedings against the remaining six assailants, the initial error whereby the applicant's complaint had been declared inadmissible had never been rectified, despite the fact that four of them were minors so that the proceedings against them should have been instituted by the competent State Attorney's Office. Even after the applicant had lodged a private subsidiary indictment against them, the prosecution of the offence had already become time-barred by the time the first hearing was held. In such circumstances, as the proceedings were discontinued as a result of the inactivity of the State authorities, the Court could not accept that the purpose of affording effective protection against ill-treatment had been achieved. The outcome of the criminal proceedings in the applicant's case could therefore not be said to have had a sufficiently deterrent effect on the individuals concerned, or to have been capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant.
Conclusion: violation (unanimously).

Article 14 – The applicant and his assailants had belonged to the same group of friends until the incident of December 1999. Neither in his police interview nor in his evidence before the first-instance court had the applicant indicated that any of his assailants had made reference to his Roma origin. The only one of the applicant's assailants to have mentioned the applicant's ethnic origin did not in any way indicate that it had played any role in the attack on him. In sum, there was no evidence in the applicant's case that the attack on him had been racially motivated.
Conclusion: no violation (unanimously).

Article 41 – EUR 1,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

LAWFUL ARREST OR DETENTION
EXPULSION
Failure to take into account applicant's status as asylum seeker when detaining him with a view to his expulsion: *violation*.

S.D. - Greece (N° 53541/07)
Judgment 11.6.2009 [Section I]

(See Article 3 above)

Article 5 § 3

GUARANTEE TO APPEAR FOR TRIAL
RELEASE PENDING TRIAL
Level of recognizance required to secure release on bail of a ship's captain in maritime pollution case: *case referred to the Grand Chamber*.

MANGOURAS - Spain (N° 12050/04)
Judgment 8.1.2009 [Section III]

In this case the applicant, the captain of a ship which caused pollution at sea, was deprived of his liberty for eighty-three days and was released against provision of a bank guarantee of EUR 3,000,000, corresponding to the amount of bail demanded.

In its judgment the Chamber held unanimously that there had been no violation of Article 5 § 3, finding that the national authorities had given sufficient reasons to demonstrate that the level of bail the applicant had been required to put up was proportionate and had taken sufficient account of his personal circumstances, in particular the fact that he was an employee of the ship's owner which, in turn, was insured against this type of risk. In the Court's view the amount set for bail, though high, had not been disproportionate in view of the legal interest being protected, the seriousness of the offence and the catastrophic consequences, both environmental and economic, stemming from the spillage of the ship's cargo.

The case was referred to the Grand Chamber on 5 June 2009 at the applicant's request.

For further information see Information Note no. 115.

Article 5 § 4

TAKE PROCEEDINGS
No means by which asylum seeker could obtain judicial decision on the lawfulness of his detention pending expulsion: *violation*.

S.D. - Greece (N° 53541/07)
Judgment 11.6.2009 [Section I]

(See Article 3 above)

ARTICLE 6

Article 6 § 1 [civil]

ACCESS TO COURT
Refusal of courts to process applicant company's civil actions submitted electronically: *violation*.

LAWYER PARTNERS, A.S. - Slovakia (N° 54252/07 et al.)
Judgment 16.6.2009 [Section IV]

Facts: In 2005 the applicant, a private limited company, wished to lodge over 70,000 civil actions requesting the payment of debts. Given the number of persons concerned, it generated the actions by means of computer software and recorded them on a DVD, which it then sent to the competent district courts along with an explanatory letter. However, the courts refused to register the actions on the grounds that they lacked the equipment necessary to receive and process submissions made and signed electronically. The applicant company then lodged complaints with the Constitutional Court against each of the refusals, relying on its right of access to court. Its complaints were rejected as having been lodged outside the statutory two-month time-limit. Even though the time-limit had been respected in relation to the individual complaints, the Constitutional Court considered that the relevant period had started to run from the date the applicant company first became aware of the courts' inability to register submissions in electronic form.

Law: The applicant company had lodged or intended to lodge a large number of civil actions, concerning tens of thousands of persons. If printed, those actions and their supporting documents would have filled over 40 million pages. In such circumstances, its choice as to the means of filing the actions could not be considered an abuse of process or otherwise inappropriate. Moreover, since 2002 the domestic law had provided for the electronic filing of court actions and the applicant company could not be criticised for having availed itself of this possibility. The courts' refusal to register its actions had imposed a disproportionate limitation on its right to present its cases in an effective manner.
Conclusion: violation (unanimously).

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

ACCESS TO COURT
Grant of immunity of jurisdiction to Germany in proceedings for compensation for forced labour performed during Second World War: *inadmissible*.

GROSZ - France (N° 14717/06)
Decision 16.6.2009 [Section V]

During the Second World War the applicant was arrested and deported, with the assistance of the French State, under the Vichy laws enacted between 1940 and 1944. From May 1943 until May 1945 he was forced to work without pay for the German State as part of the forced labour scheme. In 2002 the applicant applied to an employment tribunal for an order requiring the German State to make him an award as payment for the work carried out during his twenty-four months' forced labour and compensation for the damage he had sustained on account of his working conditions. The employment tribunal decided to refer the case to a special sitting to decide the issue, with a professional judge presiding. The German Government did not attend, invoking State immunity from jurisdiction. The judgment delivered by the special sitting declared the applicant's action inadmissible on the basis of the principle of immunity from jurisdiction. The court of appeal upheld the judgment and the Court of Cassation dismissed an appeal by the applicant on points of law.

Inadmissible: In view of the principles emerging from the Court's case-law (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, Information Note no. 36, and *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X, Information Note no. 48), measures taken by a State which reflected the generally recognised rules on State immunity could not be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 of the Convention. With regard to compensation of persons subjected to forced labour, while there had been some softening of the concept of State immunity from jurisdiction before the Greek courts (see *Kalogeropoulou and Others*, cited above), the Court did not hold in that judgment that the State's immunity from execution contravened the right of access to a court. This was true at least with regard to the current rule of public international law, but did not preclude a development in customary international law or treaty law in the future. Accordingly, the decisions by the domestic courts not to examine the applicant's compensation claim could not be regarded as unjustified and disproportionate restrictions on his right of access to a court: *manifestly ill-founded*.

FAIR HEARING
Lack of reasoning in assize court judgment convicting defendant: *case referred to the Grand Chamber*.

TAXQUET - Belgium (N° 926/05)
Judgment 13.1.2009 [Section II]

In this case the applicant was sentenced by the Assize Court to twenty years' imprisonment for murder and attempted murder.

In its judgment the Chamber held unanimously that there had been a violation of Article 6 § 1 on account of the lack of reasons in the assize court judgment. It also held unanimously that there had been a violation of Article 6 §§ 1 and 3 (d) as the applicant had been unable to examine or have examined an anonymous witness.

On 5 June 2009 the case was referred to the Grand Chamber at the Government's request.

For further information see Information Note no. 115.

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

RAMBUS INC. - Germany (N° 40382/04)
Decision 16.6.2009 [Section V]

The applicant company was the proprietor of a European patent that was revoked by the Board of Appeal of the European Patent Office (EPO) following an opposition proceeding. The applicant company lodged a constitutional complaint with the German Federal Constitutional Court, which, however, refused to admit it for adjudication after finding that it had not been sufficiently demonstrated that the fundamental-rights protection afforded within the European Patent Organisation was not in general equivalent to the standard of the German Constitution.
In its complaint to the European Court, the applicant company submitted that the appeal procedure before the EPO suffered from serious structural deficiencies and that, as a party to the European Patent Convention, Germany had engaged its responsibility by transferring powers to the EPO without ensuring that it afforded equivalent protection of fundamental rights to that provided by the European Convention on Human Rights.

Inadmissible: Under the European Patent Convention, a European patent had in each of the Contracting States for which it was granted the effect of a national patent granted by that State. However, the national

protection mechanisms continued to exist alongside that international instrument and both the international and national mechanisms provided their own system of judicial protection. It was for the patentee to decide to which system he wanted to submit. The question therefore arose whether the Court was competent to examine complaints about an international system of patent protection to which the applicant company had voluntarily submitted with all its advantages and disadvantages.
The Court noted that in two recent cases (*Boivin v. 34 Member States of the Council of Europe* (dec.), no. 73250/01, 9 September 2008, ECHR 2008, Information Note no. 111; and *Connolly v. 15 Member States of the European Union* (dec.), no. 73274/01, 9 December 2008) it had declared the applications incompatible *ratione personae* with the Convention after finding that the complaints were directed against the decisions of international judicial organs in the context of labour conflicts located solely within the internal legal system of the international organisations involved and that the respondent States had neither directly nor indirectly intervened in the proceedings before those judicial organs.
In the instant case, the German authorities had not intervened in the proceedings before the EPO, an international judicial organ, or, unlike the situation in *Bosphorus* (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI, Information Note no. 76), taken any subsequent measures of implementation. Further, even assuming that the *Bosphorus* case-law did apply to the applicant company's case (owing to the direct effects the grant or revocation of a European Patent had within the domestic legal systems of the States concerned), the applicant company had not established that the protection of Convention rights afforded by the EPO system was manifestly deficient. In particular, it had not put forward any arguments to persuade the Court to depart from the German Federal Constitutional Court's finding that the protection of fundamental rights within the framework of the EPO was in general equivalent to the standard of the German Constitution. Indeed, the European Commission of Human Rights had found in a 1998 decision (*Lenzing AG v. Germany, no. 39025/97*, Commission decision of 9 September 1998, unreported) that the European Patent Convention did in fact provide equivalent protection as regards the European Convention on Human Rights. Accordingly, the applicant company had not rebutted the *Bosphorus* presumption that the respondent State had not departed from the requirements of the latter Convention: *manifestly ill-founded*.

See also *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), n° 13645/05, 20 January 2009, ECHR 2009, Information Note no. 115; and *Gasparini v. Italy and Belgium* (dec.), n° 10750/03, 12 May 2009, Information Note no. 119.

FAIR HEARING
Quashing of binding and enforceable decisions by Supreme Commercial Court under new supervisory-review procedure: *inadmissible*.

OOO LINK OIL SPB - Russia (N° 42600/05)
Decision 25.6.2009 [Section I]

A legislative reform introduced on 1 January 2003 by Chapter 36 of the new Code of Commercial Procedure made a number of changes to the supervisory-review procedure in commercial cases. In particular, it abolished the discretionary power of the President and Deputy President of the Supreme Commercial Court to initiate supervisory-review proceedings, stipulated that only parties to the proceedings or affected persons could apply for supervisory review, introduced short time-limits and expressly limited the grounds for supervisory review.
The applicant company obtained a money judgment against another company which became binding and enforceable in 2005 after being upheld by a federal commercial court in cassation proceedings. Within the three-month statutory time-limit, the judgment debtor lodged an application for supervisory-review with the Supreme Commercial Court, which ordered a stay of execution pending its review. A Presidium of the Supreme Commercial Court subsequently examined the case in adversarial proceedings and quashed the judgment in the applicant company's favour on one of the three statutory grounds. The case was remitted to a commercial court, which dismissed the applicant company's claims in a decision that was upheld on appeal.

Inadmissible: The new supervisory-review procedure applicable in the Supreme Commercial Court was structurally different from the procedure exercised by courts of general jurisdiction under the Code of Civil Procedure. The latter procedure had repeatedly been found by the European Court to be in breach of the legal-certainty requirement, as the proceedings could last indefinitely through various levels and time-limits were too long or liable to be rendered nugatory. No such issue appeared to have arisen in the procedure that had been followed in the applicant company's case. The binding and enforceable decisions delivered by the commercial courts in its favour had not been liable to challenge indefinitely, but only once, before a supreme judicial instance, at the defendant party's request, on the basis of restricted grounds and within a clearly defined and limited time-frame. Supervisory review so construed was not incompatible with the principle of legal certainty and appeared as an ultimate element in the chain of domestic remedies at the disposal of the parties, rather than as an extraordinary means of reopening judicial proceedings. The fact that the judgments in the applicant company's favour had been binding and enforceable before the supervisory review did not alter the Court's conclusion as, firstly, the enforcement proceedings had been lawfully stayed pending the supervisory review and, secondly, a judgment that had become binding and enforceable was not necessarily final under the Convention: *manifestly ill-founded*.

See also *MPP Golub v. Ukraine*, no. 6778/05, ECHR 2005-XI, Information Note no. 79, and, on the question of the effectiveness of the new remedy for admissibility purposes, *Kovaleva and Others v. Russia* under Article 35 § 1 below.

REASONABLE TIME

Effectiveness of Pinto remedy for length of administrative proceedings where no application for expedited hearing was made: *inadmissible*.

DADDI - Italy (N° 15476/09)
Decision 2.6.2009 [Section II]

In 1994 the applicant asked the regional administrative court to set aside a number of planning decisions. On the same day she asked for a date to be set for the case to be heard. In 2006 she again asked for a date to be set for a hearing. The hearing was held in 2007 and the court gave a decision in the applicant's favour. As the decision had not been served beforehand, it became final in October 2008, the applicant having decided not to appeal.
The applicant complained that the length of the proceedings before the regional administrative court had been excessive and that the "Pinto" remedy was ineffective on account of the entry into force of the second paragraph of Article 54 of Legislative Decree no. 112/2008. In the applicant's view, that article covered "Pinto" applications concerning the length of main proceedings which had taken place, wholly or in part, before the entry into force of the aforementioned legislative decree. Consequently, as she had not made an urgent request for a hearing during the main proceedings, the applicant maintained that, even if she had made an application under the "Pinto" procedure, it would have been declared inadmissible.

Inadmissible: The Court had already found that applications to the courts of appeal under the Pinto Act were an accessible remedy, and that there was no cause for the time being to doubt the effectiveness of that remedy. The question in the present case was whether the second paragraph of Article 54 of Legislative Decree no. 112/2008 cast doubt on that finding in relation to cases concerning the length of administrative proceedings where no urgent request for a hearing had been made before the entry into force of the legislative decree. An obligation to make such a request could not be said to exist in domestic law until 25 June 2008, the date of entry into force of Legislative Decree no. 112/2008, and then only with a view to complaining at a later stage, by means of an application under the "Pinto" procedure, of the unreasonable length of the proceedings. Accordingly, a practice of interpreting and applying the second paragraph of Article 54 of the Legislative Decree in such a way as to make applications under the "Pinto" procedure concerning the length of administrative proceedings which had ended before 25 June 2008 inadmissible solely because no urgent request for a hearing had been made might indeed give cause to absolve applicants in that position from the obligation to make use of the "Pinto" procedure. The same would apply to proceedings still pending in which an urgent request for a hearing had not been made until

after the entry into force of the provision in question. However, the Court considered that mere doubt about the prospects of success of a particular remedy which was not quite evidently bound to fail did not constitute a valid reason to justify a decision not to avail oneself of it. Moreover, the applicant had not provided any example of a domestic decision to the effect she had relied on in her submissions. In the light of the foregoing, the applicant ought to have applied to the competent court of appeal by virtue of the Pinto Act: *failure to exhaust domestic remedies*.

Article 6 § 1 [criminal]

INDEPENDENT AND IMPARTIAL TRIBUNAL
Lack of clear distinction between prosecutory, investigative and judicial functions of bank supervisory authority: *violation*.

DUBUS S.A. - France (N° 5242/04)
Judgment 11.6.2009 [Section V]

Facts: The applicant is an investment company whose business consists of receiving, transmitting and executing orders for third parties and trading on its own behalf. In 2000 it was inspected by the Banking Commission, the supervisory authority responsible for credit and investment establishments, following which notice of a regulatory offence was served on it, together with a request to take remedial action. The same year, on the strength of the inspection report, the Banking Commission decided to open disciplinary proceedings against the applicant company. The Chair of the Commission informed the applicant company of the reasons for opening proceedings. The applicant company filed observations in reply, challenging the lawfulness and the impartiality of the proceedings with regard to Article 6 § 1 of the Convention. In particular, it objected to the fact that the Commission was all at once a prosecuting, investigating and judicial authority. The Secretariat of the Commission submitted observations in reply to the applicant company. In a 2001 decision the Commission issued a reprimand to the applicant company and stated that there had been no irregularities in the proceedings. In 2003 the *Conseil d'Etat* dismissed an appeal on points of law by the applicant company.

Law: The Banking Commission carried out two types of functions. The first was a supervisory function, encompassing administrative supervision and the power to issue orders. The second was disciplinary: the Commission exercised its disciplinary powers by acting like an "administrative court". The Court noted at the outset the lack of precision in the texts governing proceedings before the Banking Commission with regard to its composition and the prerogatives of the bodies called upon to exercise its various functions. It observed, in particular, the lack of any clear distinction between the functions of prosecution, investigation and adjudication in the exercise of its judicial power. While the combination of investigative and judicial functions was not, in itself, incompatible with the need for impartiality guaranteed by Article 6 § 1 of the Convention, it was necessary to ascertain whether the Banking Commission had decided on the disciplinary measure without "prejudgment", in view of the steps it had taken during the proceedings. Given the manner in which the judicial proceedings had been conducted, the applicant company might reasonably have had the impression that it had been prosecuted and tried by the same people. This was demonstrated in particular by the phase during which the disciplinary proceedings had been opened and the offences notified, when the confusion between the different roles had heightened that impression. The applicant company might have had doubts about the decision of the Commission, which, in its various capacities, had brought disciplinary proceedings against it, notified it of the offences and imposed the penalty. Furthermore, the role of the Secretary General of the Commission had added to the confusion, although he did not appear to have been involved in deciding on the penalty. The Secretariat carried out investigations on the instructions of the Banking Commission, setting disciplinary proceedings in motion where irregularities were found in the administrative checks. It then, through the Secretary General, replied to the submissions of the respondent party, thereby intervening in the judicial process. Lastly, the investigation had been carried out on behalf of the Commission, which had subsequently handed down the penalty. In sum, the Court was unconvinced by the Government's argument that there

was a structural separation within the Banking Commission. The applicant's doubts about the Commission's independence and impartiality had been objectively justified because of the lack of any clear distinction between its different functions.
Conclusion: violation (unanimously).

Article 41 – Finding of a violation constituted sufficient just satisfaction.

INDEPENDENT TRIBUNAL
Independence of assessors (assistant judges): *communicated*.

WERSEL - Poland (N° 860/08)
[Section IV]

In 2006 a district court, composed of an assessor and two lay judges, convicted the applicant of attempted insurance fraud and sentenced him to imprisonment. His appeal and cassation appeal were dismissed respectively in 2007 and 2008.
Under Polish law, a candidate for the office of a district-court judge must first serve a minimum of three years as an assessor in a district court. Assessors are legally qualified and appointed by the Minister of Justice. In October 2007 the Constitutional Court held that the vesting of judicial powers in assessors by the Minister of Justice (representing the executive) was unconstitutional since assessors did not offer the guarantees of independence that were required of judges. In particular, the Minister of Justice could effectively dismiss an assessor at his discretion. The Constitutional Court ordered that the unconstitutional provision should be repealed within 18 months. It did not order an immediate repeal as assessors constituted nearly 25% of the judicial personnel in the district courts and their immediate removal would have seriously undermined the administration of justice. That period was also necessary for Parliament to enact new legislation. In the interim the assessors were allowed to continue adjudicating. Having regard to the constitutional importance of the finality of rulings, the Constitutional Court held that its judgment could not serve as a ground for reopening cases which had been decided by the assessors.
Communicated under Article 6 § 1 of the Convention.

See also communicated cases *Przedsiębiorstwo Komunikacyjno-Spedycyjne TYCHY spółka z o.o. v. Poland* (no. 18342/08), *Urban v. Poland* (no. 23614/08), *BANAŚ v. Poland* (no. 50845/08) and *Witek v. Poland* (no. 3535/09).

Article 6 § 3 (c)

DEFENCE IN PERSON
Refusal to grant accused leave to appear at appellate hearing concerning questions of fact relevant to the issue of guilt: *violation*.

SOBOLEWSKI (no. 2) - Poland (N° 19847/07)
Judgment 9.6.2009 [Section IV]

Facts: In May 2006 the applicant was convicted of multiple fraud and sentenced to two years' imprisonment. He was represented by a legal-aid lawyer and was present at the first-instance proceedings. Both the applicant and his lawyer lodged appeals against the first-instance judgment. The applicant also requested leave to be brought from prison to attend the hearing before the appeal court, but his request was refused as the court held that the presence of his lawyer would be sufficient to secure his right to an effective defence. In November 2006 the second-instance court held a hearing in the presence of the applicant's lawyer and dismissed the applicant's appeal after finding that the lower court had thoroughly assessed the evidence and carefully considered the question of the applicant's guilt.

Law: The personal attendance of the defendant at an appeal hearing did not have the same crucial significance as at trial. However, if an appellate court had to examine both the factual and legal aspects of the case in order to make a full assessment of the issue of guilt or innocence, a direct assessment of the evidence given in person by the accused was necessary. Under Polish law the applicant had the right to attend the appeal hearing, unless the court found that the lawyer' presence was sufficient. Further, pursuant to the relevant rules of criminal procedure, the jurisdiction of an appeal court extended to questions of both fact and law. In his appeal, the applicant had essentially sought to challenge the soundness of his conviction on the facts and had requested leave to attend the hearing. When it refused that request, the domestic court made no reference to the specific grounds of his appeal, nor did it make a distinction between factual issues raised by the applicant – which were ultimately relevant for the assessment of his guilt – and purely legal issues. The Court considered that, in such circumstances, where the scope of a particular appeal filed with an appellate court was not confined to pure questions of law, Article 6 required, in the absence of any compelling reasons to the contrary, that the accused be allowed to be present at the hearing of his appeal and that he be notified in advance in clear terms of his right to attend the hearing.
Conclusion: violation (unanimously).

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

Article 6 § 3 (d)

EXAMINATION OF WITNESSES
Inability of defendant in criminal proceedings to question an anonymous witness and failure by investigating judge to assess reliability of the witness's evidence: *case referred to the Grand Chamber*.

TAXQUET - Belgium (N° 926/05)
Judgment 13.1.2009 [Section II]

(See Article 6 § 1 above)

ARTICLE 8

PRIVATE LIFE
Absence of means of ensuring reparation for bodily injuries caused by medical error in State hospital: *violation*.

CODARCEA - Romania (N° 31675/04)
Judgment 2.6.2009 [Section III]

Facts: In 1996 the applicant was admitted to hospital for the removal of a skin tag on her lower jaw and a post-operative healing problem affecting her right thigh. Doctor B. recommended plastic surgery and performed a blepharoplasty (corrective eyelid surgery). The applicant had to be taken into hospital and operated on again since, following the blepharoplasty, her eyelids would not close properly because of the post-operative scars. She was re-admitted to hospital the same year and this time Dr B. performed a third blepharoplastry as well as more plastic surgery. These operations resulted in paralysis of the right side of her face and other after-effects requiring specialist medical treatment. Several further operations had to be performed. In 1998 the applicant lodged a criminal complaint against Dr B. and applied to be joined as a civil party. During the proceedings the doctor's actions were characterised as unintentionally causing personal injury. The criminal proceedings produced no result and were definitively closed by a 2004 decision of the county court ruling that the doctor's criminal responsibility was now time-barred. The same year the applicant brought a civil action for damages against Dr B. and in 2005 also sued the hospital where she had been operated on. In 2005 the civil court found that the doctor had not informed

the applicant of the possible consequences of the planned operation or sought her consent other than when she was under the effects of the anaesthetic. The court ordered the doctor to pay damages in respect of pecuniary and non-pecuniary damage. It dismissed the applicant's action against the hospital, however, on the ground that the hospital could not be held liable for the actions of the doctor. The court of appeal upheld the judgment. The High Court of Cassation and Justice quashed the impugned decision and remitted the case to the county court. After noting that the applicant had withdrawn her claim for pecuniary damages, the court confirmed that the doctor had committed medical errors and found that he should have obtained the applicant's written consent to the plastic surgery, which had been a new procedure at the time it was performed, and should also have informed her of the risks involved. In 2008 the court of appeal held that the applicant's statement withdrawing her claim was valid and dismissed the appeals lodged by both parties. In the meantime, in 2006, enforcement proceedings had been issued against Dr B. by the court of first instance but had remained unsuccessful because the doctor had become insolvent on account of outstanding maintenance payments and a voluntary act of partition of real property he had concluded after judgment had been entered against him.

Law: Article 8 – The applicant complained that the proceedings seeking to have the doctor held liable had been ineffective. In the instant case the applicant had had formal access to a procedure enabling her to secure a finding of liability against the doctor who had operated on her and, if appropriate, to obtain compensation for personal injury. However, the Romanian courts had not given a final ruling on her compensation claim until more than nine years after the lodging of the criminal complaint and civil-party application, by which time the doctor's criminal responsibility was time-barred. Furthermore, she had not received the sum awarded to her for non-pecuniary damage because, a few days after being ordered to pay compensation to the applicant, the doctor had divested himself of his property and had become insolvent, thereby releasing him from his obligations towards the applicant. The consequences for the applicant of the doctor's insolvency had also been aggravated by the fact that no medical negligence scheme existed in Romanian law at the time. While the domestic law had since changed, making it compulsory for doctors to take out professional civil-liability insurance, the changes did not apply retrospectively to the applicant's situation. Moreover, in refusing to find the hospital civilly liable, the domestic courts had deprived the applicant of effective legal protection of her physical integrity despite the fact that there was some authority in the case-law of the country's highest courts and in the legal doctrine to support a finding of liability on the part of hospitals for the acts of doctors employed by them. The applicant, whose right to compensation had been recognised by the Romanian courts, had had no legal remedy available to her by which to render that right effective.
Conclusion: violation (six votes to one).

Article 6 – As the case concerned an action for damages in respect of personal injury sustained by a person who was aged 65 when she lodged the civil-party application, the judicial authorities should have exercised special diligence. While the medical issues in the case had been of some complexity, there was no justification for the fact that the proceedings had lasted for over nine years.
Conclusion: violation (unanimously).

Article 41 – EUR 20,000 to cover all heads of damage.

PRIVATE LIFE
Revocation of certificate recognising foreign diploma; removal from teaching post: *communicated*.

KUŞ - Turkey (N° 33160/04)
[Section II]

After he had obtained a university diploma in Syria, the applicant's qualification was recognised as equivalent to a bachelor's degree in Turkey. He continued his studies and was appointed as a primary school teacher. The application concerns the revocation/amendment of the certificate recognising the applicant's degree and the revocation of his appointment to a teaching post.

Communicated under Article 8 of the Convention and Articles 1 and 2 of Protocol No. 1 to the Convention.

PRIVATE AND FAMILY LIFE
Order for child whom mother had abducted with a view to settling in Switzerland to be returned to Israel: *case referred to the Grand Chamber*.

NEULINGER and SHURUK - Switzerland (N° 41615/07)
Judgment 8.1.2009 [Section I]

The first applicant settled in Israel, where she got married, and the couple had a son. In response to fears that the child (the second applicant) might be taken abroad by his father to live in a community where he would be brought up according to the father's religious beliefs, the family court issued an order prohibiting the boy's removal from Israel until he attained his majority. Provisional custody of the child was granted to the first applicant and both parents were to exercise the parental rights jointly. The father's right of access was subsequently restricted as a result of his aggressive behaviour. The couple's divorce was granted and the first applicant secretly left Israel for Switzerland with her son. The Swiss Federal Court ultimately ordered the first applicant to return the child to Israel.
In a Chamber judgment the Court held, by four votes to three, that there had been no violation of Article 8. The child's removal to Switzerland had been wrongful, since the father, jointly with the mother, exercised the parental rights, which included under Israeli law the right to determine the child's residence. Moreover, the child's removal to a foreign country had rendered illusory, in practice, the right of access that had been granted to the father living in Israel. In addition, the Israeli authorities had clearly been willing to provide for the applicants' protection through the various measures that had been ordered. Lastly, whilst a return to Israel might entail some inconvenience, it was in fact in the child's best interest, enabling him to have regular contact with both parents. The Federal Court's decision on the child's return had thus been based on relevant and sufficient reasons and had been proportionate to the legitimate aim pursued. A fair balance had been struck between the competing interests and the child's best interests had been taken into account. The case has now been referred to the Grand Chamber at the applicants' request.

For further information see press release no. 006 of 8 January 2009.

PRIVATE AND FAMILY LIFE
Sterilisation of Roma woman allegedly without her informed consent: *admissible*.

V.C. - Slovakia (N° 18968/07)
Decision 16.6.2009 [Section IV]

(See Article 3 above)

PRIVATE AND FAMILY LIFE
HOME
Failure of waste disposal services to collect, treat and dispose of rubbish: *communicated*.

DI SARNO and Others - Italy (N° 30765/08)
[Section II]

The applicants live in municipalities in the province of Naples. They allege that in failing, since 1994, to adopt the necessary measures to ensure the functioning of the collection, processing and disposal of waste and instead implementing an inadequate legislative and administrative policy, the public authorities had caused serious damage to the environment and placed the lives and health of all the area's inhabitants at

risk. In addition, the applicants claim that the authorities omitted to inform them of the risks associated with living in a polluted area.
Communicated under Articles 2, 6, 8 § 1, 13, 34 and 35 § 1 of the Convention.

FAMILY LIFE
EXPULSION
Refusal of asylum request in case in which applicant family had spent four years adapting to life in host State: *inadmissible*.

A.M. and Others - Sweden (N° 38813/08)
Decision 16.6.2009 [Section III]

(See Article 3 above)

CORRESPONDENCE
Monitoring of prisoner's correspondence with his medical specialist: *violation*.

SZULUK - United Kingdom (N° 36936/05)
Judgment 2.6.2009 [Section IV]

Facts: The applicant suffered a brain haemorrhage while on bail pending trial on drugs charges for which he later received a 14-year prison sentence. He had two operations before being discharged to prison to serve his sentence. Thereafter, he was required to attend hospital every six months for a specialist check-up. He discovered that his correspondence with the neuro-radiology specialist supervising his hospital treatment had been monitored by a prison medical officer. His complaint to the domestic courts was dismissed after the Court of Appeal found that the risk that the applicant's medical specialist, whose *bona fides* had never been challenged, could be "intimidated or tricked" into transmitting illicit messages was sufficient to justify the interference with the applicant's rights.

Law: The reading of the applicant's correspondence constituted an "interference by a public authority" that was governed by law and was aimed at the prevention of crime and the protection of the rights and freedoms of others.
As to the necessity for the interference, the Court noted that, given the severity of his condition, it was understandable that the applicant should have been concerned that the monitoring of his correspondence with his specialist would inhibit their communication and prejudice reassurance that he was receiving adequate medical treatment. There was nothing to suggest that the applicant had abused or would abuse the confidentiality given to his medical correspondence and he was not a high-risk (Category A) prisoner. The Court of Appeal had acknowledged that the importance of unimpeded correspondence with secretarial staff of Members of Parliament outweighed any risk of abuse and, in the Court's view, uninhibited correspondence between a prisoner suffering from a life-threatening condition and his medical specialist should be given no less protection. Indeed, the Court of Appeal had conceded that it could, in some cases, be disproportionate to refuse confidentiality to a prisoner's medical correspondence and changes had since been enacted to the relevant domestic law to that effect. Lastly, the Court noted that the Government had failed adequately to explain why the risk of abuse involved in correspondence with named doctors whose exact address, qualifications and *bona fides* were not in question should be perceived as greater than the risk involved in correspondence with lawyers. The monitoring of the applicant's medical correspondence had, therefore, not struck a fair balance with his right to respect for his correspondence.
Conclusion: violation (unanimously).

Article 41 – EUR 1,000 in respect of non-pecuniary damage.

ARTICLE 10

FREEDOM OF EXPRESSION
Continued prohibition of the broadcasting of a commercial on television despite European Court's finding of an infringement of freedom of expression: *violation*.

VEREIN GEGEN TIERFABRIKEN SCHWEIZ (VGT) - Switzerland (N° 32772/02)
Judgment 30.6.2009 [GC upon referral]

Facts: The applicant is an animal-protection association. In a judgment of 28 June 2001 on a previous application (no. 24699/94), the European Court of Human Rights found a violation of Article 10 because of the Swiss authorities' refusal to allow a television commercial expressing opposition to battery livestock rearing methods to be broadcast. In reliance upon the Court's judgment, the applicant association applied to the Swiss Federal Court for an order revising its judgment prohibiting the broadcasting of the commercial. In 2002 the Federal Court rejected that application on the ground that the applicant had not provided a sufficient explanation of the nature of "the amendment of the judgment and the redress being sought" or sufficiently shown that it still had an interest in broadcasting the commercial in its original version of eight years previously. The applicant association then lodged the present application with the Court to challenge that decision. The Committee of Ministers of the Council of Europe, which is responsible for supervising execution of the Court's judgments, was not informed of these developments. In 2003, unaware of the Federal Court's decision in 2002, it concluded its examination of the applicant association's initial application after noting that the applicant association was entitled to request the revision of the Federal Court's initial judgment banning the commercial.
In the meantime, the applicant association again applied to the Swiss authorities for permission to broadcast the commercial with an additional comment. This fresh request was refused. An appeal against that decision was dismissed by the Federal Office of Communication in 2003.
In a Chamber judgment of 4 October 2007 the European Court held, by five votes to two, that there had been a violation of Article 10 (see Information Note no. 101).

Law: (a) *Admissibility*: (i) Exhaustion of domestic remedies – Domestic remedies had been exhausted since in its judgment of 2002 dismissing the applicant association's application to reopen the proceedings, the Federal Court had ruled, albeit briefly, on the merits of the case.
Conclusion: preliminary objection dismissed (fifteen votes to two).

(ii) Jurisdiction *ratione materiae* – The Committee of Ministers' supervising role in the sphere of execution of the Court's judgments did not mean that measures taken by a respondent State to remedy a violation found by the Court could not raise a new issue undecided by the judgment. In dismissing the application to reopen the proceedings, the Federal Court had relied on new grounds, namely the alleged loss of interest in having the commercial broadcast after an important lapse of time. By comparison, the initial refusal to allow the commercial to be broadcast had been based on the prohibition of political advertising. Furthermore, the Committee of Ministers had not been informed of the Federal Court's judgment when it decided to end its supervision of the execution of the Court's judgment of 2001. Therefore, the refusal to reopen the proceedings had constituted a new fact capable of giving rise to a fresh violation of Article 10. Otherwise, if the Court were unable to examine it, it would escape all scrutiny under the Convention.
Conclusion: preliminary objection dismissed (eleven votes to six).

(b) *Merits*: The reopening of proceedings at the domestic level was not an end in itself, but a key means that could be used for the full and proper execution of the Court's judgments. However, the reopening procedure also had to afford the authorities of the respondent State the opportunity to abide by the conclusions and the spirit of the Court judgment being executed, while complying with the procedural safeguards in the Convention. In view of the importance of the execution of its judgments in the Convention system and having regard to the fair balance that had to be struck between the general interest of the community and the interests of the individual, the Court had to ascertain whether the respondent

State had a positive obligation to take the necessary measures to allow the television commercial in issue to be broadcast following the Court's finding of a violation of Article 10. The commercial in question related to consumer health and to animal and environmental protection and was in the public interest. The public interest in dissemination of a publication did not necessarily decrease with the passing of time. The Court agreed with the Chamber that the Federal Court's approach had been overly formalistic and that the applicant association alone had been competent at that stage to judge whether there was still any purpose in broadcasting the commercial. Moreover, the Federal Court had not offered its own explanation of how the public debate on battery farming had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast. Nor had it shown that after the Court's judgment of 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. The Court also rejected the argument that the applicant association had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or the association itself, to assume a responsibility that fell to the national authorities alone: that of taking appropriate action on a judgment of the Court. The principle imposing a duty on the Contracting States to organise their judicial systems in such a way that their courts could meet the requirements of the Convention also applied to the execution of the Court's judgments. Accordingly, it was immaterial to argue, as the Government had done, that the Federal Court could not in any event have ordered that the commercial be broadcast and that the applicant association should have instituted civil proceedings. In sum, the Swiss authorities had failed to comply with their positive obligation under Article 10 of the Convention.
Conclusion: violation (eleven votes to six).

FREEDOM OF EXPRESSION
Conviction for defamation arising out of newspaper report on rumours about the then Austrian President's marriage: *no violation*.

STANDARD VERLAGS GMBH (no. 2) - Austria (N° 21277/05)
Judgment 4.6.2009 [Section I]

Facts: The applicant was the owner of the *Der Standard* daily newspaper. In 2004 the newspaper published an article commenting on rumours that the wife of the then Austrian President intended to divorce and had close contacts with two men, an Austrian politician and a foreign ambassador. The presidential couple and the politician concerned brought successful defamation proceedings against *Der Standard*. The applicant company was ordered to pay compensation of EUR 5,000 to the President, EUR 7,000 to his spouse and EUR 6,000 to the politician and to publish the court's judgment.

Law: The domestic courts had given "relevant" and "sufficient" reasons to justify the interference with the applicant company's right to freedom of expression and had not transgressed their margin of appreciation. In particular, balancing the various interests concerned, the courts had duly considered the claimants' status as public figures but had nonetheless found that the article had failed to contribute to any debate of general interest. They had made a convincing distinction between the information concerning the health of a politician which might, in certain circumstances, be an issue of public concern and idle gossip about the state of his or her marriage or alleged extra-marital relationships. The latter did not contribute to any public debate in respect of which the press had to fulfil its role of "public watchdog", but merely served to satisfy the curiosity of a certain readership. At no time had the applicant company alleged that the rumours were true. Even public figures could legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life. Furthermore, the measures imposed on the applicant company had not been disproportionate.
Conclusion: no violation (five votes to two).

FREEDOM OF EXPRESSION
Criminal conviction of journalist for calling a prominent historian "an idiot" and "a fascist": *violation*.

BODROŽIĆ - Serbia (N° 32550/05)
Judgment 23.6.2009 [Section II]

Facts: The applicant, a journalist, published an article in a local newspaper condemning views that had been expressed on public television by a prominent historian concerning the existence and history of national minorities in Vojvodina. In particular, the article described the historian as "an idiot" and "a fascist". In the ensuing criminal proceedings for insult and defamation brought by the historian, the applicant was found guilty and fined.

Law: The Court found that, while the journalist had indeed used harsh words which might have been considered offensive, his statements had been a reaction to the provocative interview given by the historian in the context of a free debate on an issue of general interest. The article had not aimed to stir up violence; the expressions used by the applicant could only have been interpreted as value judgments and therefore opinions not susceptible of proof. The historian, a well-known public figure who had appeared on television, should have anticipated potential harsh criticism from a large group of people. Therefore, he should have displayed a greater degree of tolerance in this context. Finally, as regards the sanction imposed on the applicant, the Court noted that not only had he been criminally prosecuted, he had also been liable to 75 days' imprisonment in default of payment of the fine.
Conclusion: violation (unanimously).

Article 41 – EUR 500 in respect of non-pecuniary damage.

FREEDOM OF EXPRESSION
Criminal conviction of journalists for comparing a prominent local lawyer to a blonde woman: *violation*.

BODROŽIĆ and VUJIN - Serbia (N° 38435/05)
Judgment 23.6.2009 [Section II]

Facts: The applicants, who were journalists on a local magazine, published an article criticising the criminal convictions of journalists for defamation. In the article, the first applicant called a well-known male lawyer "a blonde" and the second applicant published a photograph of a blonde woman in her underwear next to an anagram of the lawyer's name. In the ensuing criminal proceedings for insult brought by the lawyer, both applicants were found guilty and fined.

Law: While the text of the article and the picture had been somewhat mocking, when considered as a whole, they could not have been understood as a gratuitous personal insult of the lawyer. In addition, the domestic courts' conclusion that comparing an adult man to a blonde woman was an attack on the integrity and dignity of men was unacceptable. As the article expressed general disapproval of the domestic courts' practice of punishing journalistic freedom of expression, the applicants had raised an important issue of general public interest. As a well-known figure locally, the lawyer should therefore have displayed a higher degree of tolerance of the criticism directed at him. As regards the sanction imposed on the applicants, the Court noted that they had been liable to 60 days' imprisonment in default of payment of the fine and pointed out that recourse to the criminal prosecution of journalists for purported insults that raised issues of public debate should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual's rights.
Conclusion: violation (unanimously).

Article 41 – No claim made in respect of damage.

FREEDOM OF EXPRESSION
Award of damages against university lecturer for having criticised procedures for recruiting and promoting assistant lecturers: *violation*.

SORGUÇ - Turkey (N° 17089/03)
Judgment 23.6.2009 [Section II]

Facts: The applicant is a university professor. At an academic conference in 1997, he distributed a paper in which he criticised the system of appointment and promotion of academics in the university. Relying on his personal experience, he maintained that the presence on promotion panels of persons who were not experts in the relevant field led to the selection of people who did not have the academic qualifications required for the posts of assistant professors. He gave an example of a candidate without, however, mentioning his name. Later that year, an assistant professor brought civil proceedings for compensation against the applicant claiming that certain comments used in his paper represented an attack on his reputation. His case was dismissed by the first-instance court. Upon fresh examination, his claim was allowed and the applicant was ordered to pay damages (in a sum equivalent to approximately EUR 1,600).

Law: The applicant had made his statements on the basis of personal experience, and the information he had disclosed was already known in academic circles. His speech therefore presented value judgments which were, at least in part, susceptible of proof. In the course of the proceedings, the applicant had endeavoured to demonstrate that his statements were well-founded or, at least, that he had voiced them in good faith since the plaintiff had later been dismissed from his post as a result of his inadequate scientific competence and personal values. However, without addressing his arguments, the domestic courts had concluded that the impugned statements had constituted an attack on the plaintiff's reputation. Further, they had not explained why the reputation of the plaintiff, whose name had not even been mentioned in the paper, had outweighed the applicant's freedom of expression. In particular, it did not appear from the domestic courts' decisions that the applicant's statement had affected the plaintiff's career or private life. Thus, greater importance had been attached to the protection of an unnamed individual, including through the payment of substantial compensation, than to the freedom of expression that should normally have been enjoyed by an academic in a public debate. The Court underlined the importance of academic freedom, and in particular the freedom of academics to express freely their opinion about the institution or system in which they worked and their freedom to disseminate knowledge and truth without restriction. The national authorities had therefore failed to strike a fair balance between the relevant interests.
Conclusion: violation (unanimously).

Article 41 – EUR 3,500 in respect of pecuniary and non-pecuniary damage.

ARTICLE 11

FREEDOM OF ASSOCIATION
Dissolution of political parties with links to a terrorist organisation: *no violation*.

HERRI BATASUNA and BATASUNA - Spain (N^os 25803/04 and 25817/04)
Judgment 30.6.2009 [Section V]

Facts: The political organisation Herri Batasuna was established as an electoral coalition and took part in the 1979 general elections. In 1986 Herri Batasuna was entered in the register of political parties at the Ministry of the Interior. In 2001 the applicant Batasuna filed documents with the register of political parties seeking registration as a political party.
In June 2002 the Spanish Parliament enacted Organic Law 6/2002 on political parties ("the LOPP"). The main innovations introduced by the new law appeared in Chapter II on the organisation, functioning and activities of political parties, and in Chapter III on their dissolution or judicial suspension. By a decision given in August 2002, the central investigating judge at the *Audiencia Nacional* suspended the activities

of Batasuna and ordered the closure, for three years, of any offices and premises that Herri Batasuna and Batasuna might use. In September 2002 State Counsel, acting on behalf of the Spanish Government, brought proceedings before the Supreme Court seeking the dissolution of the applicant parties, on the ground that they had breached the new LOPP by a series of activities that irrefutably amounted to conduct incompatible with democracy and constitutional values, the democratic process and human rights. On the same day the Attorney General also brought proceedings before the Supreme Court seeking the dissolution of the parties in question, in accordance with the LOPP. In 2003 Batasuna requested that a preliminary question on the constitutionality of the LOPP be submitted to the Constitutional Court. The Supreme Court dismissed the request, noting that the objections raised by Batasuna concerning the constitutionality of the LOPP had already been examined and dismissed in a judgment delivered by the Constitutional Court in March 2003. The Supreme Court declared the parties Herri Batasuna and Batasuna illegal and ordered their dissolution on the ground that they pursued "a strategy of 'tactical separation' through terrorism". The court found it established that the parties concerned were fundamentally indistinct from each other and from the terrorist organisation ETA. The Supreme Court described them as "groupings sharing substantially the same ideology … and, moreover, closely controlled by the aforesaid terrorist organisation" and concluded that there was in reality a "single entity, namely the terrorist organisation ETA, concealed behind these apparently separate legal entities set up at different times by virtue of a process of 'operational succession' planned in advance by ETA". The court based its decision on the LOPP. It also ordered the liquidation of the assets of the parties concerned in accordance with the same law. By two judgments given in 2004, the Constitutional Court dismissed the *amparo* appeals lodged by the applicants against the Supreme Court judgment.

Law: The dissolution of the applicant parties amounted to interference with the exercise of their right to freedom of association. The LOPP defined with sufficient clarity the organisation and functioning of political parties and the actions liable to result in their being dissolved or suspended by the courts. Furthermore, the acts taken into account by the Supreme Court in ordering the dissolution of the applicant parties had been committed after the LOPP had entered into force. Accordingly, the interference in question had been "prescribed by law". In addition, the parties' dissolution had pursued a number of the legitimate aims enumerated in Article 11, including protecting public safety, preventing disorder and protecting the rights and freedoms of others.

As to whether the interference had been necessary in a democratic society and had been proportionate, the Court first had to ascertain whether the dissolution of the applicant parties corresponded to a "pressing social need" before considering, if appropriate, whether it had been "proportionate to the legitimate aims pursued". In ordering the parties' dissolution, the Supreme Court had not confined itself to mentioning the fact that the applicants had not condemned attacks carried out by ETA, but had listed a number of acts giving grounds to conclude that the applicant parties were instrumental in ETA's terrorist strategy. These could be divided into two categories: firstly, those which had contributed to creating a climate of social conflict and secondly, those which amounted to implicit support for ETA's terrorist activities. In all cases, as observed by the domestic courts, these acts came very close to explicit support for violence and endorsement of persons with probable terrorist links. Furthermore, the acts and speeches of the members and leaders of the applicant parties referred to by the Supreme Court did not rule out the use of force in order to achieve their aims. The Court was also unable to subscribe to the applicants' argument that none of the acts referred to by the Supreme Court was mentioned in the LOPP as a ground for dissolving a political party. In the Court's view, the applicants' actions had to be considered together as forming part of a strategy in pursuance of their political aims, which in their very essence ran counter to the democratic principles articulated in the Spanish Constitution. That corresponded to one of the grounds for dissolution under the LOPP, namely lending political support to the activities of terrorist organisations in order to achieve the aims of undermining the constitutional order or creating serious social unrest. In the instant case the domestic courts had arrived at reasonable conclusions after a detailed study of the evidence before them and the Court saw no reason to depart from the reasoning of the Supreme Court in finding links between the applicant parties and ETA. Furthermore, in view of the situation that had existed in Spain for many years with regard to terrorist attacks, particularly in the "politically sensitive region" of the Basque country, those links could objectively be considered as a threat to democracy. Lastly, the Supreme Court's findings had to be placed in the context of the international resolve to condemn the public defence of terrorism. Consequently, the acts and speeches imputable to the applicant parties, taken

together, created a clear image of the social model that was envisaged and advocated by them, which was in contradiction with the concept of a "democratic society". Accordingly, the order made against the applicants by the Supreme Court and upheld by the Constitutional Court could reasonably be considered as corresponding to a "pressing social need", even seen in the context of the narrow margin of appreciation left to States. It remained for the Court to ascertain whether the interference complained of had been proportionate to the legitimate aim pursued. In view of the fact that the above-mentioned projects were in contradiction with the concept of a "democratic society" and presented a considerable threat to Spanish democracy, the sanction imposed on the applicants had been proportionate to the legitimate aim pursued within the meaning of Article 11 § 2. In view of the foregoing, the parties' dissolution could be said to have been "necessary in a democratic society", in particular to ensure public safety, prevent disorder and protect the rights and freedoms of others for the purposes of Article 11 § 2.
Conclusion: no violation (unanimously).

See also *Exteberria, Barrena Arza, Nafarroako Autodeterminazio Bilgunea* and *Aiarako and Others v. Spain* (nos. 33579/03, 35613/03, 35626/03 and 35634/03) and *Herritarren Zerrenda v. Spain* (no. 43518/04) under Article 3 of Protocol No. 1 below.

FREEDOM OF ASSOCIATION
Ban on distributing meals mainly composed of pork to the underprivileged: *inadmissible*.

ASSOCIATION SOLIDARITÉ DES FRANÇAIS - France (N° 26787/07)
Decision 16.6.2009 [Section V]

The applicant, Association Solidarité des Français, is an association aimed at helping persons in need. In 2003 it began distributing clothing and meals. However, several sections of the media criticised what they saw as the discriminatory nature of the meals served, which consisted mainly of soup made with pork. The law-enforcement agencies therefore prevented an initial handout of soup in 2005. In 2006 the Commissioner of Police prohibited the handout planned by the association for the following day on the ground that the staging of the event on the streets entailed a considerable risk of a reaction posing a threat to public order, given the discriminatory nature of the implied message and the controversy surrounding it. An order was issued prohibiting a second planned handout. The urgent-applications judge of the Administrative Court suspended that order on the ground that, while the information obtained on the applicant association indicated that its charitable activities pursued aims that were clearly discriminatory in terms of the potential beneficiaries, this fact did not in itself amount to a threat to public order. The applicant association informed the police authorities of its intention to organise another soup handout, which was also prohibited by the Commissioner of Police. It then requested the urgent-applications judge to suspend the prohibition order. The judge granted the request and suspended the order, with the result that the association was able to distribute the soup as planned. The following day the Minister of the Interior and Regional Development lodged an application with the *Conseil d'Etat* asking it to set aside the decision suspending the order and reject the association's request for suspension. The applicant association argued that the prohibition infringed its right to freedom of association, expression and assembly, as there was no disturbance to public order which would justify such a measure. It further contended that no discrimination had been established, as the association had never refused to serve its meals to anyone. The applicant requested the *Conseil d'Etat* to find that it was unnecessary to rule on the Minister's application, which had been made after the soup handout in question. The urgent-applications judge of the *Conseil d'Etat* set aside the decision of the first judge and rejected all the applicant association's claims.

Inadmissible: The prohibition complained of amounted to interference with the rights enshrined in Article 11, in the light of Article 9. It had been based on the public-order regulations and had pursued legitimate aims, namely to protect public order and morals and the right of others to respect for their religious beliefs. As to whether it had been necessary in a democratic society, the Commissioner of Police had noted that the applicant association's Internet site stated explicitly that the food being handed out to those in need contained pork. Hence, the prohibition of the handout had been justified on the basis of the

clearly discriminatory aims of the applicant association, the affront to the dignity of vulnerable persons and the considerable risk of public disorder in view of the controversy surrounding the handouts. Furthermore, while the urgent-applications judge of the Administrative Court had held that the event did not pose a threat to public order, the judge of the *Conseil d'Etat* had stated, among other things, that there had been no unlawful infringement of the freedom to demonstrate in view of the risk of a reaction that might disturb public order. The Court pointed out that freedom of assembly also covered demonstrations which were likely to annoy or give offence to persons opposed to the ideas or claims that they sought to promote. In addition, the authorities had a duty to take the necessary measures to ensure that lawful demonstrations passed off smoothly and to protect the public's safety. In the instant case, however, the Commissioner of Police had legitimately considered that the handing out in the streets of meals containing pork, given the underlying message, which was clearly discriminatory and an affront to the beliefs of those persons unable to take advantage of the meals on offer, was liable to cause public disorder which could only be prevented by prohibiting the event. This finding had been upheld at final instance by the *Conseil d'Etat*. Accordingly, the national authorities, who were in principle best placed to assess the situation, had drawn conclusions which were in conformity with the reasons contemplated in Article 11 § 2 of the Convention: *manifestly ill-founded*.

ARTICLE 13

EFFECTIVE REMEDY
Available remedy in election context offering solely monetary compensation: *violation*.

PETKOV and Others - Bulgaria (N^{os} 77568/01, 178/02 and 505/02)
Judgment 11.6.2009 [Section V]

(See Article 3 of Protocol No. 1 below)

EFFECTIVE REMEDY
Effectiveness of Pinto remedy for length of administrative proceedings where no application for expedited hearing was made: *inadmissible*.

DADDI - Italy (N^{o} 15476/09)
Decision 2.6.2009 [Section II]

(See Article 6 § 1 above)

ARTICLE 14

DISCRIMINATION (Articles 2 and 3)
Failure of judicial system to provide adequate response to serious domestic violence: *violation*.

OPUZ - Turkey (N^{o} 33401/02)
Judgment 9.6.2009 [Section III]

(See Article 2 above)

DISCRIMINATION (Article 1 of Protocol No. 1)
Allegedly discriminatory rule prohibiting concurrent drawing of Russian military and Estonian old-age pensions: *communicated*.

TARKOEV and Others - Estonia (N° 14480/08)
MININ and Others - Estonia (N° 47916/08)
[Section V]

The applicants are former servicemen of the Soviet and/or Russian Army who had retired from service at different points in time before the withdrawal of the Russian Army from Estonia in 1994. Under the Agreement of 1994 between Estonia and Russia, they were paid a Russian military pension. After retiring from the army, they worked in Estonia in the civil sphere for periods varying from 15 to 37 years and were granted an Estonian national pension in 2006. Under Estonian law, only the years of their work in Estonia – not the years of service in the Soviet/Russian armed forces – were taken into account for the purposes of calculating the amount of their pension. A few months later, when the Estonian authorities realised that the applicants continued to receive Russian military pensions, they suspended payment of the Estonian pensions as the 1994 Agreement excluded the possibility of drawing both pensions simultaneously. The applicants, who were thus required to choose between the two pensions, unsuccessfully challenged this decision before the Estonian courts. They argued, *inter alia*, that persons in receipt of Russian military pensions were discriminated against, as Estonian law generally allowed concurrent receipt of both Estonian and foreign pensions.
Communicated under Article 14 (in conjunction with Article 1 of Protocol N° 1) and under Article 1 of Protocol N° 1.

ARTICLE 33

INTER-STATE CASE
Alleged pattern of official conduct by Russian authorities resulting in multiple breaches of Georgian nationals' Convention rights: *admissible.*

Georgia - Russia (I) (N° 13255/07)
Decision 30.6.2009 [Section V]

The application concerns events following the arrest in Tbilisi in September 2006 of four Russian service personnel on suspicion of espionage. In October 2006 the four servicemen were released by executive act of clemency. Eleven Georgian nationals were arrested on the same charges.
The applicant Government maintain that the reaction of the Russian authorities to this incident amounted to a pattern of official conduct giving rise to specific and continuing breaches of the Convention and its Protocols. These breaches are said to derive from alleged harassment of the Georgian immigrant population in Russia together with widespread arrests and detention generating a generalised threat to security of the person and multiple interferences with the right to liberty on arbitrary grounds. The Georgian Government also complain of the conditions in which more than 2,000 Georgians had been detained. They assert that the collective expulsion of Georgians from the Russian Federation involved systematic and arbitrary interference with documents evidencing a legitimate right to remain, due process requirements and the statutory appeal process. In addition, closing the land, air and maritime border between the Russian Federation and Georgia, thereby interrupting all postal communication, frustrated access to remedies for the persons affected.

The applicant Government's complaints fall into four main categories: the arrest and detention of Georgian nationals in alleged violation of Article 5; those nationals' conditions of detention in violation of Article 3; the expulsion measures taken against them, in breach of Article 4 of Protocol No. 4 and of Article 1 of Protocol No. 7; and finally, the other measures which were allegedly in violation of the rights guaranteed by the Convention (Article 8 and Articles 1 and 2 of Protocol No. 1). Each of these Articles is invoked alone and in combination with Articles 13, 14 and 18 of the Convention.
The Russian Government denied the existence of an administrative practice targeted against Georgian nationals and challenged the content of the documents submitted by the Georgian Government, as well as the conclusions of the reports by international organisations. The Russian Government argued that the Russian authorities had not adopted reprisal measures against Georgian nationals, but had merely continued to apply the ordinary law aimed at preventing illegal immigration, in compliance with the requirements of the Convention and the Russian Federation's international obligations.

The Court first established the object of the application. It considered that its content and scope, and the written and oral submissions by the Georgian Government, were sufficiently clear to allow a judicial examination under the Convention. In the opinion of the Court, the object of the application covered two different complaints: the allegations concerning the existence of an administrative practice and those concerning individual violations of the rights guaranteed by the Convention. Examining whether the allegations of the existence of an administrative practice had complied with Article 35 § 1 (admissibility criteria), the Court had regard to the evidence submitted by the parties and found that the allegations made by the Georgian Government could not be considered as being wholly unsubstantiated or that they lacked the requirements of a genuine allegation required by Article 33 of the Convention. As to whether these allegations complied with the six-month rule, the disputed events were said to have begun in Russia following the arrest on 27 September 2006 of four Russian officers in Georgia and the application was lodged with the Court on 26 March 2007. In so far as the Georgian Government had submitted additional evidence after that date, the question of the six-month rule was so closely related to that of the existence of an administrative practice that they had to be considered jointly during an examination of the merits of the case. As regards whether the allegations of individual violations of the rights guaranteed by the Convention had complied with Article 35 § 1, the question of exhaustion of domestic remedies was so closely linked with that of the existence of an administrative practice that they had to be considered jointly during an examination of the merits of the case.
Admissible.

ARTICLE 34

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Alleged failure to comply with indication by Court not to transfer applicants to authorities of another State where they faced the death penalty: *admissible*.

AL-SAADOON and MUFDHI - United Kingdom (N° 61498/08)
Decision 30.6.2009 [Section IV]

(See Article 1 above)

ARTICLE 35

Article 35 § 1

EXHAUSTION OF DOMESTIC REMEDIES
EFFECTIVE DOMESTIC REMEDY (Italy)
Effectiveness of Pinto remedy for length of administrative proceedings where no application for expedited hearing was made: *inadmissible*.

DADDI - Italy (No 15476/09)
Decision 2.6.2009 [Section II]

(See Article 6 § 1 above)

EFFECTIVE DOMESTIC REMEDY (Russia)
SIX-MONTH PERIOD
Supervisory-review by Supreme Commercial Court under new Code of Commercial Procedure: *effective remedy*.

KOVALEVA and Others - Russia (N° 6025/09)
Decision 25.6.2009 [Section I]

The applicants lodged an application with the European Court more than six months after a decision at cassation level, but less than six months after the dismissal of a subsequent application for supervisory-review by the Supreme Commercial Court. The question arose as to whether or not the supervisory-review procedure that had been introduced in 2003 by the new Code of Commercial Procedure (see *OOO Link Oil SPB v. Russia* under Article 6 § 1 above) constituted an effective remedy requiring exhaustion for the purposes of Article 35 § 1. If so, the application had been lodged within the six-month time-limit; if not, it was out of time.

Admissibility: The Court had held in a series of previous cases that an application for supervisory-review under the former Code of Commercial Procedure or under the transitional provisions before the entry into force of the new Code on 1 January 2003 did not constitute an effective remedy. The same was true of supervisory-review in civil and criminal proceedings in the Russian Federation owing to the legal uncertainty to which they gave rise.
However, the supervisory-review procedure provided for by the new Code of Commercial Procedure presented important differences. In particular, the proceedings were conducted before a single instance, the Supreme Commercial Court, and were subject to clear and strict time-limits. In the applicants' case, the binding and enforceable decisions of the commercial courts had not been liable to challenge indefinitely, but only once, before a supreme judicial instance, at a party's request, on the basis of restricted grounds and within a clearly defined and limited time-frame. Supervisory review so construed was not incompatible with the principle of legal certainty and appeared as an ultimate element in the chain of domestic remedies at the disposal of the parties rather than an extraordinary means of reopening judicial proceedings. The fact that the lower courts' judgments had become binding and enforceable before the application for supervisory review did not in itself make supervisory review an extraordinary remedy or otherwise unsuitable for exhaustion, as an enforceable judgment was not necessarily final for Convention purposes. Moreover, since 5 April 2005 one of the grounds for supervisory review in the Supreme Commercial Court was a violation of human rights and freedoms provided for by international treaties. That provision clearly opened a way for the Supreme Commercial Court to remedy any alleged violation of the Convention in supervisory-review proceedings. Accordingly, the new procedure had to be considered an effective remedy capable of preventing and putting right possible violations of the Convention at the domestic level. The Supreme Commercial Court's decision dismissing the application

for supervisory review thus constituted the "final decision" within the meaning of Article 35 § 1 and was the starting point of the six-month time-limit: *application lodged in time*.

The application was, however, ruled inadmissible on other grounds.

Article 35 § 3

COMPETENCE *RATIONE PERSONAE*
Complaints of procedural unfairness in an international criminal tribunal established by UN Security Council Resolution: *inadmissible*.

GALIĆ - Netherlands (N° 22617/07)
BLAGOJEVIĆ - Netherlands (N° 49032/07)
Decisions 9.6.2009 [Section III]

The applicants in these two cases were convicted of crimes against humanity and war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and given lengthy prison sentences. The trials took place at the ICTY's seat at The Hague. In their complaints to the European Court, the applicants alleged, *inter alia*, that the ICTY had violated their rights under Article 6 of the Convention and that the responsibility of the Netherlands was thereby engaged.
The ICTY was established by United Nations Security Council Resolution S/RES/827 of 25 May 1993 for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between certain dates. By virtue of Article 31 of its Statute the ICTY's seat was to be at The Hague. The United Nations entered into a separate agreement with the Netherlands (the Headquarters Agreement) to regulate matters relating to or arising out of the establishment and functioning of the ICTY in the Netherlands. The preamble to that agreement stated that the ICTY was established as a "subsidiary organ" of the United Nations.

Inadmissible: It was beyond dispute that the matters complained of had resulted from acts or omissions of the ICTY and evident from the manner of its creation and the preamble to the Headquarters Agreement that the ICTY was a "subsidiary organ" of the Security Council. Its acts and omissions were thus attributable in principle to the United Nations, an intergovernmental international organisation with a legal personality separate from that of its members states and which was not itself a Contracting Party to the Convention. It followed that the Court lacked jurisdiction *ratione personae* to examine complaints against the United Nations or, by extension, the ICTY itself.
Furthermore, as the Court had stated in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the Convention could not be interpreted in a manner that would subject the acts and omissions of Contracting Parties covered by Security Council Resolutions to the Court's scrutiny, as to do so would interfere with the fulfilment of the UN's key mission to secure international peace and security, so that the responsibility of the Netherlands could not be engaged on that account.
It was, however, implicit in the applicants' submissions that they nevertheless considered themselves to have been within the "jurisdiction" of the Netherlands for the purposes of Article 1 of the Convention, either on account of their physical presence there, or additionally (in *Galić*) on the basis of the Headquarters Agreement.
As regards the "physical presence" argument, the Court noted that there were exceptions to the general rule that physical presence on the territory brought an individual within the jurisdiction of the Contracting State concerned. Thus, restrictions had been accepted on fundamental-rights protection on the basis of immunity accorded to States or international organisations in certain situations. Similarly, it was not axiomatic that a criminal trial had to engage the responsibility under public-international law of the State on whose territory it was held. This was demonstrated by the provisions in the NATO Status of Forces Agreement engaging the responsibility of the sending, not the receiving, State when a State exercised criminal jurisdiction over its forces overseas and by the arrangements made for the Lockerbie trial of two Libyan nationals accused of a terrorist attack on an aircraft in Scotland to be held in the Netherlands. The

sole fact that the ICTY had its seat and premises in The Hague could not, therefore, constitute sufficient grounds to attribute the matters complained of to the Netherlands. Indeed, the applicants' cases involved an international tribunal established by an international organisation founded on the principle of respect for fundamental human rights and whose organisation and procedure were purposely designed to provide indictees with all appropriate guarantees. As to the Headquarters Agreement, although voluntarily entered into and ratified by the Netherlands, it was clearly no more than a document intended to give practical effect to actions of the Security Council and subject to its approval: *incompatible* ratione personae.

See also: *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC] nos. 71412/01 and 78166/01, 2 May 2007, Information Note no. 97; *Berić and Others v. Bosnia and Herzegovina*, nos. 36357/04 et seq., ECHR 2007-XI, Information Note no. 101.

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*.

BEYGO - 46 member States of the Council of Europe (N° 36099/06)
Decision 16.6.2009 [Section V]

The applicant, an employee of the Council of Europe, was removed from his post by the organisation's Secretary General. He appealed against that decision to the Administrative Tribunal of the Council of Europe. The Tribunal upheld his dismissal. The applicant argued before the Court that, on account of its composition and the fact that its members had been appointed by the executive authorities of the Council of Europe, the Administrative Tribunal had not provided the guarantees of independence and impartiality required by the Convention.

Inadmissible: In the instant case only entities of the Council of Europe, namely the Secretary General and the Administrative Tribunal, had been called on to deal with the dispute between the applicant and the organisation. The Court noted that at no point had any of the respondent States intervened, directly or indirectly, in the dispute. It saw no evidence of any act or omission on the part of those States or their authorities capable of engaging their responsibility under the Convention. The applicant could not therefore be said to be within the "jurisdiction" of the respondent States within the meaning of Article 1 of the Convention.
Furthermore, the applicant did not claim that, in transferring their powers to the Administrative Tribunal, the member States of the Council of Europe had failed to fulfil their obligations under the Convention by not providing an "equivalent" system of fundamental rights protection (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI, Information Note no. 76). Accordingly, the alleged violations of the Convention could not be imputed to the respondent States: *incompatible* ratione personae.

See also *Boivin v. 34 Member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008, Information Note no. 111; *Connolly v. 15 Member States of the Council of Europe*, no. 73274/01, 9 December 2008, unpublished; *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, 20 January 2009, ECHR 2009, Information note no. 115; and *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009, Information Note no. 119.

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
Application of different limitation period and starting points for default interest between State and private parties in labour dispute: *violation*.

ZOUBOULIDIS - Greece (no. 2) (N° 36963/06)
Judgment 25.6.2009 [Section I]

Facts: The applicant, a civil servant in the Ministry of Foreign Affairs, is married and has two minor children. Between 1993 and 2002 he worked at the Greek Embassy in Berlin under a permanent contract governed by private law. Officials of the Ministry receive a basic salary plus allowances and additional payments. The applicant received an expatriation allowance but the Ministry refused him entitlement to the additional payments for dependent children on account of a distinction, established on the basis of ministerial decisions, between officials employed under private-law contracts and others. In 1998 the applicant brought an action in the civil courts and, on the basis of a new law that removed the above-mentioned distinction, had his entitlement to the additional payments recognised by a judgment of the Court of Cassation. In 2001 the applicant applied to the court of first instance seeking payment of the supplement to his expatriation allowance plus default interest from the date on which the payments had been due. The court granted the application and the State appealed against that judgment. The court of appeal reversed the judgment, re-examined the case on the merits and partially granted the applicant's request. The court of appeal observed that the Court of Cassation judgment, which had become final, represented an irrevocable ruling on the applicant's entitlement to the payments in question. It went on to find, however, that the applicant's claims were subject to the two-year limitation period provided for by law. Lastly, it concluded that the applicant was entitled to the payments plus default interest from the date on which notice of his action had been served on the State. The applicant appealed on points of law, arguing that the privilege accorded to the State resulting from the two-year limitation period was contrary to the principle of equality and infringed his right to peaceful enjoyment of his possessions. He also challenged the rule that the date from which default interest was charged on all State debts was the day on which notice of the action was served on the State. In the applicant's view, this privilege amounted to an unjustified derogation from the rules of employment law. The appeal was dismissed by the Court of Cassation. It considered, in particular, that the existence of different rules was justified by the nature of the debts and by the need to ensure that the State's debts were settled promptly. The court found that this system was justified on the public-interest ground of reducing public expenditure in this sphere and allowing the State to meet other expenses connected with the provision of services to the public.

Law: The applicant had been entitled to a supplement to his expatriation allowance by virtue of a law which clearly stipulated that the allowance in question, increased by a certain percentage to cover family and accommodation costs, was to be paid to all civil servants working abroad. The applicant's entitlement had been recognised with final effect by the domestic courts and he had therefore had a certain and enforceable claim to payment of the supplement to his expatriation allowance. The courts had also recognised that default interest was payable on the amounts owed to the applicant by the State. The applicant had therefore had a claim in respect of the default interest which was sufficiently well established to be enforceable. Accordingly, Article 1 of Protocol No. 1 was applicable in the instant case. The applicant had not been fully compensated for the non-payment of the supplement during the relevant period, as the domestic courts had applied the special provisions of a law on civil servants which permitted exceptions to the rules of civil law and employment law and accorded certain privileges to the State, including limitation periods of between five and twenty years. The two-year limitation period constituted an exception to the provisions of civil law. The period within which the State could enforce its claims was two to ten times as long as the limitation period for enforcing claims against the State. The Court took note of the Government's main argument, reaffirmed by the case-law of the Court of Cassation but not by the recent rulings of the Supreme Administrative Court, that the preferential treatment accorded

to the State with regard to the limitation periods applied to its obligations towards individuals was justified on two main grounds: the need to ensure that the State's debts were settled promptly and the need to avoid an unforeseen burden on its budget. However, the instant case concerned an employment dispute relating to the payment of a supplement to the expatriation allowance of a contractual employee of the State, which in this case had been acting like any other private employer. While the authorities might discharge public duties even in the context of private-law procedures, the mere fact of belonging to the State structure was not sufficient in itself to justify the application of State privileges in all circumstances; such privileges had to be necessary for the proper performance of public duties. The mere interest of the State's cash flow or the concern to settle the State's debts promptly could not in themselves be treated as a public or general interest justifying interference with individual rights. Furthermore, no specific additional evidence had been provided as to the impact which a decision favourable to the claims of other persons in the same situation as the applicant would have on the financial stability of the State. This was particularly true given the considerable disparity between the limitation periods applicable to the State and the applicant in the present case. Accordingly, there had been insufficient public-interest grounds to justify applying the two-year limitation period to the applicant's claims against the State. The same was true with regard to the starting-point fixed by the domestic courts for calculating the default interest on the sums payable. In particular, the civil courts had taken as the starting-point the date on which notice of the applicant's action had been served on the State, whereas according to the Civil Code the employer was given notice and obliged to pay default interest on the date on which the payments in question fell due. In the light of the foregoing, a mere reference in abstract terms to the interest in settling the State's debts promptly was not sufficient justification for granting preferential treatment to the State in fixing the date from which default interest was charged on the sums due to an individual occupying a civil service post under a private-law contract. The application by the domestic courts of the special provisions according privileges to the State had therefore infringed the applicant's right to peaceful enjoyment of his possessions and upset the fair balance to be struck between the protection of property and the demands of the general interest.
Conclusion: violation (unanimously).

Article 41 – EUR 35,000 for pecuniary damage. Finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage.

PEACEFUL ENJOYMENT OF POSSESSIONS
Allegedly discriminatory rule prohibiting concurrent drawing of Russian military and Estonian old-age pensions: *communicated*.

TARKOEV and Others - Estonia (N° 14480/08)
MININ and Others - Estonia (N° 47916/08)
[Section V]

(See Article 14 above)

ARTICLE 3 OF PROTOCOL No. 1

STAND FOR ELECTION
Failure of the electoral authorities to abide by final court judgments and reinstate the applicants on list of candidates for parliamentary elections: *violation*.

PETKOV and Others - Bulgaria (N°s 77568/01, 178/02 and 505/02)
Judgment 11.6.2009 [Section V]

Facts: All three applicants were registered as candidates in the parliamentary elections to be held on 17 June 2001. Some two and a half months prior to the election, new legislation came into force which

contained a provision allowing parties or coalitions to withdraw nominations of individuals who had allegedly collaborated with the former State security agencies. The applicants were struck off the lists of candidates on account of such allegations just 10 days before the elections took place. The decisions to strike them off the lists were subsequently declared null and void by the Supreme Administrative Court. However, the electoral authorities did not restore their names to the lists and as a result they could not run for Parliament.

Law: Article 3 of Protocol No. 1 – It was not the Court's task to decide whether or not it had been contrary to the Convention to allow political parties to withdraw their candidates on account of their links with the former State security agencies, nor was it required to determine the correctness of the Supreme Administrative Court's rulings. Its task was confined to assessing whether the electoral authorities' failure to give effect to the final and binding judgments of the Supreme Administrative Court had violated their rights to stand for election. The reason the electoral authorities had not complied with the judgment was either that they considered that the Supreme Administrative Court had given erroneous rulings or that they believed that the judgments had not become final. However, in a democratic society abiding by the rule of law, it was not open to the electoral authorities to cite their disapproval of findings made in a final judgment as a reason for not complying with it. It was not only contrary to domestic law not to give effect to those judgments, but it also deprived the procedural guarantees available to the applicants of any useful effect and was, in the Court's view, arbitrary. The Court took account of the difficulties the electoral authorities faced on account of the fact that two of the Supreme Administrative Court's judgments had been given only a couple of days before the elections. However, those difficulties had been largely attributable to the authorities themselves. Firstly, the new electoral law had been adopted just over two months before the elections took place, at odds with the Council of Europe's recommendation on the stability of electoral law. Furthermore, instead of requiring political parties to verify links with former State security agencies before nominating their candidates, the parties had been allowed to do so afterwards. Finally, the practical arrangements for the withdrawal of candidates had been clarified only 12 days before the elections took place. All this had resulted in serious practical difficulties and led to legal challenges that had had to be adjudicated and acted upon under extreme time constraints.
Conclusion: violation (five votes to two).

Article 13 – The Court found that the remedy relied on by the Government – a claim under the State Responsibility for Damage Act 1988 – could not by itself be considered effective. Even if ultimately successful, it would not have been sufficient, as it could only have led to an award of compensation. The Court pointed out that in the electoral context only remedies capable of ensuring the proper unfolding of the democratic process could be considered effective. Given the time constraints prior to the elections, the Court concludes that the situation could be rectified solely by means of a post-election remedy by which the candidates could seek vindication of their right to stand for Parliament before a body capable of ultimately having the power to annul the election result. Under Bulgarian law, even though the Constitutional Court was competent to hear challenges regarding the lawfulness of parliamentary elections, its scope of review had been uncertain owing to a lack of clear and unambiguous provisions. Finally, only a limited category of persons or bodies were entitled to refer a matter to the Constitutional Court and the participants in the electoral process could not have directly compelled the institution of proceedings before it.
Conclusion: violation (five votes to two).

Article 41 – Finding of a violation constituted sufficient just satisfaction.

STAND FOR ELECTION
FREE EXPRESSION OF OPINION OF PEOPLE
Cancellation of candidacy of electoral groups to territorial elections on grounds that they were carrying on activities of parties that had been declared illegal owing to their links with a terrorist organisation: *no violation*.

ETXEBERRIA, BARRENA ARZA, NAFARROAKO AUTODETERMINAZIO BILGUNEA and AIARAKO and Others - Spain (N^{os} 35579/03, 35613/03, 35626/03 and 35634/03)
Judgment 30.6.2009 [Section V]

Facts: The applicants are Spanish nationals and electoral groupings which were active within the political parties that were declared illegal and dissolved (in particular, Herri Batasuna and Batasuna) on the basis of Organic Law 6/2002 on political parties ("the LOPP"). In April 2003 the electoral commissions of the Basque country and Navarra registered the candidacies of the groupings in the municipal, regional and Autonomous Community elections scheduled to take place in the Basque country and Navarra in May 2003. State Counsel and the public prosecutor's office lodged applications with the Supreme Court for judicial review of an electoral matter, seeking to have approximately 300 candidacies, including those of the electoral groupings in question, struck off the lists. They accused the groupings of pursuing the activities of the political parties Batasuna and Herri Batasuna, which had been declared illegal and dissolved in March 2003. The Supreme Court granted the applications lodged by State Counsel and the public prosecutor's office in the part concerning the electoral groupings which have now applied to the Court, and barred the groupings from standing on the ground that their aim had been to carry on the activities of the three parties that had been declared illegal and dissolved. The electoral groupings concerned then lodged an *amparo* appeal with the Constitutional Court, which dismissed it. Sixteen of the electoral groupings involved in the domestic proceedings had their *amparo* appeals allowed.

Law: Article 3 of Protocol No. 1 – The applicants complained that they had been deprived of the possibility of standing as candidates in the elections to the parliament of Navarra and of representing the electorate; this had hindered the free expression of the opinion of the people in the choice of the legislature. Spanish legislation provided for the disputed measure and the applicants could reasonably have expected that the provision in question, which was sufficiently foreseeable and accessible, would be applied in their case. The impugned restriction pursued aims that were compatible with the principle of the rule of law and the general objectives of the Convention, in particular the protection of democracy. As to whether the measure had been proportionate, the national authorities had had considerable evidence to suggest that the electoral groupings in question intended to continue the activities of the political parties that had previously been declared illegal. Furthermore, the Supreme Court had based its reasoning on elements external to the manifestos of the groupings concerned and the authorities had taken the decisions barring the candidacies on an individual basis. In addition, after an examination in adversarial proceedings during which the groupings had been able to submit observations, the domestic courts had found an unequivocal link with the illegal political parties. In the instant case it had been sufficiently proven by the Spanish courts that the groupings concerned intended to continue the activities of Batasuna and Herri Batasuna, which had been dissolved because of their support for violence and for the activities of the terrorist organisation ETA. Lastly, the political context in Spain, characterised by the presence of separatist political parties in the institutions of government of certain Autonomous Communities and in particular in the Basque country, demonstrated that the impugned measure had not been intended to prohibit all manifestations of separatist ideas. Accordingly, the restriction complained of had been proportionate to the legitimate aim pursued and, in the absence of any element of arbitrariness, had not infringed the free expression of the opinion of the people.
Conclusion: no violation (unanimously).

Article 10 – *Applicability*: Even if the right to freedom of expression was linked in a specific case to an electoral procedure, that did not suffice to find that it did not apply in the instant cases. Article 10 was therefore applicable.

Compliance: With regard to some of the applications, the Court referred to its findings under Article 3 of Protocol No. 1. As to the applications relying on Article 10 alone the Court considered, taking into account the close relationship between the right to freedom of expression and the criteria arising from the case-law concerning Article 3 of Protocol No. 1, that the Spanish authorities had not overstepped their margin of appreciation under Article 10.
Conclusion: no violation (unanimously).

Article 13 – The time allowed to the groupings in question to submit their appeals had been short, particularly with reference to the standards laid down by the Venice Commission. However, there was a lack of unanimity on the subject among the Council of Europe member States. Hence, the time-limit laid down in Spain was not an isolated example or manifestly unreasonable when compared with the approach taken by most other European countries. In any event, the applicants had not demonstrated that the time-limits had prevented the representatives of the groupings in question from lodging their appeals with the Supreme Court or the Constitutional Court and from filing observations and defending their interests in an appropriate manner.
Conclusion: no violation (unanimously).

See also *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, in relation to Article 11, and *Herritarren Zerrenda v. Spain*, no. 43518/04, below.

STAND FOR ELECTION
FREE EXPRESSION OF OPINION OF PEOPLE
Cancellation of candidacy of electoral group to European Parliament on grounds that the group was carrying on activities of parties that had been declared illegal owing to their links with a terrorist organisation: *no violation*.

HERRITARREN ZERRENDA - Spain (N° 43518/04)
Judgment 30.6.2009 [Section V]

Facts: In 2004 the central electoral commission registered the candidacy of the applicant electoral grouping for the elections to the European Parliament in June 2004. State Counsel, representing the Spanish Government, submitted an application to the Supreme Court for judicial review in an electoral matter, seeking to have the candidacy barred. State Counsel accused the grouping of pursuing the activities of the political parties Batasuna and Herri Batasuna, which had been declared illegal and dissolved in March 2003. The public prosecutor's office also submitted an application to the Supreme Court seeking to have the applicant's candidacy barred. The Supreme Court granted the applications and barred the applicant from standing for election on the ground that its purpose was to continue the activities of the parties that had been declared illegal and dissolved. The applicant then lodged an *amparo* appeal with the Constitutional Court, which dismissed it. The elections to the European Parliament were held and the applicant, which had called on the electorate to vote for it in spite of its barred candidacy, obtained 113,000 votes in Spain. The votes were considered null and void. Relying on Article 10 of the Convention and Article 3 of Protocol No. 1, the applicant complained that it had been barred from standing as a candidate in the elections to the European Parliament and that it had been deprived of the possibility of standing for election and representing the electorate; this had hindered the free expression of the opinion of the people in the choice of the legislature. The applicant also alleged a violation of Article 13 on account of the judicial review procedure before the Supreme Court.

Law: For the same reasons as in *Etxeberría and Others* (see above in relation to Article 3 of Protocol No. 1), the Court held unanimously that there had been no violation of Article 3 of Protocol No. 1 and Article 13 and that no separate issue arose under Article 10.

See also *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, in relation to Article 11, and *Etxeberria, Barrena Arza, Nafarroako Autodeterminazio Bilgunea and Aiarako and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, above.

ARTICLE 4 OF PROTOCOL No. 7

NE BIS IN IDEM
Conviction for petty tax fraud and subsequent fuel-fee debit based on substantially the same facts: *violation*.

RUOTSALAINEN - Finland (N° 13079/03)
Judgment 16.6.2009 [Section IV]

Facts: The applicant ran his pickup van on fuel that was more leniently taxed than diesel oil but without paying an additional tax. Consequently, a summary penal order was made against him to pay a fine of approximately EUR 120 for petty tax fraud. Subsequently, in separate administrative proceedings, he was issued with a fuel-fee debit in the amount of EUR 15,000 to compensate for the tax advantage he had gained. This was three times higher than the amount he would have had to pay if he had given prior notice to the competent authority. His appeals against the latter decision were unsuccessful.

Law: Whereas the legal characterisation and the nature of the first set of proceedings concerning tax fraud were undoubtedly criminal, the second set of proceedings had not been classified as such under domestic law. However, having regard to the fact that the amount of the fuel-fee due had been trebled, the Court concluded that it had not only a compensatory character, but also a deterrent and punitive one, sufficient to establish the criminal nature of the offence. Since both sanctions concerned the same conduct by the same person and within the same time frames, the Court was required to verify whether the facts giving rise to both sets of proceedings were identical or substantially the same. The facts that had given rise to the summary penal order in the first set of proceedings had related to the applicant's use of more leniently taxed fuel than diesel oil in his van without paying the additional tax due for such use. The second set of proceedings resulted in a fuel-fee debit that was imposed because the applicant's van had been run on more leniently taxed fuel. That amount had then been tripled because he had not given prior notice thereof. Thus, the facts in the two sets of proceedings hardly differed and must, in the Court's view, have been regarded as substantially the same for the purposes of Article 4 of Protocol No. 7.
Conclusion: violation (unanimously).

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

ARTICLE 1 OF PROTOCOL No. 13

ABOLITION OF THE DEATH PENALTY
Transfer of suspects under control of British Armed Forces in Iraq into custody of Iraqi authorities on charges carrying death penalty: *admissible*.

AL-SAADOON and MUFDHI - United Kingdom (N° 61498/08)
Decision 30.6.2009 [Section IV]

(See Article 1 above)

Referral to the Grand Chamber

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

MANGOURAS - Spain (N° 12050/04)
Judgment 8.1.2009 [Section III]

(See Article 5 § 3 above)

TAXQUET - Belgium (N° 926/05)
Judgment 13.1.2009 [Section II]

(See Article 6 § 1 above)

NEULINGER and SHURUK - Switzerland (N° 41615/07)
[Section I]

(See Article 8 above)

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

On 5 June 2009 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

HOLZINGER (No. 3) – Austria (N° 9318/05)
HOLY SYNOD OF THE BULGARIAN ORTHODOX CHURCH (Metropolitan Inokentiy) and Others – Bulgaria (N°s 412/03 and 35677/04)
ĆOSIĆ – Croatia (N° 28261/06)
PETKOSKI and Others – Former Yugoslav Republic of Macedonia (N° 27736/03)
LEONIDIS – Greece (N° 43326/05)
AVRAM – Moldova (N° 2886/05)
GÓRKIEWICZ – Poland (N° 41663/04)
MAKUSZEWSKI – Poland (N° 35556/05)
PALEWSKI – Poland (N° 32971/03)
PIÓRO and ŁUKASIK – Poland (N° 8362/02)
SŁAVOMIR MUSIAŁ – Poland (N° 28300/06)
TEKIELA – Poland (N° 35785/07)
WOJCIECHOWSKI – Poland (N° 5422/04)
LUCRETIA POPA and Others – Romania (N° 13451/03)
ABDULKADYROVA and Others – Russia (N° 27180/03)
ABDURZAKOVA and ABDURZAKOV – Russia (N° 35080/04)
AKHMADOVA and Others – Russia (N° 3026/03)
ALEKSANYAN – Russia (N° 46468/06)
ASKHAROVA – Russia (N° 13566/02)
AYUBOV – Russia (N° 7654/02)
BERSUNKAYEVA – Russia (N° 27233/03)
DANGAYEVA and TARAMOVA – Russia (N° 1896/04)
DOLSAYEV and Others – Russia (N° 10700/04)
IDALOVA and IDALOV – Russia (N° 41515/04)
ILYASOVA and Others – Russia (N° 1895/04)
KAZAKOV – Russia (N° 1758/02)
KOZODOYEV – Russia, KOZHEVNIKOVA – Russia, KOZODOYEV and Others – Russia (N°s 2701/04, 3597/04, 11898/04, 31946/04 and 34826/04)
MEDOVA – Russia (N° 25385/04)
MIKHAYLOVICH – Russia (N° 30019/05)
MIRILASHVILI – Russia (N° 6293/04)
MUSIKHANOVA and Others – Russia (N° 27243/03)
SAMBIYEV and POKAYEVA – Russia (N° 38693/04)
SHAKHGIRIYEVA and Others – Russia (N° 27251/03)
TAGIROVA and Others – Russia (N° 20580/04)
ZAURBEKOVA and ZAURBEKOVA – Russia (N° 27183/03)
F. H. – Sweden (N° 32621/06)
SCHLUMPF – Switzerland (N° 29002/06)
MUSTAFA AÇIKGÖZ – Turkey (N° 34588/03)
ZÖRE AKYOL – Turkey (N° 28668/03)
BERBER – Turkey (N° 20606/04)
KORKUT – Turkey (N° 10693/03)

[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.

TERZIOĞLU and Others – Turkey (N^{os} 16858/05, 23953/05, 34841/05, 37166/05, 19638/06 and 17654/07)
KHRISTOV – Ukraine (N^{o} 24465/04)
KUSHNARENKO – Ukraine (N^{o} 18010/04)
MITAKIY – Ukraine (N^{o} 183/06)
JOSEPH GRANT – United Kingdom (N^{o} 10606/07)