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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Giuliani and Gaggio v. Italy - 23458/02
Judgment 25.8.2009 [Section IV]

During an authorised demonstration extremely violent clashes broke out between anti-globalisation militants and law-enforcement officers. A vehicle belonging to the latter was immobilised by demonstrators. A member of the *carabinieri*, injured and panicking, fired two shots and Carlo Giuliani was fatally wounded by a bullet in the face. In attempting to drive away the driver rode twice over the young man's motionless body. An investigation was opened immediately by the Italian authorities. Criminal proceedings for intentional homicide were instituted against the *carabiniere* who fired the shots and the vehicle's driver. The autopsy revealed that the death had been caused by the shot. The public prosecutor's office authorised the body's cremation and ordered three expert reports. The proceedings were discontinued by the investigating judge.

In a judgment of 25 August 2009 a Chamber of the Court held unanimously that there had been no violation of Article 2 of the Convention with regard to the excessive use of force, finding that in the circumstances of the case the use of lethal force had not overstepped the bounds of what had been absolutely necessary in order to avert what the officer honestly perceived to be a real and imminent danger to his life and the lives of his colleagues. As to the State's positive obligation to protect life, the Chamber held by five votes to two that there had been no violation of Article 2, finding that it was unable to establish the existence of a direct and immediate link between possible shortcomings in the planning or conduct of the public-order operation and the death of Carlo Giuliani. Finally, the Chamber held by four votes to three that there had been a violation of Article 2 with regard to the procedural obligations flowing from that Article, on the grounds that the authorities had not conducted an adequate investigation into the circumstances of Carlo Giuliani's death in view of the shortcomings in the autopsy and the failure to preserve the body, which had ruled out any further analysis and resulted in the proceedings being discontinued. Furthermore, the domestic investigation had focused only on the details of the incident itself, confining its attention to identifying which, if any, of the persons immediately involved had been responsible, without seeking to shed light on possible failings in the planning and management of the public-order operation.

On 1 March 2010 the case was referred to the Grand Chamber at the request of the applicants and the Government.

(See Information Note no. 122 for further details)

Life
Positive obligations

Suicide of soldier with known psychological disorders during military service: *violation*

Lütfi Demirci and Others v. Turkey - 28809/05
Judgment 2.3.2010 [Section II]

Facts – The applicants are the relatives of a soldier who killed himself in January 2003 during his military service. In December 2002 the deceased had been examined by a psychiatrist, who diagnosed him as suffering from anxiety and parasomnia and put him on sick leave for seven days. He was subsequently prescribed antidepressants. The last reports relating to the deceased's interviews with his superiors dated back to early January 2003 and indicated that he had said he was feeling better. Subsequently, while on guard duty, he committed suicide by shooting himself with his service weapon.

Law – Article 2: The prescription for antidepressants was immaterial because the instructions specified that it was preferable to prescribe this treatment in reduced quantities to depressed patients with suicidal tendencies to prevent them from committing suicide

by swallowing all the pills at once, and not that the treatment could lead to suicide. The deceased had had medical and psychological examinations and interviews with his superiors on about ten occasions between September 2002 and January 2003. Lastly, his psychological problems were not linked to his military service and did not derive from any debasing treatment that might have been inflicted on him by other soldiers or by his superiors. Furthermore, where a soldier was unfit for tasks that required the use of weapons, the doctors indicated as much in their reports. Even though the authorities had kept the deceased under close supervision, they had failed to provide the requisite protection. Accordingly, they should not have left it up to the deceased to decide to refuse his assignment to canteen service and should not have trusted his mere assertions that he was feeling better. They should have excused him from tasks that involved handling weapons or even prevented him from having any access to weapons at all. The State had a positive obligation to exercise special diligence and afford treatment appropriate to military conditions for soldiers who had psychological problems. In the present case, the deceased's psychological problems had been diagnosed right at the beginning of his military service, but the system put in place by the State with a view to preventing suicides during that period had not led to concrete measures that could reasonably have been expected from the authorities, namely, preventing the deceased from having access to lethal weapons. There had therefore been a violation of Article 2 regarding the positive obligation on the State to take preventive practical measures to protect the deceased from his own actions.

Conclusion: violation (five votes to two).

Article 41: EUR 3,920 to each of the first two applicants and EUR 1,570 to each of the three others in respect of non-pecuniary damage.

Failure to provide a patient, infected with HIV virus by blood transfusions at birth, with full and free medical cover for life: *violation*

Oyal v. Turkey - 4864/05
Judgment 23.3.2010 [Section II]

Facts – The first applicant is the second and third applicants' son. He was infected with the HIV virus after undergoing blood transfusions following a premature birth. The applicants brought proceedings against the supplier of the blood and the Ministry of Health. The domestic courts ruled that the supplier was at fault for supplying HIV-infected blood and that the Ministry of Health was responsible for the negligence of its staff in the performance of their duties. They also established that the HIV had not been detected because the medical staff had failed to test the blood because of the expense of doing so and that, prior to the first applicant's infection, there was no legal requirement for blood donors to give information about their sexual activity. On account of these deficiencies, the domestic courts awarded the applicants compensation in respect of non-pecuniary damage plus statutory interest. However, following the judgments the special card (the "green card"), which was issued by the Ministry of Health and provided free access to health care and medicine to persons with minimal income, was withdrawn from the applicants, who have to meet medical expenses in the order of EUR 6,800 per month.

Law – Article 2: The applicants' complaints pertained to the alleged failure of the State authorities to fulfil their positive obligation to protect life by not taking preventive measures against the spread of HIV through blood transfusions and by not conducting an effective investigation against those responsible for the infection of the first applicant. Article 2 was therefore applicable. The applicants had had access to the civil and administrative courts, which had established the liability of those responsible for the infection of the first applicant with the HIV virus and made an order for damages. However, a crucial question in the instant case was whether the redress in question had been appropriate and sufficient. The non-pecuniary damage awards had only covered one year's treatment and medication for the first applicant. Thus the family had been left in debt and poverty and unable to meet the high costs of the continued treatment and medication. It was striking that the green card given to the applicants had been withdrawn immediately after the delivery of the judgments in their favour. The Court acknowledged the sensitive and positive approach adopted by the national courts; however, it considered that the most appropriate remedy in the circumstances would have been to have ordered the defendants, in addition to the payment in respect of non-pecuniary damage, to pay for the first applicant's treatment and medication expenses during his lifetime. The redress offered to the applicants had therefore been far from satisfactory for the purposes of the positive obligation under Article 2. Moreover, as the domestic proceedings had lasted over nine years, it could not be said that the administrative courts had complied with the requirements of promptness and reasonable expedition implicit in this context. Apart from the

concern for the respect of the rights inherent in Article 2 in each individual case, more general considerations also called for a prompt examination of cases concerning medical negligence. Knowledge of the facts and of possible errors committed in the course of medical care was essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases was therefore important for the safety of users of all health services.

Conclusion: violation (unanimously).

Article 41: EUR 300,000 in respect of pecuniary damage and EUR 78,000 in respect of non-pecuniary damage, together with free and full medical cover for the first applicant for the rest of his life.

Use of force

Use of potentially lethal gas in an operation to rescue over 900 hostages: *admissible*

Finogenov and Others v. Russia - 18299/03 and 27311/03
Decision 18.3.2010 [Section I]

In October 2002 a group of terrorists belonging to a Chechen separatist movement took about 900 hostages in a Moscow theatre and held them at gunpoint for three days. With a view to rescuing the hostages, the Russian security forces dispersed an unknown gas through the theatre's ventilation system. When the terrorists lost consciousness, the security forces stormed the building. The applicants, who were either surviving hostages or relatives of deceased hostages, alleged that the subsequent evacuation of the hostages was chaotic: they had been left lying outside on the ground in temperatures of 1.8°C and many had died through negligence, having been left lying on their backs before suffocating on their vomit. There had not been enough ambulances or medical staff to accompany the victims to hospital, so they had had to be transported in ordinary buses. According to official information, 129 hostages died on the spot, 21 in the course of the evacuation and transportation to hospital and 6 in hospital. Many of those who survived continue to suffer from serious health problems. The prosecutor started a criminal investigation into the events. The applicants as injured parties enjoyed access to the materials in the case file, but were not allowed to make photocopies, disclose the information to third parties or contact the medical experts who had examined the bodies. Concluding that there had been no direct link between the gas used in the rescue operation and the death of the hostages, the prosecutor eventually refused to initiate a criminal investigation into the actions of the State authorities during the crisis although he continued the investigation in respect of the presumed terrorists. The applicants' repeated requests for the investigation to be reopened were to no avail. Some filed civil actions against the State, but their claims were dismissed.

Conclusion: admissible under Articles 2, 3, 6 § 1 and 13 of the Convention (majority).

ARTICLE 3

Inhuman or degrading treatment
Expulsion

Inhuman and degrading treatment suffered as a result of an asylum-seeker's removal to Greece under the Dublin Regulation: *relinquishment in favour of the Grand Chamber*

M.S.S. v. Belgium and Greece - 30696/09
[Section II]

The applicant in this case is an Afghan national whose asylum request was dismissed in Belgium and who was deported to Greece. Referring to Articles 2 and 3 of the Convention, the applicant claims, *inter alia*, that Belgium took the risk of exposing him to inhuman and degrading treatment in Greece, and that he risks being deported to Afghanistan by Greece, without an examination on the merits of the reasons he fled his country. He also alleges that no effective remedy was available to him in Belgium against the deportation order, within the meaning of Article 13 of the Convention.

Inhuman treatment
Positive obligations

Transfer of detainees to Iraqi authorities despite risk of capital punishment: *violation*

Al-Saadoon and Mufdhi v. the United Kingdom - 61498/08
Judgment 2.3.2010 [Section IV]

Facts – 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 of the Rules of Court, so putting

them at real risk of an unfair trial followed by execution by hanging.

The applicants were arrested by British forces in 2003 following the invasion of Iraq by a Multi-National Force. They were initially detained in British-run detention facilities as "security internees" 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 in an ambush in southern Iraq on 23 March 2003, concluded that there was evidence of the applicants' involvement in the killing. In December 2005 the British authorities formally referred the murder cases 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 British authorities reclassified the applicants' status from "security internees" to "criminal detainees". In 2006 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, which had power to impose the death penalty. The Iraqi High Tribunal 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 Iraqi High Tribunal and was obliged to return them to the custody of that tribunal 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 Iraqi High Tribunal which 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. It also refused permission to appeal to the House of Lords or to grant the applicants interim relief.

Shortly after being informed of the Court of Appeal's ruling the European Court gave an indication under Rule 39 that the applicants should not be removed or transferred from the custody of the United Kingdom until further notice. However, the Government replied on 31 December 2008 that, since the UN Mandate was due to expire at midnight, exceptionally they could not comply and had transferred the applicants to Iraqi custody earlier in the day. The applicants' trial before the Iraqi High Tribunal started in May 2009 and ended in September 2009 with a verdict cancelling the charges against them and ordering their immediate release. Upon an appeal by the prosecutor, the Iraqi Court of Cassation remitted the cases for further investigation by the Iraqi authorities and for a retrial. The applicants remain in custody.

In its admissibility decision of 30 June 2009 (see Information Note no. 120), the European Court found that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the detention facilities in Basra, the applicants had been within the United Kingdom's jurisdiction until their physical transfer to the custody of the Iraqi authorities on 31 December 2008.

Law – Article 3: Although, the death penalty had not been considered to violate international standards when the Convention was drafted, there had since been an evolution towards its complete *de facto* and *de jure* abolition within all the member States of the Council of Europe. Two Protocols to the Convention had thus entered into force, abolishing the death penalty in time of war (Protocol No. 6) and in all circumstances (Protocol No. 13), and the United Kingdom had ratified them both. All but two member States had signed Protocol No. 13 and all but three of the States which had signed it had ratified it. These figures and consistent State practice in observing the moratorium on capital punishment were strongly indicative that Article 2 of the Convention had been amended so as to prohibit the death penalty in all circumstances. Accordingly, there was no longer any bar to considering the death penalty – which caused not only physical pain but also intense psychological suffering as a result of the foreknowledge of death – as inhuman and degrading treatment or punishment within the meaning of Article 3.

Given the nature of the evidence and allegations against them, from August 2004, when the death penalty was reintroduced in Iraq, there had been substantial grounds for believing that the applicants would run a real risk of being sentenced to death if tried and convicted by an Iraqi court. The applicants themselves must have been aware of that risk. In the Court's view, at least from May 2006, when the Iraqi criminal courts accepted jurisdiction over their cases, the applicants had been subjected to a well-founded and continuing fear of execution which it was reasonable to assume caused them intense psychological suffering that had undoubtedly intensified since their transfer into Iraqi custody on 31 December 2008.

As to the Government's contention that, in accordance with well-established principles of international law, they had had no option but to respect Iraqi sovereignty and transfer the applicants to the custody of the Iraqi courts when requested, the Court reiterated that it was not open to a Contracting State to enter into an agreement with another State which conflicted with its obligations under the Convention, especially in a case involving the death penalty and the risk of grave and irreversible harm. Furthermore, although the British courts had considered themselves bound by the principles of international law restricting the duty to provide "diplomatic asylum" to cases where the individual concerned was at risk of treatment so harsh as to constitute a crime against humanity, the Court considered that the applicants' situation was clearly distinguishable. The applicants had not sought refuge with the United Kingdom authorities, but had actively been brought, through their arrest and detention by British armed forces, within the United Kingdom's jurisdiction. In these circumstances, the respondent State had been under a paramount obligation to ensure that the applicants' arrest and detention did not end in a manner which would breach their rights.

In any event, the Court was not satisfied that the need to secure the applicants' rights under the Convention had inevitably required a breach of Iraqi sovereignty. It did not appear that any real attempt had been made to negotiate with the Iraqi authorities to prevent the risk of the death penalty. For example, although the evidence showed that the Iraqi prosecutors had initially had "cold feet" about bringing the cases themselves because the matter was "so high profile", the opportunity did not appear to have been seized to seek the consent of the Iraqi Government to an alternative arrangement involving the applicants being tried by a British court, either in Iraq or in the United Kingdom. Likewise, no request was made to the Iraqi authorities, before the decision was made to refer the applicants' cases to the Iraqi courts, for a binding assurance that, in the event of a referral, the applicants would not be at risk of capital punishment. Indeed, no such assurance had ever been obtained.

In the absence of such an assurance, the referral of the applicants' cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities had failed to take proper account of the United Kingdom's obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13. Accordingly, while the outcome of their cases before the Iraqi High Tribunal remained uncertain, the applicants had been subjected, since at least May 2006, to inhuman treatment through the fear of execution by the Iraqi authorities.

Conclusion: violation (unanimously).

Article 6: The Court accepted the national courts' finding that it had not been established that, at the date of their transfer to the Iraqi authorities, the applicants risked a flagrantly unfair trial before the Iraqi High Tribunal. Nor, now that the trial had taken place, was there any evidence before the Court to cast doubt on that assessment.

Conclusion: no violation (unanimously).

Articles 13 and 34: The Government had argued that there had been an "objective impediment" to compliance with Rule 39 indication in that the applicants' transfer to the Iraqi authorities had been the only course of action that was consistent with respect for Iraqi sovereignty. The Court considered, however, that the respondent State was responsible for the situation in which it had found itself as, firstly, it had not obtained a binding assurance regarding the death penalty before referring the applicants' cases to the Iraqi courts and transferring them physically to Iraqi custody and, secondly, it had entered into arrangements with another State which conflicted with its Convention obligations to safeguard the applicants' fundamental human rights. Nor had it established that there had been no realistic or practicable means available to safeguard those rights.

Moreover, the Government had not satisfied the Court that they had taken all reasonable steps, or indeed any steps, to seek to comply with the Rule 39 indication. They had not informed the Court, for example, of any attempt to explain the situation to the Iraqi authorities and to reach a temporary solution. The Government's approaches to the Iraqi authorities prior to the applicants'

transfer on 31 December 2008 had not been sufficient to secure any binding assurance that the death penalty would not be applied and their subsequent efforts had come after the applicants had left the jurisdiction and therefore at a time when the British authorities had lost any real and certain power to secure their safety. In sum, the respondent State had not taken all reasonable steps to comply with the interim measure and had thereby exposed the applicants to a serious risk of grave and irreparable harm. This had also had the effect of unjustifiably nullifying the effectiveness of any appeal to the House of Lords.

Conclusion: violations (six votes to one).

Article 46: The Government were required to seek to put an end to the suffering the fear of execution caused the applicants as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they would not be subjected to the death penalty.

Article 41: The findings of a violation of Articles 3, 13 and 34, coupled with the Article 46 indication, constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Expulsion

Proposed deportation to Iran of a person who had been ill-treated in detention for criticising the Iranian Government: *deportation would constitute violation*

R.C. v. Sweden - 41827/07
Judgment 9.3.2010 [Section III]

Facts – The applicant is an Iranian national who arrived to Sweden in 2003 and requested asylum. He submitted that he had taken part in a demonstration criticising the Iranian Government in 2001, following which he had been arrested, tortured and kept in detention for almost two years, before managing to escape and illegally leave Iran. During his detention, he had not been officially charged or tried before the Iranian courts, although some sort of religious trial by a revolutionary court had taken place, in which he had been brought before a priest, who had decided on his continued imprisonment. The applicant also produced a medical certificate dated 2005 which confirmed that injuries on his body could well have originated from torture. The Swedish authorities doubted the applicant's story pointing out that he had never been a member of a political party or of a movement critical of the regime, nor had he been a leading figure in the 2001 demonstration. Moreover, they refused to accept the medical report as proof that the applicant had actually been tortured. His asylum application was therefore rejected. At the request of the European Court, in 2008 the applicant submitted a forensic medical report, whose findings strongly indicated that he had been tortured.

Law – Article 3: Even though there were uncertain aspects to the applicant's story, his account had in principle been consistent throughout the proceedings and there were no reasons to doubt his overall credibility. It was corroborated by the medical certificate dating from 2005. If the Swedish authorities had had any doubts about that evidence, they should have arranged for an expert report. The forensic medical request that had been submitted at the Court's request had also concluded that the applicant's injuries strongly indicated that he had been a victim of torture. Further, from the information available on the situation in Iran, it was clear that anyone who demonstrated or in any way opposed the regime risked being detained and tortured. It was therefore irrelevant whether or not the applicant had assisted in the organisation of the said demonstration. In view of the foregoing, the Court found that the applicant had substantiated his claim that he had been detained and tortured by the Iranian authorities. According to the information available from independent international sources, Iranians returning to their home country who were unable to prove that they had left legally were particularly likely to attract the authorities' attention. The applicant – who claimed to have left Iran illegally, a fact that had not been disputed by the Government – consequently ran a high risk of being detained and ill-treated on account of his past activities if he was returned to Iran.

Conclusion: deportation to Iran would constitute violation (six votes to one).

ARTICLE 5

Article 5 § 1

Deprivation of liberty
Procedure prescribed by law

Confinement to ship of crew of foreign vessel arrested on high seas: *violation*

Medvedyev and Others v. France - 3394/03
Judgment 29.3.2010 [GC]

Facts – The applicants, Ukrainian, Romanian, Greek and Chilean nationals, were crew members on a merchant ship named the *Winner*, registered in Cambodia. In the context of the international effort to combat drug-trafficking, it came to the attention of the French authorities that the ship might be carrying large quantities of drugs. In a diplomatic note dated 7 June 2002 Cambodia gave its agreement for the French authorities to take action. The French naval authorities accordingly had the *Winner* intercepted on the high seas off Cape Verde and escorted to the French port of Brest.

In a judgment of 10 July 2008 a Chamber of the Court unanimously found a violation of Article 5 § 1 in that the applicants had not been deprived of their liberty "in accordance with a procedure prescribed by law". It also found, by four votes to three, that there had been no violation of Article 5 § 3. It noted that the applicants had not been brought before "a judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 until they were brought before the liberties and detention judge to be placed in detention pending trial, that is, after fifteen or sixteen days' deprivation of liberty. However, it considered that the duration of the applicants' detention had been justified by wholly exceptional circumstances.

Law – Article 1: As France had exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner, the applicants had effectively been within France's jurisdiction for the purposes of Article 1.

Conclusion: applicants within jurisdiction (unanimously).

Article 5 § 1: (a) *Applicability* – The applicants had been placed under the control of the French special forces and deprived of their liberty throughout the voyage as the ship's course had been imposed by the French forces. Their situation after their ship was boarded thus amounted to a deprivation of liberty within the meaning of Article 5.

(b) *Merits* – In cases concerning drug-trafficking on the high seas public international law upheld the principle that the flag State – in this case Cambodia – had jurisdiction.

The Montego Bay Convention[1] did not provide any legal basis for the action taken by the French authorities in this case. As Cambodia was not party to the Montego Bay Convention, it could not have been acting under its provisions when it sent its diplomatic note of 7 June 2002. Nor did France's request for cooperation from the Cambodian authorities fall within the scope of that convention, as it was not based on France's suspicion that a ship flying the French flag was engaged in drug-trafficking. Furthermore, it had not been shown that there was any constant practice on the part of the States capable of establishing the existence of a principle of customary international law generally authorising the intervention of any State which had reasonable grounds for believing that a ship flying the flag of another State was engaged in illicit traffic in drugs. Nor could it reasonably be argued that the possibility for a warship to board a ship it had reasonable ground to suspect was without nationality applied to the present case, where the circumstances did not support that hypothesis.

Concerning the relevant French law, apart from the fact that its main purpose was to transpose the international treaties, and in particular the Vienna Convention[2], into domestic law, it could not override the treaties concerned, or the principle of the exclusive jurisdiction of the flag State. Thus, as Cambodia was not a party to the conventions transposed into domestic law, and as the *Winner* was not flying the French flag and none of its crew members were French nationals, there had been no grounds for French law to be applied. Nor could it be argued that French law satisfied the general principle of legal certainty, as it failed to meet the requisite conditions of foreseeability and accessibility: it was unreasonable to contend that the crew of a ship on the high seas flying the Cambodian flag could have foreseen – even with appropriate advice – that they might fall under French jurisdiction in the circumstances of the case. Furthermore, although the purpose of the Montego Bay Convention was, *inter alia*, to codify or consolidate the customary law of the sea, its provisions concerning illicit traffic in narcotic drugs on the high seas – like those of the complementary Vienna Convention, organising international cooperation without making it mandatory – reflected a lack of consensus and of clear, agreed rules and practices in the matter at the international level.

However, independently of the Montego Bay and Vienna Conventions, and of French law, Cambodia

1. United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, which entered into force on 16 November 1994.

2. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988, which entered into force on 11 November 1990.

had consented in a diplomatic note to the intervention of the French authorities. Although the Montego Bay Convention did not apply to the present case, it did not prevent States from envisaging other forms of collaboration to combat drug-trafficking at sea. Moreover, diplomatic notes were a source of international law comparable to a treaty or an agreement when they formalised an agreement between the authorities concerned, a common stance on a given matter or even, for example, the expression of a unilateral wish or commitment. The diplomatic note in question thus officialised the Cambodian authorities' agreement to the interception of the *Winner*. The text of the diplomatic note mentioned "the ship *Winner*, flying the Cambodian flag", the sole object of the agreement, confirming the authorisation to intercept, inspect and take legal action against it. Evidently, therefore, the fate of the crew was not covered sufficiently clearly by the note and so it was not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a "clearly defined law" within the meaning of the Court's case-law. The diplomatic note did not meet the "foreseeability" requirement either. Nor had the Government demonstrated the existence of any current and long-standing practice between Cambodia and France in the battle against drug-trafficking at sea in respect of ships flying the Cambodian flag; on the contrary, Cambodia had not ratified the relevant conventions, and the use of an *ad hoc* agreement by diplomatic note, in the absence of any permanent bilateral or multilateral treaty or agreement between the two States, attested to the exceptional, one-off nature of the cooperation measure adopted in this case. In any event the foreseeability, for an offender, of prosecution for drug-trafficking was not to be confused with the foreseeability of the law relied on as the basis for the intervention. Otherwise any activity considered criminal under domestic law would release the States from their obligation to pass laws having the requisite qualities, particularly with regard to Article 5 § 1 of the European Convention and so deprive that provision of its substance.

It was regrettable that the international effort to combat drug-trafficking on the high seas was not better coordinated bearing in mind the increasingly global dimension of the problem. The fact remained that when a flag State, like Cambodia in this case, was not a party to the Montego Bay or Vienna Conventions, the insufficiency of such legal instruments, for want of regional or bilateral initiatives, was of no real consequence. In fact such initiatives were not always supported by the States, in spite of the fact that they afforded the possibility of acting within a clearly defined legal framework. In any event, for States that were not parties to the above-mentioned conventions one solution might be to conclude bilateral or multilateral agreements with other States. Having regard to the gravity and enormity of the problem posed by illegal drug-trafficking, developments in public international law which embraced the principle that all States had jurisdiction as an exception to the law of the flag State would be a significant step in the fight against illegal trade in narcotics. This would bring international law on drug-trafficking into line with what had already existed for many years now in respect of piracy.

In view of the above and of the fact that only a narrow interpretation was consistent with the aim of Article 5 § 1, the deprivation of liberty to which the applicants were subjected between the boarding of their ship and its arrival in Brest was not "lawful" within the meaning of Article 5 § 1, for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty.

Conclusion: violation (ten votes to seven).

Article 5 § 3: The arrest and detention of the applicants had begun with the interception of the ship on the high seas on 13 June 2002. The applicants were not placed in police custody until 26 June 2002, after arriving in Brest. Before the Grand Chamber, and for the first time since the beginning of the proceedings, the Government submitted substantiated information concerning the presentation of the applicants, that same day, to the investigating judges in charge of the case. The fact remained that the applicants were not brought before the investigating judges – who could certainly be described as "judge[s] or other officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 – until thirteen days after their arrest. At the time of its interception the *Winner* had been on the high seas off the Cape Verde islands, and therefore a long way from the French coast. There was nothing to indicate that it had taken any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the

journey faster, it was not for the Court to assess the feasibility of such an operation in the circumstances of the case. Lastly, after arriving in France the applicants had spent only about eight or nine hours in police custody before being brought before a judge. That period of eight or nine hours was perfectly compatible with the concept of "brought promptly" enshrined in Article 5 § 3 and in the Court's case-law. (See *Rigopoulos v. Spain* (dec.), no. 37388/97, 12 January 1999, Information Note no. 2.)

Conclusion: no violation (nine votes to eight).

Article 41: EUR 5,000 to each applicant in respect of non-pecuniary damage.

Article 5 § 3

Brought promptly before judge or other officer

First appearance before a judge thirteen days after initial detention following arrest of vessel on high seas: *no violation*

Medvedyev and Others v. France - 3394/03
Judgment 29.3.2010 [GC]

(See Article 5 § 1 above, page 14)

Article 5 § 4

Procedural guarantees of review

Refusal of judge to allow legally-represented defendant to attend hearing of prosecution appeal against an order for her release on bail: *violation*

Allen v. the United Kingdom - 18837/06
Judgment 30.3.2010 [Section IV]

Facts – The applicant was granted bail on drugs charges by a deputy district judge. As the prosecution gave notice that it wished to appeal, the applicant remained in custody. Her counsel arranged with the Prison Service for her to be present at the court building on the day of the appeal, but the judge hearing the appeal refused to allow her to attend the hearing as it would set a precedent for other defendants in custody. The judge allowed the prosecution's appeal and refused bail, on the grounds that there was a risk of the applicant absconding or obstructing the course of justice. The applicant was refused permission to apply for judicial review.

Law – Article 5 § 4: With regard to the applicant's complaint that she had not been permitted to attend the hearing of the prosecution's appeal against bail, it was relevant that the deputy district judge had had the opportunity to see the applicant in person and make his own assessment of her before deciding to grant her bail. In contrast to other cases in which the Court had previously found that special criteria had to be met for an applicant's personal attendance to be required under Article 5 § 4, the present case did not concern an applicant's appeal against detention in remand, but a prosecution appeal against bail that had already been granted and without which the applicant would have been entitled to be at liberty. It was of central importance that the domestic law qualified a prosecution appeal against bail as a re-hearing of the application for bail, thereby entitling the judge hearing the appeal to remand the accused in custody or to grant bail subject to such conditions as he or she deemed appropriate. It followed that the applicant should have been afforded the same guarantees on the appeal as at first instance. There was no evidence of any compelling reasons which might have rendered the applicant's presence undesirable or impracticable. On the contrary, her representatives had made arrangements for her to be present in the building. Having regard to the particular circumstances of the applicant's case, fairness had required that her request to be present at the appeal be granted.

Conclusion: violation (six votes to one).

Article 5 § 3: The Court rejected the applicant's contention that, because his decision on bail was open to appeal, the deputy district judge did not "exercise judicial power". It noted that, on the contrary, all that its case-law required under Article 5 § 3 was that either the judge or judicial officer conducting the initial review should have power to release if the detention was unlawful or not based on reasonable suspicion of the commission of an offence. Furthermore, in the applicant's case the question of bail had been reconsidered a short time later by a judicial officer who undisputedly did have the power to make a final decision.

Conclusion: no violation (unanimously).

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

ARTICLE 6

Article 6 § 1 (civil)

Applicability

Proceedings for unfair dismissal by Embassy employee: *Article 6 applicable*

Cudak v. Lithuania - 15869/02
Judgment 23.3.2010 [GC]

(See below)

Inability of victim to join criminal proceedings as civil party where accused enters into plea bargain with prosecution during preliminary investigation: *Article 6 inapplicable; inadmissible*

Mihova v. Italy - 25000/07
Decision 30.3.2010 [Section II]

Facts – The applicant made a complaint against a person or persons unknown for sexual abuse of her minor daughter. The authorities identified the man in question. The investigating judge subsequently applied a sentence resulting from a plea bargain between the accused and the prosecution. The applicant was not informed of the date of the hearing in the case and appealed on points of law against the judgment. The Court of Cassation declared the appeal inadmissible on the ground that an injured party who was not joined to the proceedings as a civil party could not appeal against a conviction or acquittal but could only request the prosecution to do so. In the meantime, the applicant commenced civil proceedings against the man in question.

Law – Article 6 § 1: The applicant had not been joined to the proceedings as a civil party, as the accused had entered into a plea bargain with the prosecution at the preliminary investigation stage. The question therefore arose whether Article 6 was applicable. In the instant case the applicant complained that she had been unable to challenge the sentence imposed, which she felt to have been too lenient. In the circumstances, the Court was of the view that the applicant's chief aim in the criminal proceedings had been to take punitive action or exercise a right to "private revenge" which was not, as such, guaranteed by the Convention. Even assuming that Article 6 § 1 was applicable in such circumstances, the fact that domestic law did not allow the injured party to intervene in the plea bargaining between the accused and the prosecution and request a heavier sentence could not, in itself, be considered contrary to the Convention. Furthermore, the applicant had been able to bring a civil action for damages against the man in question, as a result of which she had secured an interim attachment of the defendant's possessions. She had therefore had access to a court with jurisdiction to examine her civil right to compensation. Accordingly, there was no appearance of a violation of Article 6 § 1.

Conclusion: inadmissible (manifestly ill-founded).

Access to court

Grant of State immunity from jurisdiction in respect of claim for unfair dismissal by Embassy employee: *violation*

Cudak v. Lithuania - 15869/02
Judgment 23.3.2010 [GC]

Facts – The applicant, a Lithuanian national, worked as a secretary and switchboard operator with the Polish Embassy in Vilnius. In 1999 she complained to the Lithuanian Equal Opportunities Ombudsperson of sexual harassment by a male colleague. Although her complaint was upheld, the Embassy dismissed her on the grounds of unauthorised absence from work. The Lithuanian courts declined jurisdiction to try an action for unfair dismissal brought by the applicant after finding that her employers enjoyed State immunity from jurisdiction. The Lithuanian Supreme Court found that the applicant had exercised a public-service function during her employment at the Embassy and that it was apparent from her job title that her duties had facilitated the exercise by Poland of its sovereign functions, so justifying the application of the State-immunity rule.

Law – Article 6 § 1: (a) *Preliminary objection* – The Court rejected a preliminary objection by the respondent Government that the applicant had had a remedy available in the Polish courts to complain about the termination of her contract. Article 35 § 1 of the Convention referred, in principle, only to remedies made available in the respondent State. In any event, even if a remedy before the Polish courts was theoretically available, it was neither accessible nor effective since, as a Lithuanian national, recruited in Lithuania under a contract governed by Lithuanian law, the applicant would have encountered serious practical difficulties in exercising it.

(b) *Applicability* – The applicant's status as a civil servant did not, on the facts, exclude her from Article 6 protection. Two conditions had to be fulfilled for the exclusion to apply: the State must have expressly excluded in its national law access to a court for the post or category of staff in question, and the exclusion had to be justified on objective grounds in the State's interest (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, Information Note no. 96). While it was by no means certain that the *Vilho Eskelinen* decision applied at all in the applicant's case (as it concerned the relationship between a State and its *own* civil servants), even if it did, it could not reasonably be argued that the second condition had been fulfilled as the applicant's duties could hardly give rise to "objective grounds [for exclusion] in the State's interest". Therefore, since the exclusion did not apply and the applicant's action before the Lithuanian Supreme Court was for compensation for wrongful dismissal, it concerned a civil right within the meaning of Article 6 § 1.

Conclusion: Article 6 § 1 applicable (unanimously).

(c) *Compliance* – The grant of immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. The issue before the Court, therefore, was whether the impugned restriction on the applicant's right of access to court was proportionate to those aims. In that connection, the Court noted a trend, both in international law and in the practice of a growing number of States, towards limiting the application of State immunity. Thus, Article 11 of the Draft Articles adopted by the International Law Commission in 1991 had, in principle, exempted contracts of staff employed in a State's diplomatic missions abroad from the immunity rule. That provision (which was later to form the basis of a corresponding provision in the UN Convention on Jurisdictional Immunities of States and their Property 2004) applied to Lithuania under customary international law. Although Article 11 contained a number of exceptions that allowed immunity to continue in certain circumstances, none of these had applied in the applicant's case. In particular, she had not performed any functions closely related to the exercise of governmental authority but had worked as a switchboard operator whose main duties were recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government had shown how those duties could objectively have been related to the sovereign interests of the Polish Government. Although the Supreme Court had found that the applicant's duties had facilitated the exercise of Poland's sovereign functions, it had done so solely on the basis of her job title and the Polish request for immunity, without any information about their true scope. As to whether the duties in question were of importance for Poland's security interests – a criterion that had subsequently been added by Article 11 § 2 (d) of the 2004 Convention – the mere allegation that the applicant could have had access to documents or been privy to confidential telephone conversations in the course of her duties was not sufficient. Her dismissal and the ensuing legal proceedings had arisen originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsperson and could hardly be regarded as undermining Poland's security interests. Lastly, the concern that the Lithuanian authorities would encounter difficulties in enforcing a judgment in favour of the applicant could not be allowed to frustrate the proper application of the Convention. In conclusion, by granting State immunity and declining jurisdiction to hear the applicant's claim, the Lithuanian courts had impaired the very essence of the applicant's right of access to court.

Conclusion: violation (unanimously).

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

Fair hearing

Failure to give reasons for holding newspaper photographer and publishing company jointly liable in damages: *violation*

Antică and "R" company v. Romania - 26732/03
Judgment 2.3.2010 [Section III]

(See Article 10 below, page 28)

Article 6 § 1 (criminal)

Applicability
Determination of a criminal charge

Investigations by authorities not resulting in a charge: *Article 6 § 1 inapplicable; inadmissible*

Sommer v. Italy - 36586/08
Decision 23.3.2010 [Section II]

Facts – At the end of the Second World War, the Italian authorities launched investigations into killings of groups of Italian civilians, in particular during the massacre in Sant'Anna di Stazzema on 12 August 1944. Almost fifty years later, on 19 September 1992, an Italian military tribunal informed the applicant, a German citizen, that a preliminary investigation had been opened into his suspected involvement in the massacre as commanding officer of an SS unit. In 2005 the military tribunal found the applicant guilty and sentenced him to life imprisonment. The decision was upheld on appeal.

Law – Article 6 § 1: As regards the delay in opening the proceedings, the Court did not have jurisdiction to deal with complaints concerning facts dating from before 1 August 1973, when Italy's recognition of the right of individual petition had taken effect. As to the events occurring after that date, the investigations launched by the Italian authorities in 1947 into the Sant'Anna killings had not, at that time, resulted in the indictment of the applicant. Only from 19 September 1992, when he had been informed of the opening of a preliminary investigation in respect of him, had the investigation substantially affected his situation. Accordingly, Article 6 was not applicable in its criminal aspect for the period prior to 19 September 1992.

Conclusion: inadmissible (incompatible *ratione temporis* and *ratione materiae*).

Article 6 § 3 (d)

(a) *Inability to examine the sole prosecution witness* – The witness in question had been examined on the basis of a request for judicial assistance under the procedure provided for in the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. The applicant's lawyer had been able to take part in the examination of the witness and to exercise the rights of the defence, for the purposes of the 1959 Convention and domestic law. In any event, the witness's statements had not been the only evidence on which the trial and appeal judges had based the applicant's conviction. There had also been statements by other witnesses and archive documents.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Impossibility of securing exonerating evidence sixty years after the events* – This complaint was closely linked to the question of non-applicability of statutory limitations to particularly serious crimes punishable by life imprisonment. While limitation periods served several purposes, which included ensuring legal certainty, the importance of the obligations under Articles 2 and 3 of the Convention to enact laws punishing serious infringements of the rights secured therein and to take steps to ensure effective investigation and prosecution should not be overlooked. In the various cases that had come before the Court concerning crimes against humanity, it had never found the non-applicability of statutory limitations to be contrary to the Convention. It could not therefore conclude that Article 6 was breached by a restriction of the rights of the defence resulting from difficulties no more severe than those inevitably entailed by a prosecution which, on account of the non-applicability of statutory limitations, it had been possible to conduct several decades after the commission of the acts in question. Furthermore, the prosecution evidence had been adduced and discussed in adversarial proceedings in the trial and appeal courts and the applicant, in person or through his lawyers, had been able to put forward all the arguments he had considered useful for the protection of his interests and to produce evidence in his favour.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: As regards the allegation that the domestic courts had imposed a heavier penalty on the applicant than the one applicable at the time the offence had been committed, there was nothing to suggest that the law under which he had been convicted had not been clear or foreseeable as to its effect or that the national courts had been arbitrary in their interpretation of the relevant provisions of the Wartime Military Criminal Code, which had been in force at the time of the commission of the offences of which he was accused.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 in conjunction with Article 7: The applicant alleged that he had been discriminated against in that only Italian nationals were entitled to an amnesty under Presidential Decree no. 332/1966. However, the Court found that although the decree in question, as interpreted by the domestic courts, gave rise to a difference in treatment on the basis of nationality, the choice of limiting the amnesty to Italian citizens alone was based on objective and reasonable grounds, namely the restoration of peace between Italian citizens in the extraordinary post-war context.

Conclusion: inadmissible (manifestly ill-founded).

Fair hearing

Conviction based to decisive degree on witness statements that had since been retracted: *violation*

Orhan Çaçan v. Turkey - 26437/04
Judgment 23.3.2010 [Section II]

Facts – At his trial in the National Security Court the applicant challenged, in particular, the evidence of a key witness who had retracted his previous incriminating statements in a letter and did not appear at the hearings to which he had been summoned. Another prosecution witness likewise withdrew his evidence. Relying in particular on a record drawn up on the basis of the two witness statements in question, the National Security Court found the applicant guilty of secessionist acts, considered it established that he had committed murder and sentenced him to life imprisonment. The Court of Cassation upheld that judgment.

Law – Article 6 §§ 1 and 3 (d): The National Security Court had decided that it was unnecessary to re-examine the key witness on the grounds that he had not appeared at the hearings and that it had not been possible to ascertain his address despite efforts to that end. However, a further appearance by the witness should have been essential, as he had explicitly retracted and completely altered his version of events during the course of the trial, so that the relevance of his previous statements was seriously called into question. Furthermore, another important witness had withdrawn his accusations. Although it was not for the Court to state its view on the assessment of the applicant's guilt or the probative value of the statements in issue, it nevertheless observed that the National Security Court had found the applicant guilty largely on the basis of a key witness's evidence against him which was open to doubt since it had been withdrawn during the proceedings. Seeing that the witness had not been re-examined by the National Security Court and the applicant's conviction had been mainly based on the evidence in question, his defence rights had been restricted to an extent incompatible with the requirements of a fair trial.

Conclusion: violation (five votes to two).

Article 41: EUR 1,800 for non-pecuniary damage; a retrial, if requested by the applicant, considered the most appropriate form of redress.

Impartial tribunal

Successive performance by the same judge of investigative and judicial duties in respect of the same minor: *violation*

Adamkiewicz v. Poland - 54729/00
Judgment 2.3.2010 [Section IV]

Facts – The applicant, who was a minor at the material time, was arrested at his home and taken to the police station for questioning in connection with the murder of another minor. He was questioned for about five hours, during which he initially denied any involvement in the crime and subsequently confessed to it. He confirmed his confession when he was questioned by the family-affairs judge, but in the absence of his lawyer. The latter made several unsuccessful requests to meet his client. Approximately six weeks after his arrest the applicant had his first meeting with his defence counsel, during which he was informed of his right to remain silent and not to incriminate himself. Subsequently the Youth Court found the applicant guilty as charged and ordered his placement in a reformatory for six years. An appeal by the applicant was dismissed by the regional court, which acknowledged irregularities regarding the rights of the defence but held that these had not had a decisive effect on the content of the judgment having regard to the evidence other than the applicant's statements to the police. An appeal by the applicant on points of law was also dismissed.

Law – Article 6 § 3 (c): During the preliminary investigation – which had lasted about six months – the applicant's lawyer had submitted eight applications to the family-affairs judge for leave to meet with his client. Only two of those applications had been granted. Despite having been appointed promptly, the applicant's lawyer had only been able to discuss the case with his client once during the entire investigation. On only one occasion during the preliminary investigation, namely, approximately three months after it had been commenced, had the applicant's lawyer been able to acquaint himself with the case file. The inevitable conclusion was that during the preliminary investigation the applicant's defence rights had been considerably curtailed. The applicant's first police interview, during which he had confessed to the crime, and his two subsequent examinations by the family-affairs judge, had been conducted without the applicant being able to discuss the case with his lawyer beforehand. Accordingly, the authorities

had obtained his confession before the applicant, who was supposed to have the benefit of the presumption of innocence, had been informed of his right to remain silent and not to incriminate himself. Given that the applicant had been fifteen years old at the material time and had had no criminal record, it was difficult to maintain that he could reasonably have known of his right to request legal representation and of the consequences of the lack of representation during examination as a murder suspect. During that period, which had been decisive for the outcome of the proceedings, the applicant had remained isolated in the children's home and, moreover, had been deprived of contact with his family for some time. He had inevitably been affected by the restrictions imposed on his ability to have access to his lawyer because his confession that had served as a basis for his conviction had been obtained in the absence of his defence lawyer. That consideration sufficed for the Court to find that the applicant's trial had not been fair.

Conclusion: violation (unanimously).

Article 6 § 1: The order made at the end of the preliminary investigation and in which the family-affairs judge had committed the applicant for trial before the Youth Court had been based on the judge's finding that "the evidence gathered during the investigation indicated that the applicant had committed the crime". Having regard to the content of the order, it followed that the question on which the judge had ruled prior to the opening of the judicial phase of the proceedings had overlapped to a large extent with the matter on which he had subsequently had to rule when sitting on the trial bench as a member of the Youth Court. It was therefore difficult to maintain that the judge had not had any preconceived ideas about the matter on which he had subsequently been required to rule as president of the bench of the Youth Court hearing the case. During the investigation he had made ample use of the extensive powers conferred on him by the Law governing the procedure applicable to juveniles. Accordingly, after the decision had been made of the judge's own motion to open the proceedings, the judge had himself conducted the evidence-gathering procedure at the end of which he had decided to commit the applicant for trial. Referring to its finding of a violation of Article 6 on account of the breach of the principles of fairness during the investigation conducted by the family-affairs judge, the Court did not see how the fact that the same judge had subsequently presided over the trial bench that had found the applicant guilty of the offence could in this case contribute to safeguarding the best interests of the child that the applicant had then been.

Conclusion: violation (unanimous).

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

Article 6 § 2

Presumption of innocence

Virulent remarks made on television by candidate for election as governor about a district prosecutor accused of rape: *violation*

Kouzmin v. Russia - 58939/00
Judgment 18.3.2010 [Section V]

Facts – A seventeen-year-old girl lodged a criminal complaint through her mother against the applicant, a district prosecutor, alleging rape. The proceedings were instituted on 22 April 1998. On 7, 12 and 13 May 1998 Mr Alexander Lebed, a candidate for election to the post of regional governor and a well-known public figure, stated in television interviews that the applicant was a "criminal" who should have been in the "nick" for some time, promising that the "son of a bitch" would soon be "rotting in jail". The applicant was dismissed from the prosecution service. On 22 May 1998 he was arrested and remanded in custody. The following day he was charged with the rape of a minor. In November 1998 the indictment was served on the applicant, who maintained that he had not had access to the full version of the document in good time. In December 1998 he was sentenced to three years and six months' imprisonment. He lodged appeals but to no avail.

Law – Article 6 § 2: (a) *Statements by Mr Lebed* – Besides being a candidate for the post of governor, at the time of the events Mr Lebed had been a retired army general, a prominent figure in Russian society who had occupied various posts as a senior government official and a very well-known politician. The Court did not consider that he had made the impugned comments on television as a private individual. The comments in question, including a promise to arrest the applicant, could well have been construed as confirming his belief that the applicant was guilty of the alleged offence. Moreover, several days after giving the interviews, Mr Lebed had been elected governor and the applicant, who at that point was a suspect, had swiftly

been arrested and charged with the rape of a minor. It had been particularly important at that early stage of the proceedings against the applicant – before he had even been charged – not to make any public allegations which could have given the impression that certain senior officials believed him to be guilty. Accordingly, given the very particular circumstances in which Mr Lebed had made the statements in question in television interviews, the Court considered that they amounted to declarations by a public official which had served to encourage the public to believe the applicant guilty and prejudged the assessment of the facts by the competent authorities. The impugned statements had not been relevant to considerations of protection against defamation by a private individual and the right of access to a court for the determination of civil rights.

Conclusion: violation (four votes to three).

(b) *Language used in the prosecuting authorities' documents* – Although the use of the terms in issue in the application and subsequent order for the applicant's dismissal had been somewhat careless, in the specific circumstances of the case they had not been likely to encourage the public to believe the applicant guilty or to prejudge the assessment of the facts by the competent judicial authorities.

Conclusion: no violation (unanimously).

Article 6 §§ 1 and 3 (d): Irrespective of whether or not the accused had received the full bill of indictment, the Court attached decisive weight to the following two aspects. Firstly, even if the indictment had been received without a list of the witnesses to be called, neither domestic law nor the practice of the domestic courts had prevented the applicant from applying orally or in writing to the court dealing with the case to have any witnesses called if he thought that their testimony might be significant for the determination of the charge against him. The evidence in the file did not support the conclusion that the judges had failed to respond to any request by the applicant for witnesses to be called. Secondly, the applicant had not explained how the evidence supplied by the witnesses in question might be useful. The Court could therefore only assume, having regard to the concerns expressed by the defence before the domestic courts, that the applicant had wished to have certain witnesses examined in order to substantiate his argument that the police and the investigator had pressured the victim's mother into lodging the complaint and that, after forging certain documents, the authorities had succeeded in having him imprisoned for rape. However, according to the records in the file, those allegations had been examined at the trial, the applicant had been confronted with a number of persons who had been directly involved in registering and following up the complaint, and he had been able to defend his position according to the principle of equality of arms.

Conclusion: no violation (unanimously).

The Court also held unanimously that there had been a violation of Article 3 of the Convention as regards the conditions of the applicant's detention.

Prosecution of senior civil servant on basis of reports compiled during an administrative inquiry that was biased against him: *violation*

Poncelet v. Belgium - 44418/07
Judgment 30.3.2010 [Section II]

Facts – The applicant was a senior civil servant. In 1994 an inspector was asked to conduct an administrative inquiry into certain public procurement contracts. He was of the opinion that there had been anomalies in the performance of those contracts and submitted various reports whose content displayed a hostile and biased attitude towards the applicant. In 1995 a judicial investigation was opened on charges of forgery and bribery. In 2006 the investigation division of the criminal court found that the inspector's stance had breached the applicant's right to be presumed innocent. In 2008 the criminal court, ruling on the merits after appeal proceedings before higher courts, came to the same conclusion. In 2009 the court of appeal declared the proceedings against the applicant admissible but found that the prosecution had become time-barred.

Law – Article 6 § 2: The investigation division had found that the right to be presumed innocent had been breached because of the biased stance adopted from the outset by the inspector, who had taken on the role of prosecutor. However, at the time the application was lodged the applicant's case had not yet been brought before the trial court and it could not be determined whether there had been a breach of the right to be presumed innocent merely from an examination of the judicial investigation stage. The Court had to ascertain the findings of the trial court and in particular its assessment of the reports on which the criminal proceedings had been based. According to the criminal court, from his very first report the inspector had ruled out any error on the part of the authorities. That report had justified

the opening of a judicial investigation concerning the applicant and the inquiry had been conducted on that basis. The criminal court had found that the inspector had begun his inquiry with opinions that were already biased against the applicant and that his conclusions reflected that bias. The inquiry had thus been conducted in breach of the right to be presumed innocent and of defence rights. The court of appeal had set aside the criminal court's judgment and declared the criminal proceedings against the applicant admissible but had held that the prosecution had become time-barred. It had thus invalidated the effects of the investigation division's decision and the criminal court's judgment finding a breach of the right to be presumed innocent. The proceedings against the applicant having been brought and pursued in spite of the breach of the right to be presumed innocent and of defence rights, the court of appeal had crystallised the feeling that only the limitation period had prevented the applicant's conviction. There had therefore been a breach of the applicant's right to be presumed innocent.

Conclusion: violation (four votes to three).

Article 41: EUR 5,000 for non-pecuniary damage.

Article 6 § 3 (c)

Defence through legal assistance

Use in evidence of confession to police of a minor who had been denied access to a lawyer: *violation*

Adamkiewicz v. Poland - 54729/00
Judgment 2.3.2010 [Section IV]

(See Article 6 § 1 (criminal) above, page 21)

Article 6 § 3 (d)

Examination of witnesses

Convictions based on statements by absent witnesses: *case referred to the Grand Chamber*

Al-Khawaja and Tahery v. the United Kingdom - 26766/05 and 22228/06
Judgment 20.1.2009 [Section IV]

In wholly unrelated cases, the applicants were convicted of criminal offences for which they received custodial sentences. In their applications to the European Court, they complained that they had been denied a fair trial as their convictions had been based to a decisive degree on statements by witnesses who were not available for cross-examination by the defence. In the first applicant's case, the witness in question had died before the trial. In the second applicant's case, the witness was found by the trial court to have been genuinely prevented by fear from giving evidence before the jury. In both cases, the jury was warned about the dangers of relying on written statements without having had the opportunity to see the witness or to hear cross-examination. The applicants' convictions were upheld on appeal.

In a judgment of 20 January 2009, a Chamber of the Court held unanimously in both cases that there had been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (d) of the Convention concerning the decisions to allow statements from absent witnesses to be read at the applicants' trials. It found that the loss of the opportunity to cross-examine the witnesses concerned had not been effectively counterbalanced in the proceedings.

On 1 March 2010 the case was referred to the Grand Chamber at the request of the Government.

Conviction based to decisive degree on witness statements that had since been retracted: *violation*

Orhan Çaçan v. Turkey - 26437/04
Judgment 23.3.2010 [Section II]

(See Article 6 § 1 (criminal) above, page 21)

Inability of person accused of crimes against humanity to find evidence in defence owing to passage of time between alleged offence and start of investigation: *inadmissible*

Sommer v. Italy - 36586/08
Decision 23.3.2010 [Section II]

(See Article 6 § 1 (criminal) above, page 20)

ARTICLE 8

Private life

Refusal of domestic courts to issue injunction restraining further publication of a photograph of a famous couple taken without their knowledge: *relinquishment in favour of the Grand Chamber*

Von Hannover v. Germany
- 40660/08 and 60641/08
[Section V]

The applicants are Princess Caroline von Hannover and her husband. In 2004 the applicant had won her case before the European Court (*Von Hannover v. Germany*, no. 59320/00, 24 June 2004, Information Note no. 65) for interference with her private life. Following that judgment the applicants brought further proceedings in the domestic courts for an injunction restraining any further publication of three photographs of the couple which had been taken without their knowledge during their skiing holidays and had already been published by two German magazines. The Federal Court of Justice allowed the applicants' action regarding two of the photographs, but dismissed it in respect of the third one on the ground that even if the photo in question did not contain information relating to an event of contemporary history and did not contribute to a debate of general interest, the same could not be said of the accompanying article which concerned the health of the applicant's father, the late Prince Rainier III of Monaco. The Federal Court of Justice held that, in those circumstances and having regard to the whole context in which the news item had been prepared, the applicant did not have any legitimate interests within the meaning of section 23(2) of the Copyright Act that could have provided her with valid grounds on which to oppose publication of the photo showing the applicant and her husband out in the street. The applicants complained before the European Court of an interference with their private life. They submitted, among other things, that the domestic courts had not taken sufficient account of the Court's decision in the aforementioned case of *Von Hannover*.

Both these cases were communicated in November 2008 and January 2009 under Article 8.

(See also the case of *Axel Springer AG v. Germany* under Article 10 below, page 30)

Medical examination of suspected child-abuse victim without parental consent or court order: *violation*

M.A.K. and R.K. v. the United Kingdom - 45901/05 and 40146/06
Judgment 23.3.2010 [Section IV]

(See below, page 27)

Private and family life
Expulsion

Deportation of long-term immigrant for particularly serious and violent offences: *no violation*

Mutlag v. Germany - 40601/05
Judgment 25.3.2010 [Section V]

Facts – The applicant is a Jordanian national who was born in Germany in 1981, grew up and received all his education there and was granted a permanent residence permit. He was deported to Jordan in 2006 at the age of twenty-five, after committing a number of serious criminal offences and being sentenced to two years and eleven months' imprisonment.

Law – Article 8: The imposition and enforcement of the order for the applicant's deportation had constituted interference with his right to respect for his private and family life. The interference had been in accordance with the law and had pursued the legitimate aim of preventing disorder or crime. Referring to its Grand Chamber judgment in *Maslov v. Austria*, the Court reiterated that in the case of a settled migrant who had lawfully spent all or the majority of his childhood and youth in the host country, very strong reasons were required to justify expulsion. The applicant in the present case had received several sentences for serious offences involving considerable violence. He had, moreover, committed a series of offences at the age of nineteen while he was on probation and had been warned by the administrative authorities of the consequences of a further conviction. Furthermore, he had been nearly twenty-four years old when the order for his deportation had been upheld. In addition, he had lived all his life in Germany, and could speak and write German; however, although his main social, cultural and family ties were in Germany, the evidence produced by him did not show that he had developed social relations with anyone other than his family members and a therapist. With regard to his ties to Jordan, although opinions differed on the subject, it could not be maintained that he had no command of Arabic, his parents' mother tongue. In conclusion, the seriousness of the offences committed by the applicant and their violent and repeated nature warranted the conclusion that the German authorities had put forward sufficiently strong reasons to justify his expulsion from German territory. Consequently, the order for his deportation had not been disproportionate to the

legitimate aim pursued and had thus been necessary in a democratic society.

Conclusion: no violation (unanimously).

(See also *Maslov v. Austria* [GC], no. 1638/03, 23 June 2008, Information Note no. 109)

Family life

Failings of local authority in conducting risk assessment of child with brittle bone disease: *violation*

A.D. and O.D. v. the United Kingdom - 28680/06
Judgment 16.3.2010 [Section IV]

Facts – The first applicant is the second applicant's mother. During medical examinations a few months after the second applicant's birth, physicians noticed fractures to his ribs, which a paediatrician concluded had been sustained "non-accidentally" while dismissing the possibility, raised by the mother, that the child might have Osteogenesis Imperfecta (brittle bone disease). The local authority placed the child on the "at risk" register and, on receipt of a report from a professor of paediatric radiology concurring with the paediatrician's conclusions, applied to a county court for an interim care order, which was granted in May 1997. The mother, her partner and the child were required to relocate to a family resource centre some 150 miles (240 kilometres) away so that a risk assessment could be made. They remained there for twelve weeks. Owing to ambiguities in the instructions it received, the centre conducted a parenting assessment instead of a risk assessment. In the absence of a risk assessment, the local authority concluded that the child could not safely be placed with his parents and in August 1997 obtained a second interim care order. The child was placed with foster parents while a risk assessment was carried out by the National Society for the Prevention of Cruelty to Children (NSPCC). The mother and her partner were allowed contact five days a week. On 27 October the NSPCC informed the local authority that the child should be returned to his parents without delay. On 12 November, while still in foster care, the child fell and was taken to hospital where X-rays showed his bones to be thin and osteopenic. On 20 November the NSPCC submitted their risk assessment, which recommended that the child be returned quickly to his parents' care. The child was returned on 8 December 1997. Following a joint medical report, the interim care order was discharged in July 1998. The mother subsequently complained to the local authority about the handling of the case and, following an investigation which found some of the authority's practices to have been deficient, brought an action for damages against the authority on behalf of herself and the child. The claims were rejected and the applicants' appeal against that decision was dismissed. The Court of Appeal held that the mother had not been owed a duty of care by the local authority and that there was no evidence that the child had suffered harm other than transient distress.

Law – Article 8: The removal of the child from the first applicant's care constituted interference with the applicants' right to respect for their family life that was in accordance with the law and pursued the legitimate aim of protecting the rights of the child.

As to whether that interference had been necessary in a democratic society, the Court reiterated that mistaken judgements or assessments by professionals did not *per se* render childcare measures incompatible with the requirements of Article 8. The authorities had duties to protect children and could not be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their family were proved, retrospectively, to have been misguided. Osteogenesis Imperfecta was a very rare condition that was difficult to diagnose in small infants. A considerable number of medical experts had been consulted in the course of the investigation into the child's injuries, and in their opinion there was no evidence to suggest the disease or to indicate that further investigations were desirable. Although the experts had later agreed that the child had suffered from the disease from birth, it did not follow that the medical evidence previously relied on had been inadequate, confused or inconclusive. The Court therefore considered that the authorities could not be faulted for not reaching an earlier diagnosis of the disease or, in the absence of such a diagnosis, acting on the assumption that the injury could have been caused by the child's parents.

The Court was not satisfied, however, that it had been necessary to relocate the family far from their home for the purpose of conducting a risk assessment. Moreover, it noted that there had been a number of fundamental errors by the local authority in the handling of the case. It was evident that the failure to conduct a risk assessment during the applicants' stay in the Family Assessment Centre had been a relevant factor in the decision to place the child in foster care. When finally produced, the risk assessment report had recommended a speedy return of the child to his parents. There had there-

fore been a real chance that, had the proper assessment been conducted earlier, the child might never have been placed in foster care. Furthermore, the Court was not satisfied that less intrusive measures had not been available for conducting the risk assessment, such as placement with relatives, and it found that the local authority had dismissed these possibilities too quickly. Finally, the six-week delay in returning the child to his parents after the NSPCC's recommendation had not been reasonable. Accordingly, while there had been relevant and sufficient reasons for the authorities to take initial protective measures, the subsequent failings of the local authority had both extended and exacerbated the interference with the applicants' right to respect for their family life and were not proportionate to the legitimate aim of protecting the child from harm.

Conclusion: violation (unanimously).

Article 13: The Court found a violation in respect of the first applicant, as no means had been open to her of bringing an action for compensation against the local authority at the time. The second applicant had, however, been able to bring a claim in negligence. That claim had failed because there was no evidence to suggest that he suffered from a recognised psychiatric disorder as a result of the period of separation from his parents and he could not, therefore, show that he had suffered any justiciable damage. Even if it did not always produce the outcome the applicant hoped for, the right to bring a claim in negligence and to appeal against an unfavourable decision would normally constitute an effective domestic remedy.

Conclusion: violation in respect of first applicant (unanimously); no violation in respect of second applicant (unanimously).

Article 41: EUR 15,000 jointly in respect of non-pecuniary damage.

(See also *R.K. and A.K. v. the United Kingdom*, no. 38000/05, 30 September 2008, Information Note no. 111)

Delays in referring suspected child-abuse victim to specialist to determine cause of her injuries: *violation*

M.A.K. and R.K. v. the United Kingdom
- 45901/05 and 40146/06
Judgment 23.3.2010 [Section IV]

Facts – After suffering what appeared to be bruising on her legs, a nine-year-old girl (the second applicant) was taken to see a consultant paediatrician by her father (the first applicant). The paediatrician said that the bruising did not appear to be a skin disease and admitted the girl to hospital for further examination. As he had to go to work, the father left the hospital after leaving instructions with the hospital that no further medical examination or tests were to be carried out until his wife arrived and gave the necessary consent. On her arrival an hour later, the wife discovered that blood samples and photographs of the girl's legs had nonetheless been taken. She gave consent for further examination, and was subsequently informed by the paediatrician that there was evidence of sexual abuse. No questions about the suspected abuse were put to the girl. The father was not allowed to visit his daughter at all that day and thereafter only under supervision. Although in the interim the wife had informed the paediatrician that the girl had recently complained to her that she had hurt herself riding her bicycle, the paediatrician was insistent that there had been sexual abuse. A few days later, after noticing marks on the girl's hands, the wife arranged for her to be seen by a dermatologist. The girl was later diagnosed with a rare skin disease and discharged from hospital. The paediatrician wrote a letter stating that there was insufficient evidence to consider that the girl had been abused.

Following a complaint by the applicants, an Independent Review Panel found that the girl should have been interviewed about the marks on her skin and that, while the paediatrician was not to be blamed for misdiagnosing the bruises, she should have sought a dermatologist's opinion as a matter of urgency. The applicants were unsuccessful in proceedings in negligence against the local authority and hospital trust.

Law – Article 3: While child-protection measures were generally liable to cause parents distress and on occasion humiliation if they were suspected of failing in their parental responsibilities, it would be contradictory to the effective protection of children's rights to hold that authorities were automatically liable to parents under this provision whenever they erred, reasonably or otherwise, in their execution of their duties. There consequently had to be a factor apart from the normal implementation of those duties for the matter to come within the scope of Article 3. While the Court did not doubt the first applicant's distress at being mistakenly suspected of abuse, this did not constitute a special element such as to cause his suffering to go beyond that inherent in the implementation of the measures.

Conclusion: inadmissible (manifestly ill-founded).

Article 8: (a) *Hospital visiting restrictions* – In the absence of any legal basis for the initial decision to prevent the first applicant from visiting the second applicant on the night of her admission to hospital, there had been a violation of both applicants' rights to respect for their family life. Thereafter, although the first applicant was granted visiting rights for the remainder of the second applicant's stay in hospital, this had been under supervision and so constituted a continuing interference. That interference was in accordance with the law and pursued the legitimate aim of protecting the second applicant's rights.

On the question whether the interference had been necessary in a democratic society, it had been reasonable, in view of the available evidence, for the paediatrician to suspect abuse and contact social services. While it must have been frustrating for the parents that the information about the bicycle accident had apparently been ignored, the continued suspicions of the local authority had been justified as the parents were themselves under suspicion and any explanation they provided had to be treated with caution. In any event, the bicycle accident had only accounted for one of the apparent injuries. The Court was, however, concerned about two of the Independent Review Panel's other findings. As to the first – the need to interview the girl about the allegations of abuse – the Court found this not to have been indispensable as, in the absence of a medical diagnosis for the bruising, it was unlikely that any denial by the second applicant would, or indeed could, have been taken at face value or, therefore, that abuse could have been ruled out as a possible cause of her injuries at an earlier stage. Of greater concern was the panel's finding that a dermatologist's opinion should have been obtained as a matter of urgency. It was not until four days after the girl's admission to hospital, when the mother noticed marks on her daughter's hands, that a dermatologist had been consulted, thus permitting a diagnosis. Accordingly, while there had initially been relevant and sufficient reasons for the authorities to suspect abuse, the delay in consulting a dermatologist had prolonged the interference and was not proportionate to the legitimate aim of protecting the second applicant from harm. There had thus been a violation of both applicants' rights to respect for their family life.

(b) *Tests conducted without parental consent* – Domestic law and practice clearly required the consent of parents or those exercising parental responsibility before any medical intervention could take place. The parents had given express instructions that no further tests were to be carried out until the mother's arrival. In view of those instructions, the only possible justification for the decision to proceed with the blood test and photographs was that they were required as a matter of urgency. However, there was no evidence to suggest that the second applicant's condition was critical, deteriorating or likely to deteriorate, or that she was in any pain or discomfort. Nor had there been any reason to believe that the mother would have withheld consent and, even if she had, the hospital could have sought a court order authorising the tests. In the circumstances, there had been no justification for the decision to take a blood test and intimate photographs of a nine-year-old girl, against the express wishes of both her parents, while she was alone in hospital. The interference with the second applicant's private life was, therefore, not in accordance with domestic law.

Conclusion: violation (unanimously).

Article 13: The first applicant had had no means available to him of claiming that the local authority had been responsible for any damage which he had suffered and of obtaining compensation for that damage.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 to the first applicant and EUR 4,500 to the second applicant in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Newspaper publisher held jointly liable in damages with its photo-journalist employee for damage to reputation of third party implicated in high profile case: *violation*

Antică and "R" company v. Romania - 26732/03
Judgment 2.3.2010 [Section III]

Facts – The applicants are a photo-journalist and his employer, a newspaper publisher. In January 1999 the newspaper published two articles containing accusations against R.D., the former head of an American company that had gone bankrupt and to which the Romanian State had made financial contributions. The second of these articles was signed by the first applicant and a fellow photo-journalist Cornel V. In March 1999 R.D. filed a criminal complaint with the prosecutor's office at the Bucharest District Court for the offences of proffering insults and defamation. In

September 2002 the court acquitted the newspaper editor, Cornel V. and the first applicant of the criminal charges but found the latter civilly liable and ordered him to pay damages to the injured party. The applicant company was found liable, jointly and severally with the first applicant, as his employer. The applicants appealed unsuccessfully against that judgment.

Law – Article 6 § 1: The first applicant had been found guilty as the author of an article in the newspaper published by the applicant company that had damaged the reputation of a businessman, R.D. The domestic courts had declared the first applicant alone to be personally liable for that article, which he had signed jointly with his colleague Cornel V. By so ruling they had accepted Cornel V.'s defence that, in spite of the fact that his signature appeared next to that of the first applicant at the end of the offending article, all he had done was to take the accompanying photographs. However, the domestic courts had failed to explain why the same defence presented by the first applicant and supported by Cornel V.'s statement, by the results of the prosecution's investigation and by the first applicant's contract of employment showing his position as photo-journalist had not been accepted. It was not for the Court to examine the merits of the argument that the first applicant was not the author of the impugned article. However, without needing to undertake such an examination it was clear that the argument in question was at least pertinent and that if the district court had deemed it well-founded it should necessarily have dismissed the claimant's action against the applicant. That question therefore required a specific and explicit response, in the absence of which it was impossible to ascertain whether the district court had simply disregarded the argument in question or had deliberately dismissed it, and if so, for what reasons. Lastly, the district court had also found the ap plicant company liable as the first applicant's employer. The award against it had thus stemmed from the finding against the first applicant. Even though the publication of the offending article by the newspaper had never been in dispute, the publisher had never been directly implicated by the domestic courts. The award against the applicant company had also lacked reasoning, being simply incidental to the finding against the first applicant.

Conclusion: violation (unanimously).

Article 10: The parties had agreed that the finding of civil liability against the newspaper publisher had constituted an interference with its right to freedom of expression. The interference had been prescribed by law. It had pursued a legitimate aim, namely the protection of the reputation of another, namely R.D. It remained to be examined whether the interference was necessary in a democratic society. The applicant company had been found liable following an article in the newspaper it published. The article concerned the alleged involvement of the businessman R.D. in the bankruptcy of a company to which the Romanian Government had granted a very significant loan, accusing him of benefiting personally from the situation by using the money for the building of a costly country house that he had subsequently resold for fear of prosecution. It thus concerned a subject of general interest for the community, namely the management of the State's assets in granting loans directly to companies. The district court had found the applicant company liable as the first applicant's employer. That finding had therefore stemmed from the liability of the first applicant and had not concerned the applicant company's own liability as publisher of the newspaper in which the article had appeared. In so finding, the domestic courts had not given sufficient reasons for the judgment in question. Moreover, the amount awarded in damages was particularly high, about thirty times the average monthly salary in Romania at the time, and three times higher than the maximum fine then applicable for the criminal offence of defamation. It had thus upset the fair balance that had to be struck between the applicant company's right to freedom of expression and the requirement of the general interest of the community.

Conclusion: violation (unanimously).

Measures taken by prison service to prevent serial killer publishing autobiographical work: *inadmissible*

Nilsen v. the United Kingdom - 36882/05
Decision 9.3.2010 [Section IV]

Facts – The applicant was a convicted serial killer serving a life sentence. Following his conviction, he spent four years writing an autobiography in prison which contained detailed accounts of the killings and the abuse, dismemberment and disposal of the bodies. By that stage, a journalist had already published a book about the murders containing graphic descriptions of the offences. The applicant arranged for his own 400-page manuscript to be removed from the prison without

the knowledge of the prison authorities but, although copies were made, no steps were taken to publish it. Some years later his solicitor sent a copy of the manuscript to the prison as the applicant wished to rework it with a view to publication. The prison service refused to pass it on to the applicant, however, on the grounds that it would be contrary to a standing order that prevented the transmission of material intended for publication which contained information about a prisoner's offences[1]. In its view, the manuscript would be likely to cause great distress to surviving victims and to victims' families and to cause a justifiable sense of outrage among the general public. An application by the applicant for leave to seek judicial review of that decision was refused by the High Court in a decision that was upheld by the Court of Appeal.

Law – Article 10: The refusal to return the manuscript to enable the applicant to revise it in prison with a view to publication amounted to an interference with his right to freedom of expression that was prescribed by law and pursued the legitimate aim of protecting health or morals and the reputation or rights of others.

As to whether the interference was necessary in a democratic society, the Court noted, firstly, that the relevant provisions of domestic law were not of themselves disproportionate. Some control over the content of prisoners' communication outside prison was part of the ordinary and reasonable requirements of imprisonment and was not, in principle, incompatible with Article 10. Paragraph 34 of the standing order did not contain a blanket restriction, but allowed constructive communication by prisoners about their crimes in the form of "serious representations about conviction or sentence or ... serious comment about crime, the processes of justice or the penal system". It explicitly required Convention compliance and, in particular, the carrying out of a balancing exercise, which the domestic courts had performed. As to the application of those provisions, the applicant's crimes had been described by the High Court as being "as grave and depraved as it is possible to imagine". The impact on the families and surviving victims had been a main, if not key, concern of the domestic authorities. That the perpetrator of such crimes should seek to publish for personal satisfaction his own account of the killing and mutilation of his victims was an affront to human dignity, one of the fundamental values underlying the Convention. As regards the sense of outrage amongst the public, there was a substantive and substantial difference between the perpetrator of grave, depraved and serious crime publishing his own detailed autobiographical description of those offences and a third party writing about the crimes and the offender. The Court also rejected the applicant's contention that, since copies of the manuscript were already in the public domain and a book on his crimes had been published in 1985, the restriction was futile. The applicant had clearly not wished to publish the manuscript in its original form but had sought to get it back with a view to reworking it and publishing a revised version, which, quite obviously, was not in the public domain. As to the book that had already been published, the Court had already noted that there was a relevant difference between a detailed autobiographical description of the crimes and a third party account. Lastly, the suggestion that the applicant intended to rewrite the manuscript to make it compliant with the standing order was untenable in the absence of any indication as to how a voluminous autobiographical manuscript could be excised of injurious material and comment and be converted into a serious work on the criminal-justice system. The interference thus corresponded to a pressing social need and was proportionate to the legitimate aims pursued.

Conclusion: inadmissible (manifestly ill-founded).

1. Paragraph 34(9) of SO5B. Paragraph 34(9)(c) does, however, permit an exception to be made where the material contains "serious representations about conviction or sentence or forms part of serious comment about crime, the processes of justice or the penal system ...".

Freedom to impart information

Prohibition on reporting arrest and conviction of famous actor: *relinquishment in favour of the Grand Chamber*

Axel Springer AG v. Germany - 39954/08
[Section V]

The application concerns an injunction issued by the domestic courts against a publishing house that publishes a national newspaper with a high circulation, prohibiting it from reporting the arrest and conviction of a well-known actor who had committed a drugs-related offence. In its judgment of 21 March 2006 upholding the Regional Court's injunction, the Court of Appeal pointed out that according to the case-law of the Federal Court of Justice it was necessary to strike a balance between, on the one hand, the nature of the offence and the danger that it represented for others and, on the other, the position of the perpetrator of the offence,

his degree of celebrity and the manner in which he had previously behaved *vis-à-vis* the general public. In the present case, the nature of the offence and the actual circumstances in which it had been committed had not gone beyond the context of everyday crime and would have been of no interest if the perpetrator had not been famous.

This case was communicated in November 2008 under Article 10.

(See also the case of *Von Hannover v. Germany* under Article 8 above, page 25)

Fine imposed on defence counsel for disclosing to the press, before the jury's verdict, evidence the trial court had ruled inadmissible: *inadmissible*

Furuholmen v. Norway - 53349/08
Decision 18.3.2010 [Section I]

Facts – The applicant acted as defence counsel for a man charged with the aggravated ill-treatment of his former wife. At the trial, he requested permission to show photographs from a reconstruction he had organised with a view to proving that one of the alleged incidents could not have taken place. The court rejected his request as the reconstruction had been carried out in the absence of the victim, the accused, the prosecution or any independent observer and was therefore devoid of any evidentiary value. When interviewed by the journalists after the hearing, the applicant made the photographs from the reconstruction available to the press, explained what they showed and pointed out that it was absurd that the question of guilt was to be determined without this allegedly decisive material being made known to the jury. The following day, two newspapers published reports including the applicant's photographs and comments. As a result, the applicant was fined approximately EUR 1,200. He appealed unsuccessfully to the Supreme Court. His client was convicted as charged. However, the conviction was quashed on appeal after the Supreme Court found that the trial court should have sought evidence, for instance, by staging a technical reconstruction or obtaining an expert evaluation.

Law – Article 10: The fine imposed on the applicant had amounted to an interference with his freedom to impart information and ideas which was prescribed by law and pursued the legitimate aim of "maintaining the authority and impartiality of the judiciary". While the trial court's decision had not expressly prohibited the applicant from disclosing such material and comments to the press, as an advocate the applicant was under a duty to respect the court's refusal to admit that evidence and to display restraint. The Court found no reason to call into doubt the domestic courts' assessment that his actions had been aimed at influencing the jury and accordingly amounted to a disloyal attempt to circumvent the trial court's decision. Whether he had in fact exerted such influence had not been decisive; it was his aim of doing so which had made his conduct an offence. Accordingly, in the Supreme Court's reasoning it had been immaterial that the trial court had refused to hold a reconstruction. In the Court's view, it could reasonably be considered that the disclosure of the information to the press had posed a real threat to the authority and impartiality of the judiciary. Moreover, the restriction on the applicant's freedom to publicly criticise the conduct of the proceedings had related only to the evidence that had been excluded and there would have been no offence had he awaited the jury's verdict. The limitation on the scope of the applicant's freedom of expression had, therefore, not been significant. While the applicant's client had successfully appealed against his conviction, the favourable outcome of the appeal had rather shed doubt on the appropriateness of his attempt to influence the jury extra-judicially. His conduct could hardly be regarded as compatible with the contribution that it was legitimate to expect lawyers to make to maintaining public confidence in the judicial authorities. Finally, the fine imposed, had not been particularly severe. The impugned interference with the applicant's freedom of expression had been supported by reasons that were relevant and sufficient, and had therefore been proportionate to the legitimate aim pursued.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 13

Effective remedy

Appeal to House of Lords rendered ineffective by transfer of detainees to Iraqi authorities before appeal could be heard: *violation*

Al-Saadoon and Mufdhi v. the United Kingdom - 61498/08
Judgment 2.3.2010 [Section IV]

(See Article 3 above, page 11)

Post-election dispute concerning parliamentary representation of a national minority: *violation*

Grosaru v. Romania - 78039/01
Judgment 2.3.2010 [Section III]

(See Article 3 of Protocol No. 1 below, page 42)

ARTICLE 14

Discrimination (Article 6 § 1)

Refusal, as a result of applicant's ethnic origin, to suspend sentence: *violation*

Paraskeva Todorova v. Bulgaria - 37193/07
Judgment 25.3.2010 [Section V]

Facts – The applicant is a member of the Roma community. A district court sentenced her to three years' imprisonment for fraud and refused to suspend the sentence. The applicant appealed unsuccessfully to the higher courts.

Law – Article 14 in conjunction with Article 6 § 1: Although, in assessing the deterrent effect of a sentence on the rest of society, a court might take account of more general phenomena such as the situation with regard to crime in the country concerned, such considerations had to have some kind of factual basis; the domestic court in this case had not put forward any argument or fact in support of its finding. Furthermore, the Court was not convinced that the applicant's ethnic background had played only a minor part in the domestic court's assessment, as the latter had made express reference to her Roma origins at the beginning of its reasoning. Furthermore, in order to justify its refusal to suspend the sentence, the district court had referred to the existence of a general impression of impunity in society, stressing the scale of this phenomenon among the members of minority groups, who did not perceive a suspended sentence as a conviction. That comment could create the impression that it was seeking to set an example by sentencing a member of the Roma community to immediate imprisonment. Furthermore, the issue of the applicant's health had not been taken into consideration by the district court in deciding whether or not to suspend the sentence. Finally, the higher courts had dismissed the applicant's appeals. By endorsing the reasoning of the district court judgment, they had not remedied the latter's defects and had not dispelled the doubts as to the discriminatory nature of the prison sentence. Accordingly, the applicant had been subjected to a difference in treatment based on her ethnic origin, on account of the ambiguous reasoning of the domestic courts' decision to impose immediate imprisonment. There had been no objective circumstance capable of justifying that situation. The Court stressed in that connection the seriousness of the facts complained of and made the point that stamping out racism was a priority in Europe's multicultural societies and that equality of citizens before the law was enshrined in Bulgarian domestic legislation.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 in respect of non-pecuniary damage; reopening of the criminal proceedings considered the most appropriate form of redress.

Discrimination (Article 7)

Restriction on grounds of nationality on right to benefit from amnesty: *inadmissible*

Sommer v. Italy - 36586/08
Decision 23.3.2010 [Section II]

(See Article 6 § 1 (criminal) above, page 20)

Discrimination (Article 8)

Homosexual denied succession to tenancy of a flat following his partner's death: *violation*

Kozak v. Poland - 13102/02
Judgment 2.3.2010 [Section IV]

Facts – Following the death of his homosexual partner, the applicant instituted proceedings against the municipality claiming to be entitled to succeed to the tenancy of the council flat, which was in his partner's name. In dismissing his claim, the domestic courts found that the applicant had moved out of the flat and stopped paying rent before his partner's death and that, in any event, a *de facto* marital relationship, which was a prerequisite for succession to the tenancy of a council flat, could only exist between persons of the opposite sex.

Law – Article 14 in conjunction with Article 8: While agreeing that some of the applicant's statements concerning the nature and duration of his relationship with his partner and his residence in the flat made before the domestic courts had been inconsistent, the Court considered that it was

not its task to decide which of the trial courts had made correct findings of fact. It had to confine itself to the assessment of whether the rulings given on the facts as established in the domestic proceedings complained of respected the prohibition of discrimination enshrined in Article 14.

In deciding the applicant's claim to be entitled to succeed to the tenancy, the domestic courts had concentrated almost exclusively on the homosexual nature of his relationship with his partner, concluding that, since Polish law did not recognise same-sex marriages, a *de facto* marital relationship could only exist between a man and a woman. Despite the importance of the legitimate aim pursued in the applicant's case, namely that of protecting traditional families, in its choice of means to protect that aim the State had to take into account developments and changes in society, including the fact that there was not just one way or one choice in the sphere of leading and living one's family and private life. Given the State's narrow margin of appreciation in cases of difference in treatment on the basis of sexual orientation, a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy could not be considered acceptable.

Conclusion: violation (unanimously).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Discrimination (Article 1 of Protocol No. 1)

Absence of right to index-linking for pensioners resident in overseas countries which had no reciprocal arrangements with the United Kingdom: *no violation*

Carson and Others v. the United Kingdom - 42184/05
Judgment 16.3.2010 [GC]

Facts – This case concerned allegedly discriminatory rules governing the entitlement to index-linking of the State pension. Under the rules, pensions were only index-linked if the recipient was ordinarily resident in the United Kingdom or in a country having a reciprocal agreement with the United Kingdom on the uprating of pensions. Those resident elsewhere continued to receive the basic State pension, but this was frozen at the rate payable on the date they left the United Kingdom. The thirteen applicants had spent most of their working lives in the United Kingdom, paying National Insurance contributions in full, before emigrating or returning to South Africa, Australia or Canada, none of which had a reciprocal agreement with the United Kingdom on pension uprating. Their pensions were accordingly frozen at the rate payable on the date of their departure. Considering this to be an unjustified difference in treatment, the first applicant sought judicial review of the decision not to index-link her pension. However, her application was dismissed in 2002 and ultimately on appeal before the House of Lords in 2005, *inter alia*, on the grounds that she was not in an analogous, or relevantly similar, situation to a pensioner resident in the United Kingdom or in a country where uprating was available through a reciprocal agreement.

In a judgment of 4 November 2008 (see Information Note no. 113) a Chamber of the Court held by six votes to one that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: (a) *Scope* – The Grand Chamber agreed with the Chamber that the applicants' case fell within the scope of both Convention provisions. Firstly, it was undisputed that where, as here, a State had decided to enact legislation providing for the payment as of right of a welfare benefit or pension, that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. As to Article 14, although only differences in treatment based on a personal characteristic (or "status") were capable of amounting to discrimination, the list of such characteristics in that provision was illustrative and not exhaustive, and the words "other status" had been given a wide meaning by the Convention institutions. Accordingly, place of residence constituted an aspect of personal status for the purposes of Article 14.

(b) *Relevantly similar position* – The applicants' principal argument that, because they had worked in the United Kingdom and paid compulsory contributions to the National Insurance Fund, they were in a relevantly similar situation to pensioners who received uprating was misconceived. Unlike private pension schemes, where premiums were paid into a specific fund and were directly linked to the expected benefit returns, National Insurance contributions had no exclusive link to retirement pensions but formed part of the revenue which paid for a whole range of social-security benefits. Where necessary, the National Insurance Fund

could be topped-up with money derived from the ordinary taxation of those resident in the United Kingdom, including pensioners. The variety of methods for funding welfare benefits and the interlocking nature of the benefits and taxation systems made it impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who received uprating and those, like the applicants, who did not.

Moreover, as regards the comparison with pensioners living in the United Kingdom, it had to be remembered that the social-security system was essentially national in character with the aim being to ensure certain minimum standards of living for residents there. This made it hard to draw any genuine comparison with the position of pensioners living elsewhere, owing to the range of economic and social variables – such as rates of inflation, comparative costs of living, interest rates, rates of economic growth, exchange rates, social-security arrangements and taxation systems – that were capable of affecting the value of the pension from one country to the next. As the domestic courts had noted, index-linking for all pensioners, wherever they had chosen to live, would inevitably have had random effects while, unlike residents, non-residents did not contribute to the United Kingdom's economy by paying tax there to offset the cost of any increase in the pension.

Nor did the Court consider the applicants to be in a relevantly similar position to pensioners living in countries with which the United Kingdom had concluded a bilateral agreement providing for uprating. Those living in reciprocal-agreement countries were treated differently from those living elsewhere because an agreement had been entered into; and an agreement had been entered into because the United Kingdom considered it to be in its interests. Bilateral social-security treaties were entered into on the basis of judgements by both parties as to their respective interests and could depend on various factors, among them the numbers of people moving from one country to the other, the benefits available under the other country's welfare scheme, how far reciprocity was possible and the extent to which the advantages to be gained by an agreement outweighed the additional expenditure likely to be incurred by each State in negotiating and implementing it. Where an agreement was in place, the flow of funds could differ depending on the level of each country's benefits and the number of people going in each direction. It was the inevitable result of such a process that different conditions applied in each country depending on whether or not a treaty had been concluded and on what terms. It would be extraordinary if the fact of entering into bilateral arrangements in the social-security sphere had the consequence of creating an obligation to confer the same advantages on all others living in all other countries. Such a conclusion would effectively undermine the right of States to enter into reciprocal agreements and their interest in so doing.

In sum, the applicants were not in a relevantly similar position to residents of the United Kingdom or of countries which were party to such agreements.

Conclusion: no violation (eleven votes to six).

Discrimination (Article 2 of Protocol No. 1)

Placement of Roma children in Roma-only classes owing to their allegedly poor command of the Croatian language: *violation*

Oršuš and Others v. Croatia - 15766/03
Judgment 16.3.2010 [GC]

Facts – The applicants were fifteen Croatian nationals of Roma origin who attended two primary schools between 1996 and 2000. At times they attended Roma-only classes. In April 2002 they brought proceedings against the schools alleging, *inter alia*, racial discrimination and a violation of their right to education, in that the Roma-only curriculum was significantly reduced in volume and content compared to the official national curriculum. They also submitted a psychological study which reported that segregated education produced emotional and psychological harm in Roma children, both in terms of self-esteem and development of their identity. In September 2002 a municipal court dismissed their complaint after finding that the reason why most Roma pupils were placed in separate classes was that they needed extra tuition in Croatian and that the applicants had failed to substantiate their allegations concerning racial discrimination and the reduced curriculum. That decision was upheld on appeal.

Law – Article 14 in conjunction with Article 2 of Protocol No. 1: The Government had maintained that the applicants had only been put in separate classes on account of their inadequate command of the Croatian language. The Court therefore had to examine whether the school authorities had taken all necessary steps to ensure the applicants' speedy progress in learning the language and their subsequent integration in mixed classes. In this

connection, it observed that the temporary placement of children in a separate class on the grounds that they lacked adequate command of the language of instruction was not automatically contrary to Article 14. However, when such measures disproportionately affected members of a specific ethnic group, effective safeguards needed to be put in place at each stage of its implementation. The Court firstly observed that there had been no clear legal basis for placing children lacking adequate command of the Croatian language in separate classes. Moreover, the Government had not shown that such practice had been applied in respect of any other pupils with insufficient knowledge of Croatian in any other part of the country. Such practice could therefore hardly have been regarded as common or general practice designed to address the problems of children who lacked adequate command of the language of instruction. As regards the curriculum provided in Roma-only classes, the Government contended that it was the same as in all other classes of the same grade and that, in any event, the curriculum in any single class may have been reduced by up to 30%. However, instead of simply reducing the curriculum in Roma-only classes, in the Court's view, the State was called upon to adopt appropriate positive measures with a view to assisting the applicants in acquiring the necessary language skills in the shortest time possible, notably by means of special language lessons. Such lessons had indeed been provided to some of the applicants at some stage of their primary schooling, but for instance three of the applicants had never been provided with such classes, and a further six had been offered such classes only in the third grade, although they had been attending Roma-only classes since the first grade. The Court further noted that there was no established programme for addressing the special needs of Roma children with insufficient command of Croatian that would include a time-frame for the various phases of their acquisition of the necessary language skills. In addition, the Court considered that the high drop-out rate of Roma pupils in the area where the applicants had studied called for the implementation of further positive measures and the active involvement of social services in order to raise awareness of the importance of education among the Roma population. Even though the present case differed from *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, 13 November 2007, Information Note no. 102) in that it had not been a general policy in both schools to automatically place Roma pupils in separate classes, it was common ground that a number of European States encountered serious difficulties in providing adequate schooling for Roma children. Despite the very positive actions taken by the respondent State following the period in question, the facts of the applicants' case nevertheless indicated that their schooling arrangements were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had had sufficient regard to their special needs as members of a disadvantaged group. As a result, the applicants had been placed in separate classes where an adapted curriculum was followed, without clear or transparent criteria as regards their transfer to mixed classes.

Conclusion: violation (nine votes to eight).

Lastly, the Court found that the length of the proceedings before the Constitutional Court (more than four years) had been excessive, in violation of Article 6 § 1.

Article 41: EUR 4,500 to each of the applicants in respect of non-pecuniary damage.

ARTICLE 34

Locus standi

Application lodged by a municipality, a public organisation: *inadmissible*

Döşemealtı Belediyesi v. Turkey - 50108/06
Decision 23.3.2010 [Section II]

Facts – The case concerned a dispute between the applicant municipality and the Ministry of Regional Development. The Ministry had decided to attach five villages and an industrial estate to its administrative area. However, following an administrative appeal by two municipalities, the Ministry attached the villages and industrial estate to a different municipality. The applicant municipality lodged an application to have the decision set aside and the case is apparently still pending before an administrative court.

Law – Article 34: The municipality had exercised its powers as a public body in bringing the action in question because it was precisely because it was a "municipality" that it had the status of applicant in the proceedings under domestic law. Moreover, the three stakeholders in the proceedings in the present case (the applicant municipality, the Ministry of the Interior and the judicial authorities conducting the domestic proceedings) each

represented public authority and therefore the respondent State. When it had previously examined whether governmental organisations had *locus standi* before it, the Court had always looked at their competence to exercise public functions, without having regard to the act or procedure complained of. In the present case, according to the constitutional and legislative definitions in Turkish law, a municipality was a public-law legal entity whose purpose was to meet the collective needs of the local residents and whose decision-making body was made up of members elected by direct suffrage. Its budget consisted mainly of appropriations from the State's budget and other public revenue such as taxes and fines. It exercised public functions such as expropriation, the publication of by-laws and the maintaining of law and order. The Court found no reason to depart from its well-established case-law to the effect that local authorities lacked *locus standi* to lodge an application under Article 34. In addition, in the present case, the dispute in the domestic proceedings concerned only the administrative attachment of certain villages to a particular municipality and was therefore a dispute of a strictly "public nature"; accordingly, it could hardly be said to concern "civil rights and obligations" within the meaning of Article 6 § 1.

Conclusion: inadmissible (incompatible *ratione personae*).

Hinder the exercise of the right of petition

Transfer of detainees to Iraqi authorities in contravention of interim measure, allegedly because of "objective impediment" making compliance impossible: *violation*

Al-Saadoon and Mufdhi v. the United Kingdom - 61498/08
Judgment 2.3.2010 [Section IV]

(See Article 3 above, page 11)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Turkey

Failure to seek redress from Immovable Property Commission under Law no. 67/2005 in respect of deprivation of property in northern Cyprus in 1974: *inadmissible*

Demopoulos and Others v. Turkey - 46113/99 et al.
Decision 1.3.2010 [GC]

Facts – The applicants, who are all Cypriot nationals of Greek-Cypriot origin, complained, *inter alia*, that they had been deprived of the use of their property and/or access to their homes in northern Cyprus since that territory had come under the control of the "Turkish Republic of Northern Cyprus" (the "TRNC") in 1974. The Turkish Government contested their complaints, notably on the grounds that the applicants had failed to exhaust domestic remedies, specifically those provided for under Law no. 67/2005.

Law no. 67/2005 was passed by the "TRNC" authorities in response to the Court's judgment in the pilot case of *Xenides-Arestis v. Turkey* (no. 46347/99, 22 December 2005, Information Note no. 81), which required Turkey to introduce a remedy securing genuinely effective redress for violations of property rights within the territory. It set up a body known as the Immovable Property Commission (IPC), which had power to order the restitution or exchange of property or the payment of compensation. Claimants were required to submit title deeds or other proof of ownership. A right of appeal against the decisions of the IPC lay to the "TRNC" High Administrative Court. As of November 2009, the number of cases brought before the IPC stood at 433. Of these, 85 had been concluded, the vast majority by means of friendly settlement. In more than 70 cases, compensation had been awarded. Restitution had been ordered in 4 cases and exchange of property had been agreed in 2 others.

Law – Article 1 of Protocol No. 1: The applicants argued that they were not required to exhaust the IPC remedy as, firstly, that requirement should not apply to them and, secondly, the remedy was not, in any event, effective.

(a) *Applicability of the requirement to exhaust the IPC remedy to the applicants* – The first issue was a chronological one: were the applicants required to exhaust a remedy that had come into being after they had lodged their applications? In holding that they were, the Court found that the applicants' case fell within the exceptions to the rule that the reference point for determining whether domestic remedies had been exhausted was the date on which the application was lodged, the reason being that the remedies introduced by Law no. 67/2005

had been brought in specifically to redress grievances in similar cases that were pending before the Court. The Court went on to reject as artificial a submission that, since Law no. 67/2005 had been introduced by the "TRNC" authorities, it did not form part of Turkish domestic law. It further considered that the fact that the European Commission of Human Rights had in the inter-State case found there to be an administrative practice of ongoing violations of Greek-Cypriot property rights in the "TRNC"[1] did not absolve the applicants from the exhaustion requirement: the situation had improved (both with the introduction of new legislation and a more favourable political climate) and it had to be open to governments to take steps to eliminate an administrative practice. The Court also rejected the argument that requiring exhaustion would lend legitimacy to an illegal occupation. Pending resolution of the international dimensions of the situation, it was of paramount importance for individuals to continue to receive protection of their rights on the ground on a daily basis. The right of individual petition under the Convention was no substitute for a functioning judicial system and framework for the enforcement of criminal and civil law. An appropriate domestic body, with access to the properties, registries and records concerned, was clearly the more appropriate forum for deciding complex matters of property ownership, valuation and financial compensation. Even if the applicants were not living as such under the control of the "TRNC", the rule of exhaustion applied to them if there was an effective remedy available. That conclusion did not in any way put in doubt the view of the international community regarding the establishment of the "TRNC" or the fact that the Government of the Republic of Cyprus remained the sole legitimate Government. Nor did it amount to an indirect legitimisation of a regime unlawful under international law. Accordingly, the remedies available in the "TRNC", in particular the IPC procedure, could be regarded as "domestic remedies" and no ground for exemption had been established.

(b) *Effectiveness of the proposed remedy* – The effectiveness of the IPC remedy was contested on several grounds, including the nature of the redress it afforded, an alleged lack of independence and impartiality, the adequacy of the compensation levels and an alleged lack of accessibility and efficiency.

1. See the Commission Report in *Cyprus v. Turkey*, no. 25781/94, 4 June 1999.

(i) *Nature of the redress*: The Court rejected the suggestion that the IPC was a sham or smokescreen. The international-law position and the findings of the Court had been acknowledged by the internal "TRNC" authorities, in particular the "TRNC" Constitutional Court, which had insisted on the interpretation of the legislation so as to permit Greek-Cypriot owners to recover possession or receive compensation. Moreover, the Turkish Government no longer contested their responsibility under the Convention for the areas under the control of the "TRNC" and had, in substance, acknowledged the rights of Greek-Cypriot owners to remedies for breaches of their rights under Article 1 of Protocol No. 1. In any event, there was no basis to conclude that the adequacy of the remedy was affected by a lack of any formal indication of unlawfulness or breach of rights.

In so far as criticism was made of an allegedly overly-restrictive approach to restitution to Greek-Cypriot owners, the Court reiterated that if *restitutio in integrum* was not possible, the member State had the alternative of paying compensation, even in cases of manifestly unlawful and flagrant expropriation. No difference of principle arose where the illegality was on an international level. Property was a material commodity which could be valued and compensated for in monetary terms. Similarly, an exchange of property could be regarded as an acceptable form of redress. Some thirty-five years after the event, it would risk being arbitrary and injudicious for the Court to attempt to impose an obligation on the respondent State to effect restitution in all cases, or even in all cases except those in which there was material impossibility, without taking into account other considerations, in particular the position of third parties. It could not be within the Court's task to impose an unconditional obligation on a government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention. The Court had to leave the choice of implementation of redress for breaches of property rights to Contracting States, who were in the best position to assess the practicalities, priorities and conflicting interests on a domestic level even in a situation such as that pertaining in northern Cyprus. No problem therefore arose as regards the impugned discretionary nature of the restitutionary power under Law no. 67/2005.

(ii) *Independence and impartiality*: The IPC was made up of five to seven members, including two independent international members. The rules

applicable to appointment and termination and conditions of employment were similar to those that applied to senior members of the "TRNC" judiciary. Persons occupying Greek-Cypriot property were expressly excluded from membership. The Court was not persuaded that the illegal nature of the regime under international law, the ongoing presence of Turkish military personnel or the "TRNC" President's powers of appointment affected the subjective or objective impartiality or independence of the members of the IPC.

(iii) *Compensation levels*: With regard to quantum, the Court was not convinced on the evidence before it that the sums awarded under Law no. 67/2005 would automatically fall short of what could be regarded as reasonable compensation.

(iv) *Accessibility and efficiency*: The Court noted that although claimants were required to prove their ownership or title beyond reasonable doubt, the formulation of evidentiary standards in domestic law could not be taken in isolation from their application in practice and it was not apparent that this element has led to a significant number of claims being rejected. The requirement that claimants provide title deeds or proof of ownership, even if onerous in some cases, appeared to be necessary and unavoidable. The Court also took note of the budgetary provision made in Law no. 67/2005 for the payment of compensation and the guarantees given to the claimants and representatives concerning access to and from the northern area. Overall, it did not consider that the IPC procedure was unduly slow, onerous or inaccessible or that the applicants' complaints relating to various procedural matters were justified. Nor did it find that assertions of undue pressure being put on claimants to settle had been made out. In any event, an appeal lay to the "TRNC" High Administrative Court if any claimant considered that there had been material unfairness or procedural irregularity.

Accordingly, Law no. 67/2005 provided an accessible and effective framework of redress in respect of complaints about interference with property owned by Greek Cypriots. As the applicants had not made use of that mechanism, their complaints under Article 1 of Protocol No. 1 had to be rejected for non-exhaustion of domestic remedies.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

Article 8: Law no. 67/2005 also enabled claimants who owned property to make claims to the IPC in respect of non-pecuniary damages, a category broad enough to encompass aspects of any loss of enjoyment of home. Accordingly, the Article 8 complaints of the property owning applicants also failed for non-exhaustion of domestic remedies as they had not brought such claims before the IPC.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

One of the applicants was absolved from this exhaustion requirement as she had not made a property claim and thus had no realistic prospect of applying to the IPC. However, on the facts, her complaint that she had been denied access to her home was manifestly ill-founded as she had been living for almost her entire life elsewhere. The fact that she might inherit a share in the title to the property in the future was a hypothetical and speculative element, not a concrete tie. There had, therefore, not been any present interference with her right to respect for her home.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 41

Just satisfaction

Obligation to provide a patient infected with HIV virus by blood transfusions at birth with full and free medical cover for life

Oyal v. Turkey - 4864/05
Judgment 23.3.2010 [Section II]

(See Article 2 above, page 10)

ARTICLE 46

Execution of a judgment – Individual measures

Respondent Government required to take all possible steps to obtain assurance from Iraqi authorities that applicants would not be subjected to death penalty

Al-Saadoon and Mufdhi v. the United Kingdom - 61498/08
Judgment 2.3.2010 [Section IV]

(See article 3 above, page 11)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Azeri Kurds displaced from province near Nagorno-Karabakh and allegedly unable to return: *relinquishment in favour of the Grand Chamber*

Chiragov and Others v. Armenia - 13216/05
[Section III]

The applicants are Azerbaijani nationals of Kurdish origin who, until 1992, lived in the province of Lachin located between Nagorno-Karabakh and the Republic of Armenia. Under the Soviet system of territorial administration, Nagorno-Karabakh was an autonomous region situated within the territory of the Republic of Azerbaijan. Azerbaijan became independent in 1991. In January 1992, the parliament of the Nagorno-Karabakh Republic declared independence from Azerbaijan. The level of violence in Nagorno-Karabakh and surrounding regions eventually culminated in military conflict in and around Lachin and the applicants fled to Baku. In their application to the European Court, they allege that they have been unable to return to Lachin, which, they say, is under the effective control of Armenia, and have lost all control over their properties and homes. They further complain of discrimination as a result of their ethnic and religious affiliation.

The case was communicated in 2006 under Articles 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 (see Information Note no. 87).

(See also *Sargsyan v. Azerbaijan* below)

Armenian national displaced from Azerbaijan as a result of the Nagorno-Karabakh conflict: *relinquishment in favour of the Grand Chamber*

Sargsyan v. Azerbaijan - 40167/06
[Section I]

The applicant, an Armenian national, complains of his forced displacement from Azerbaijan in 1992 during the military phase of the Nagorno-Karabakh conflict and his subsequent inability to use his home and property and to visit his relatives' graves.

The case was communicated in 2007 under Articles 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1.

(See also *Chiragov and Others v. Armenia* above)

Inability to recover "old" foreign-currency savings following dissolution of SFRY: *communicated*

Ališić and Others v. Bosnia and Herzegovina, Croatia, "the former Yugoslav Republic of Macedonia", Serbia and Slovenia - 60642/08
[Section IV]

This is one of a large number of applications concerning matters of "old" foreign-currency savings following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY). The applicants complain that they have been unable to recover foreign-currency savings they had deposited with two banks in what is now Bosnia and Herzegovina: the Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka.

Communicated to the respondent Governments under Article 1 of Protocol No. 1, Article 13 of the Convention read in conjunction with Article 1 of Protocol No. 1, and Article 14 read in conjunction with Article 13 of the Convention and/or Article 1 of Protocol No. 1.

Deprivation of property

Tax liability arising out of delays by authorities in complying with court order to pay compensation for expropriation: *violation*

Di Belmonte v. Italy - 72638/01
Judgment 16.3.2010 [Section II]

Facts – In 1983 the district council expropriated part of the applicant's land with a view to building low-rent housing on it. The applicant brought proceedings against the district council, seeking compensation for the expropriation. In a judgment of 23 February 1990, which became final on 8 May 1991, the court of Appeal held that he was entitled to compensation corresponding to the market value of the land, together with interest for late payment. In June 1991 the applicant formally requested payment of the sums due, but to no avail. One month later he applied to the regional administrative court for the enforcement of the judgment. In May 1992 he received an initial instalment. Not until January 1995, after a series of applications to the regional administrative court, did he receive the outstanding amount. However, that amount was reduced by virtue of a law of 30 December 1991 which provided that tax at a rate of 20% was to be deducted at source from compensation for expropriation. Prior to the

introduction of the law, compensation for expropriation had not been taxable at source. The applicant applied to the tax authorities for reimbursement of the tax in question, as the expropriation had taken place before the new tax law had come into force. At final instance the Court of Cassation found in favour of the authorities.

Law – Article 1 of Protocol No. 1: The law in question fell within the State's wide margin of appreciation, bearing in mind that it was in the first place for the national authorities to decide what kinds of taxes or contributions were to be levied. Accordingly, the law as such could not be considered arbitrary. Admittedly, it had been applied in the present case despite having come into force after the expropriation of the applicant's land and after the court of appeal's judgment determining the amount of compensation for the expropriation had become final. However, it had already been in force by the time the applicant had received the two instalments of the compensation awarded. In any event, the possibility of retrospective application of the law in question in the applicant's case would not in itself have breached Article 1 of Protocol No. 1, since that Article did not prohibit as such the retrospective application of a law on taxation. However, prior to the entry into force of the law, compensation for expropriation had not been taxable. Furthermore, the law had come into force more than seven months after the date on which the court of appeal's judgment determining the amount of compensation for the expropriation had become final. Accordingly, the delay by the authorities in executing that judgment had had a decisive impact on the application of the new tax system, since the compensation awarded to the applicant would not have been subject to the tax provided for by the new tax legislation if the judgment had been complied with properly and punctually. The authorities' reluctance to execute the court of appeal's judgment was, moreover, confirmed by the numerous applications which the applicant had had to make in order to receive full payment of the amount owing to him. The application of the law had therefore upset the fair balance that had to be struck between the demands of the general interests of the community and the requirements of protection of the individual's fundamental rights.

Conclusion: violation (unanimously).

Article 41: EUR 1,100,000 in respect of pecuniary damage and EUR 3,000 in respect of non-pecuniary damage.

Control of the use of property

Obligation on owners to demolish, at their own expense and without compensation, house they had lawfully purchased on maritime public land: *no violation*

Depalle v. France - 34044/02
Brosset-Triboulet and Others v. France - 34078/02
Judgments 29.3.2010 [GC]

Facts – In the *Depalle* case the applicant and his wife had purchased a dwelling house in 1960 that had been partly built on land on the coast falling within the category of maritime public property. A series of decisions authorising temporary occupancy of maritime public property subject to certain conditions, which were regularly renewed up until December 1992, gave the applicants legal access to the property. The *Brosset-Triboulet* case concerns similar facts. In 1945 the applicants' mother had acquired a dwelling house falling within the category of maritime public property. The successive occupants of the land had had the benefit of a prefectoral decision authorising occupancy that had been systematically renewed between September 1909 and December 1990. In September 1993 the prefect informed the parties in both cases that the entry into force of the Coastal Areas (Development, Protection and Enhancement) Act ("the Coastal Areas Act") no longer allowed him to renew authorisation on the same terms and conditions because the Act ruled out any private use of maritime public property, including as a dwelling house. However, he proposed to enter into an agreement with them that would authorise limited and strictly personal use and prohibit them from transferring or selling the land and houses and from carrying out any work on the property other than maintenance and would include an option for the State, on the expiry of the authorisation, to have the property restored to its original condition or to reuse the buildings. The parties rejected the offer and, in May 1994, applied to the Administrative Court for the prefect's decision to be set aside. In December 1995 the prefect lodged an application with the Administrative Court citing the parties as defendants in respect of an offence of unlawful interference with the highway as they continued to unlawfully occupy public property. He also sought an order against them to restore the foreshore to its original state prior to construction of the dwelling houses, at their expense and without compensation. As a final court of appeal, the *Conseil d'Etat* held in March 2002 that the property in question was part of

maritime public property, that the parties could not rely on any right *in rem* over the land in question or over the buildings and that the obligation to restore the land to its original state without any prior compensation was not a measure prohibited by Article 1 of Protocol No. 1 to the European Convention on Human Rights.

Law – Article 1 of Protocol No. 1: (a) *Applicability* – In strictly applying the principles governing public property – which authorised only precarious and revocable private occupancy – the domestic courts had ruled out any recognition of a right *in rem* over the houses in favour of the applicants. The fact that the applicants had occupied them for a very long time had not had any effect on the classification of the property as inalienable and imprescriptible maritime public property. In the circumstances, and notwithstanding the fact that the houses had been acquired in good faith, as the decisions authorising occupancy had not constituted rights *in rem* over public property the Court doubted that they could reasonably have expected to continue having peaceful enjoyment of the property solely on the basis of the decisions authorising occupancy. All the prefectoral decisions had referred to the obligation, in the event of revocation of the decision authorising occupancy, to restore the site to its original state if so required by the authorities. However, the fact that the domestic laws of a State did not recognise a particular interest as a property right did not necessarily prevent the interest in question, in some circumstances, from being regarded as a possession within the meaning of Article 1 of Protocol No. 1. In the present case the time that had elapsed had had the effect of vesting in the applicants a proprietary interest in peaceful enjoyment of their houses that was sufficiently established and weighty to amount to a possession.

Conclusion: Article 1 of Protocol No. 1 applicable.

(b) *Merits* – Having regard to the principles governing this category of property, and to the fact that the demolition measure had not been implemented to date, there had not been a deprivation of possessions. The non-renewal of the decisions authorising private occupancy of the public property, which the applicants must have anticipated would one day affect them, and the resulting order to demolish the houses could be analysed as control of the use of property in accordance with the general interest. Furthermore, the reasons given by the Prefect for refusing to renew authorisation had been based on the provisions of the Coastal Areas Act. The interference had pursued a legitimate aim that was in the general interest: to promote unrestricted access to the shore. It therefore remained to be determined whether, having regard to the applicants' interest in keeping their houses, the order to restore the site to its original state was a means proportionate to the aim pursued. Regional planning and environmental conservation policies, where the community's general interest was pre-eminent, conferred on the State a wide margin of appreciation. Since the acquisition by the applicants of the possessions, or possibly even since the houses had been built, the authorities had been aware of the existence of the houses because they had been occupied on the basis of a decision specifying that the dyke had to be accessible to the public at all times. Each prefectoral decision authorising occupancy had specified the length of the authorisation and the authorities' right to modify or withdraw the authorisation should they deem it necessary, on any ground whatsoever, without the permittee thereby acquiring a right to claim any compensation. Furthermore, it had been specified that the permittee must, if required, restore the site to its original state by demolishing the constructions built on public land, including those existing on the date on which the decision had been signed. Accordingly, the applicants had always known that the decisions authorising occupancy were precarious and revocable and, therefore the authorities could not be deemed to have contributed to maintaining uncertainty regarding the legal status of the property. Admittedly, the applicants had had peaceful enjoyment of the possession for a long time. The Court did not, however, see any negligence on the part of the authorities, but rather tolerance of the ongoing occupancy, which had, moreover, been subject to certain rules. Accordingly, there was no evidence to support the applicants' suggestion that the authorities' responsibility for the uncertainty regarding the status of the houses had increased with the passage of time. It was not until 1986 that the applicants' situation had changed, following the enactment of the Coastal Areas Act which had put an end to a policy of protecting coastal areas merely by applying the rules governing public property at a time when development and environmental concerns had not reached the degree witnessed today. In any event, the aforementioned tolerance could not result in a legalisation *ex post facto* of the status quo. Regarding the appropriateness of the measure in terms of the general interest in protecting coastal areas, it was first and foremost for the national authorities to decide which type of measures should be imposed. The refusal to renew authorisation of occupancy and the measure ordering the applicants to restore the site to its

condition prior to the construction of the houses corresponded to a concern to apply the law consistently and more strictly. Having regard to the appeal of the coast and the degree to which it was coveted, the need for planning control and unrestricted public access to the coast made it necessary to adopt a firmer policy of management of this part of the country. The same was true of all European coastal areas. Allowing an exemption from the law in the case of the applicants, who could not rely on acquired rights, would go against the aims of the Coastal Areas Act and undermine efforts to achieve a better organisation of the relations between private use and public use. Moreover, the applicants had refused the compromise solution and the Prefect's proposal to continue enjoyment of the houses subject to conditions, which could have provided a solution reconciling the competing interests and did not appear unreasonable. Lastly, having regard to the rules governing public property, and considering that the applicants could not have been unaware of the principle that no compensation was payable, which had been clearly stated in every decision issued since 1961 and 1951 respectively, the lack of compensation could not, in the Court's view, be regarded as a measure disproportionate to control of the use of the applicants' property, carried out in pursuit of the general interest. The applicants would not bear an individual and excessive burden in the event of demolition of their houses with no compensation. Accordingly, the balance between the interests of the community and those of the applicants would not be upset.

Conclusion: no violation (thirteen votes to four).

ARTICLE 2 OF PROTOCOL No. 1

Respect for parents' religious and philosophical convictions

Display of crucifixes in State-school classrooms: *case referred to the Grand Chamber*

Lautsi v. Italy - 30814/06
Judgment 3.11.2009 [Section II]

The applicant's two children attended a publicly-run school in which a crucifix was displayed on the wall of each classroom. She challenged in the administrative courts the head teacher's decision to leave crucifixes in the school's classrooms, arguing that she wished to bring up her children in accordance with the principle of secularism. Her application was refused in a decision upheld in the final instance by the *Consiglio di Stato*. Subsequently the Ministry of Education adopted a Directive recommending that school principals display crucifixes.

In a judgment of 3 November 2009 a Chamber of the Court held unanimously that there had been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention, considering that the State had a duty to uphold confessional neutrality in public education. The compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricted the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe.

On 1 March 2010 the case was referred to the Grand Chamber at the Government's request.

(See Information Note no. 124 for further details)

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people
Choice of the legislature

Post-election dispute concerning parliamentary representation of a national minority: *violation*

Grosaru v. Romania - 78039/01
Judgment 2.3.2010 [Section III]

Facts – The applicant was a candidate in the parliamentary elections of 2000, when he stood for the seat allocated to the Italian minority in Romania. One of the organisations representing the Italian minority nominated him as their candidate in nineteen out of forty-two constituencies. Once all the votes had been counted the central election bureau, under the Elections Act, granted the parliamentary seat belonging to the Italian minority to the organisation to which the applicant belonged. Although he was the candidate from that organisation who had obtained the most votes nationally, the seat in Parliament was given to another member of the organisation who had obtained the most votes in a single constituency. Appeals by the applicant were unsuccessful.

Law – Article 3 of Protocol No. 1: The case concerned the allocation of a parliamentary seat and therefore an issue of post-electoral law. The Elections Act did not clearly stipulate the procedure to be followed for the allocation of the parliamentary seat reserved for the winning organisation representing a national minority. The central election

bureau had to determine the surname and forename of the first candidate on the list of the eligible organisation which had obtained the most votes. The law did not stipulate whether this meant the highest number of votes nationally or for a single constituency. In the present case the central election bureau had opted for a method based on local representation rather than national representation. This lack of clarity in the electoral rules entailed an obligation on the Romanian authorities to be prudent in interpreting them, bearing in mind the direct impact that their interpretation would have on the result of the elections. The central election bureau had not indicated whether it was the first time the rules had been interpreted in that way or whether there was an established practice in such matters. Nor had it explained why the criterion of local representation applied to national minorities when, in other electoral matters, they benefited from special provisions linked to the criterion of national representation. The Government had not provided any further information. Accordingly, the relevant provisions did not, at the material time, satisfy the requirements of precision laid down in the Court's case-law. However, the Court took note of the legislative amendment concerning the scope of the impugned provision, which now provided that the parliamentary seat of a national minority organisation was allocated to the first candidate in the constituency where the list of candidates had obtained the most votes, even though that amendment had largely post-dated the facts complained of by the applicant and would not have been capable of remedying his situation. Moreover, the central election bureau and the validation commission of the House of Representatives had examined the applicant's complaint but had rejected it as ill-founded. The rules of membership of those bodies, which were composed of a large number of representatives of political parties, did not appear to offer sufficient guarantees of impartiality. Secondly, neither the Supreme Court of Justice nor the Constitutional Court nor any other national court had ruled on the interpretation of the disputed statutory provision. It was important for the applicant's allegations to be examined in the context of judicial proceedings. In those circumstances, the lack of clarity in the electoral legislation pertaining to national minorities and the absence of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's complaints had breached the very essence of the rights guaranteed by Article 3 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1: The applicant's right to an effective remedy had been breached on account of the lack of judicial review as regards the interpretation of the electoral legislation in question.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 in respect of non-pecuniary damage.

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:

Giuliani and Gaggio v. Italy - 23458/02
Judgment 25.8.2009 [Section IV]
(See Article 2 above, page 9)

Al-Khawaja and Tahery v. the United Kingdom - 26766/05 and 22228/06
Judgment 20.1.2009 [Section IV]
(See Article 6 § 3 (d) above, page 24)

Lautsi v. Italy - 30814/06
Judgment 3.11.2009 [Section II]
(See Article 2 of Protocol No. 1 above, page 42)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

M.S.S. v. Belgium and Greece - 30696/09
[Section II]
(See Article 3 above, page 11)

Von Hannover v. Germany - 40660/08 and 60641/08 [Section V]
(See Article 8 above, page 25)

Axel Springer AG v. Germany - 39954/08
[Section V]
(See Article 10 above, page 30)

Chiragov and Others v. Armenia - 13216/05
[Section III]
(See Article 1 of Protocol No. 1 above, page 39)

Sargsyan v. Azerbaijan - 40167/06 [Section I]
(See Article 1 of Protocol No. 1 above, page 39)