



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

Overview of the Court's case-law 2021

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Case-law overview

This overview¹ contains a selection by the Jurisconsult of the most interesting cases from 2021.

In 2021 the Grand Chamber delivered twelve judgments, one of which in an inter-State case, and a decision concerning an inter-State case. It also ruled, for the first time, on a request for an advisory opinion under the Council of Europe Convention on human rights and biomedicine (Oviedo Convention); the Grand Chamber panel also delivered its first decision to refuse a request for an opinion under Protocol No. 16 to the Convention.

Under Article 1 the Grand Chamber clarified its case-law on extraterritorial jurisdiction, in respect of an attacking State in an international armed conflict, for acts committed in the State that was attacked and then invaded (*Georgia v. Russia (II)*), and also in the context of a State's complaint about the "annexation" of its territory by another member State (*Ukraine v. Russia (re Crimea)*). In connection with a military operation led by the United Nations, in *Hanan* the Court examined whether the respondent State had a procedural obligation to carry out an effective investigation after a member of its armed forces had ordered a fatal air-strike on foreign soil (Articles 1 and 2). In *Kurt*, the Court consolidated, both generally and in the specific context of domestic violence (Article 2), the positive obligation of States to preventively take operational measures to protect an individual whose life is threatened by the criminal acts of others, in a case concerning a child killed by its father. As to minors taken into public care, in *X and Others v. Bulgaria* it set out the State's positive obligations in response to allegations of sexual assault. In *Savran* the Court clarified its case-law on the expulsion of an alien suffering from a severe mental illness (Article 3). Under Article 5, in

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court.

Denis and Irvine the Court addressed the confinement of criminals with mental illnesses who have been found to lack criminal responsibility for their acts. In the fields of private life, beliefs and health, in the judgment in *Vavříčka and Others* established the case-law on the legal obligation to vaccinate school children against common infectious diseases (Articles 8 and 9), emphasising in particular the obligation of States to place the best interests of children, as a group, at the centre of all decisions affecting their health and development. Addressing the present-day means of surveillance of cross-border communications, the Grand Chamber set out fundamental safeguards against abuse in the bulk interception and collection of communications data and in the reception by a member State of data from foreign intelligence services (*Centrum för rättvisa and Big Brother Watch and Others*, Articles 8 and 10). In the field of immigration control, the Court ruled on the imposition of a waiting time for the access of aliens to family reunion (*M.A. v. Denmark*), and on the deportation and permanent exclusion of a settled migrant who, suffering from a severe mental illness, had been under a compulsory treatment order instead of a criminal sanction (*Savran*). Under Article 8, read in the light of Article 9, the Court ruled on a child's adoption by a foster family practising a different religion from that of the biological mother, who wanted her son to be raised in line with her own religious beliefs (*Abdi Ibrahim*: see also Article 2 of Protocol No. 1). In addition, the Grand Chamber examined, for the first time under Article 2 of Protocol No. 4, the issue of persons displaced within their own country as a result of an international armed conflict (*Georgia v. Russia (II)*). It also reiterated the obligation to cooperate with the Court under Article 38 of the Convention (*ibid*).

In response to two requests for an advisory opinion, one under Protocol No. 16 to the Convention, the other under the Council of Europe Oviedo Convention, the Court had occasion to clarify the nature, scope and limits of its advisory jurisdiction. It emphasised that the purpose of the Protocol No. 16 procedure was to reinforce the implementation of the Convention in respect of cases pending before national courts, in accordance with the principle of subsidiarity.

During the year the Court delivered a number of judgments which were interesting in terms of the development of its case-law.

First of all, it clarified its case-law on the concept of "jurisdiction" and on the responsibility of a State for acts committed by private parties outside its territory (*Carter*), on the application of the six-month period to continuing situations (*E.G. v. the Republic of Moldova*), and on abuses of the right of individual application in the context of the COVID-19 health crisis (*Zambrano*).

Secondly, regarding Convention rights and freedoms, a number of major or new jurisprudential questions were addressed: protecting law-enforcement personnel against risks to their life (*Ribcheva and Others*); conditions of detention following the execution of a European arrest warrant (*Bivolaru and Moldovan*); the granting of an amnesty for sexual assault and ineffective enforcement of a prison sentence as a result (*E.G. v. the Republic of Moldova*); and deportation for committing acts of terrorism (*K.I. v. France*) (Articles 2 and 3). The Court also ruled on the novel question of the COVID-19 “health pass” and vaccination (*Zambrano*).

The Court emphasised the positive obligation of States to protect victims of human trafficking when criminal proceedings are brought against them (*V.C.L. and A.N. v. the United Kingdom*, Articles 4 and 6). For the first time, in the context of the COVID-19 pandemic, it examined whether a national general lockdown measure on grounds of health protection constituted a “deprivation of liberty” within the meaning of Article 5 § 1 (*Terheş*). It also ruled on the foreseeability, under Article 7, of the conviction of a prison officer who had given information about the prison to a journalist in exchange for money (*Norman*).

Also for the first time, the Court dealt with exceptions to the right of appeal in criminal matters in a case concerning a fine of which non-payment could be punished by a prison sentence (Article 2 of Protocol No. 7) (*Kindlhofer*), and under Article 4 of Protocol No. 7 (*ne bis in idem* principle) it examined proceedings and penalties for acts of domestic violence (*Galović*) and the existence of a “fundamental defect” in criminal proceedings which allowed for them to be reopened (*Sabalić*).

The Court extended the protection of Article 8 to a case of verbal harassment in class of a pupil by a teacher in a State school (*F.O. v. Croatia*) and to a case of begging by a destitute and vulnerable person (*Lacatus*), as well as addressing the subject of negative stereotyping of a social group (*Budinova and Chaprazov* and *Behar and Gutman*). It emphasised that human dignity fell within the very essence of the Article 8 rights (*ibid.*), and that it was important to protect the right of children to respect for their private life at school (*F.O. v. Croatia*).

The Court looked into the conformity of autopsies in public hospitals and the extraction of internal organs with the right to respect for the private life and religious beliefs of the deceased’s close relatives (*Polat*). In addition, in *E.G. v. the Republic of Moldova* it indicated that the granting of an amnesty in a case of serious physical and psychological harm committed by individuals had breached Article 8, which enshrined a procedural obligation to enforce a sentence for sexual assault.

As to freedom of expression (Article 10), new jurisprudential developments covered, in the past year, access by intelligence services engaged in bulk data interception to confidential information about the activity of journalists (*Big Brother Watch and Others*), a ban on the publication of an opposition newspaper on account of a state of emergency (*Dareskizb Ltd*), the scope of the concept of a journalist's "source" as regards comments posted on a news website (*Standard Verlagsgesellschaft mbH (no. 3)*), and the protection of journalists' sources following the disclosure of the identity of a source by a newspaper under an agreement with the police (*Norman*). The Court also gave rulings in the domain of online social media: in *Biancardi*, it examined the "right to be forgotten", in the case of a refusal by an Internet newspaper to remove from its online archives an old article containing information on criminal proceedings; and in *Standard Verlagsgesellschaft mbH (no. 3)*, the obligation for a media outlet to waive the anonymity of the authors of insulting comments published on its online discussion forum.

Under Article 11 the Court ruled for the first time on the possibility for working prisoners to form or join a trade union (*Yakut Republican Trade-Union Federation*).

As regards the prohibition of discrimination, the Court clarified the response required of the domestic authorities under Articles 3 and 14 to homophobic violence (*Sabalić*) and under Articles 8 and 14 to discrimination based on ethnic origin (*Budinova and Chaprazov v. Bulgaria* and *Behar and Gutman v. Bulgaria*). In *Jurčić* it acknowledged, for the first time, that a pregnant woman had been discriminated against by her employer on account of her pregnancy.

The Court also ruled on the concept of "public danger threatening the life of the nation" within the meaning of Article 15 on derogation in time of emergency (*Dareskizb Ltd*), and on Article 18 of the Convention (*Azizov and Novruzlu*). Lastly, in *Willems and Gorjon* the Court set out the consequences of it taking note of a unilateral declaration by a respondent Government in a given case and striking the application out of its list.

In its case-law, the Court considered the interactions between the Convention, on the one hand, and European Union law and case-law of the Court of Justice of the European Union, on the other, in cases concerning, among other things, conditions of family reunion (*M.A. v. Denmark*), the European arrest warrant and the presumption of "equivalent protection" in the European legal order as established in the *Bosphorus* judgment (*Bivolaru and Moldovan*), deportation for acts of terrorism (*K.I. v. France*), online media and a request for the removal of an old article on a trial (*Biancardi*), and maternity in the workplace (*Jurčić*).

In various cases the Court also noted the interactions between the Convention and international/European law (for example, in *Ukraine v. Russia (re Crimea)*, *Vavrička and Others*, *E.G. v. the Republic of Moldova*, *F.O. v. Croatia*, *Lacatus*, *Biancardi*), in areas including international humanitarian law (*Georgia v. Russia (II)*, *Hanan*), domestic violence (*Kurt*), gender equality (*Jurčić*), journalists (*Standard Verlagsgesellschaft mbH (no. 3)*), the United Nations Convention on the Rights of the Child (*Abdi Ibrahim*), the Refugee Convention of 1951 (*K.I. v. France*), the Council of Europe Conventions on the protection of children against sexual exploitation and abuse (*X and Others v. Bulgaria*), the prevention of human trafficking (*V.C.L. and A.N. v. the United Kingdom*), human rights and biomedicine (request for advisory opinion), or the Istanbul Convention (*Jurčić*). The Court also provided clarification on the methodology to be used in cases where there seems, at first sight, to be a conflict between Convention law and international humanitarian law (*Georgia v. Russia (II)*).

It should also be noted that once again this year in many areas the Court developed its case-law on the positive obligations that have to be fulfilled by member States under the Convention.

Lastly, in a year marked by the entry into force of Protocol No. 15 to the Convention, introducing in particular a reference to the margin of appreciation doctrine into the Convention's Preamble, the Court ruled on the breadth of the margin that should be afforded to States Parties to the Convention, for example in the area of health (*Vavrička and Others*), bulk surveillance of cross-border communications (*Big Brother Watch and Others*, *Centrum för rättvisa*), access to family reunion for aliens (*M.A. v. Denmark*), protection of pupils from any form of violence at school (*F.O. v. Croatia*), regulation of begging (*Lacatus*), and the rights of working prisoners (*Yakut Republican Trade-Union Federation*). In this connection, in leading judgments the Court examined whether or not there was a consensus in the Council of Europe States as to the question raised by the application (for example, *Vavrička and Others*, *M.A. v. Denmark*, *Abdi Ibrahim*, *Lacatus*, *Yakut Republican Trade-Union Federation*).

In addition, the Court highlighted the principle of subsidiarity, now expressly provided for in the Preamble to the Convention since the entry into force of Protocol No. 15. In one case it emphasised the sharing of responsibility between the national authorities and the Court, and more specifically the primary responsibility of the national authorities to ensure compliance with the Convention and the Protocols thereto (*Willems and Gorjon*).

JURISDICTION AND ADMISSIBILITY

Jurisdiction of States (Article 1)²

The judgment in *Georgia v. Russia (II)*³ concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities.

In this inter-State application (Article 33) the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely before and after the ceasefire agreement of 12 August 2008. It held that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction.

This Grand Chamber judgment is novel in that it clarifies the issue of jurisdiction in the context of an armed conflict: for the purposes of Article 1 of the Convention, military personnel and the civilian population of a country cannot be considered as falling within the “jurisdiction” of an attacking or invading State during the active combat phase of the hostilities (as distinct from the later phase of “military occupation”).

(i) This is the first case, since the decision in *Banković and Others v. Belgium and Others*⁴, in which the Court has examined the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. The Grand Chamber did so in the light of two existing lines of case-law: on the one hand, the exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State of an area and/or on “State agent authority and control” over the direct victim of the alleged violation (*Al-Skeini and Others v. the United Kingdom*⁵); and, on the other hand, the general principle of *Banković and Others* according to which the provisions of Article 1 do not admit of a mere “cause and effect” notion of “jurisdiction” so that a State’s responsibility cannot be engaged by an “instantaneous extraterritorial act” (explicitly restated in *Medvedyev and Others v. France*⁶;

2. See also, under Article 2 (Right to life) below, *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final).

3. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021. See also under Article 2 of Protocol No. 4 (Freedom of movement) and Article 33 (Inter-State cases) below.

4. *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

5. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 133-40, ECHR 2011.

6. *Medvedyev and Others v. France* [GC], no. 3394/03, § 64, ECHR 2010.

see also *M.N. and Others v. Belgium*⁷). It also found that neither of the two conditions of extraterritorial jurisdiction (State agent authority and control over individuals or effective control over an area) are met in the case of military operations carried out during an international armed conflict. The reality of fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no actual “control” either over that area or over the individuals therein. This interpretation is confirmed by the practice of the member States in not derogating under Article 15 in situations where they have engaged in an international armed conflict outside their own territory. Having regard to the fact that such situations are predominantly regulated by legal norms other than those of the Convention (namely, international humanitarian law) and that the Contracting Parties have not endowed the Court with the necessary legal basis for assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, the Grand Chamber concluded that it could not develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date. Accordingly, the events of the active phase of hostilities fell outside the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention.

(ii) Nevertheless, the Grand Chamber held that the respondent State had to be deemed to have had “jurisdiction” in respect of the complaint under the procedural limb of Article 2 of the Convention, even in respect of deaths which took place during the active phase of the military conflict. The Grand Chamber followed the case-law set out in *Güzelyurtlu and Others v. Cyprus and Turkey*⁸, according to which a jurisdictional link to the obligation to investigate under Article 2 may be established if the respondent State has begun an investigation or proceedings in accordance with its domestic law in respect of a death which has occurred outside its jurisdiction or if there were “special features” in a given case. In the present situation, both of these conditions had been met: the fact that the Russian Federation had an obligation to investigate the events in issue in accordance with the relevant rules of international humanitarian law, that it had established “effective control” over the territories in question shortly after the hostilities and that Georgia had been prevented from carrying out an adequate and effective investigation into the allegations all constituted “special features” sufficient to establish Russia’s jurisdiction in respect of this specific complaint.

7. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, § 112, 5 May 2020.

8. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 188-90, 29 January 2019.

(iii) In accordance with the Court’s case-law (for example, *Al Skeini and Others*, cited above, §§ 138 and 142, with further references), from the time when a State exercises “effective control” over a foreign territory, it is also responsible for the actions of separatist forces (which, in the present case, included irregular militias) and internationally unrecognised authorities supported by it in those territories, without it being necessary to provide proof of “detailed control” of each of those actions.

*Hanan v. Germany*⁹ concerned, in particular, whether there existed a “jurisdictional link” such as to trigger a procedural obligation under Article 2 to investigate an airstrike (ordered in the framework of a UN Security Council multinational military operation).

On 4 September 2009 a German Colonel, K., (acting in an International Security Assistance Force (ISAF) under a mandate given under Chapter VII of the UN Charter), ordered an airstrike on two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan, which killed and injured both insurgents and civilians. A German prosecutor began and then discontinued an investigation on the basis of a lack of grounds for the criminal liability of Colonel K. (or the Staff Sergeant assisting): liability under the Code of Crimes against International Law was excluded because Colonel K. did not have the necessary intent; and liability under the Criminal Code was excluded because the lawfulness of the airstrike under international law served as an exculpatory defence.

The Grand Chamber found that there were “special features” triggering the existence of a “jurisdictional link” in relation to the procedural obligation to investigate under Article 2.

The Grand Chamber judgment is noteworthy since it develops the “jurisdictional link” case-law as regards the obligation to investigate under Article 2 as regards deaths occurring during active hostilities in an extraterritorial armed conflict.

(i) The Grand Chamber examined the existence of a “jurisdictional link”, in relation to the Article 2 obligation to investigate, for the purposes of Article 1 on the basis of the principles set out in *Güzelyurtlu and Others v. Cyprus and Turkey*¹⁰.

(a) The Grand Chamber considered that the principle – that the institution of a domestic criminal investigation into deaths occurring

9. *Hanan v. Germany* [GC], no. 4871/16, 16 February 2021. See also under Article 2 (Effective investigation) below.

10. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 188-90, 29 January 2019.

outside the jurisdiction *ratione loci* of a State and not within the exercise of its extraterritorial jurisdiction was in itself sufficient to establish a jurisdictional link between that State and the victim's relatives who bring proceedings before the Court (ibid., §§ 188, 191 and 196) – did not apply to the present scenario. The deaths investigated by the German authorities had occurred in the context of an extraterritorial military operation within the framework of a mandate given by the UN Security Council acting under Chapter VII of the UN Charter, outside the territory of the Contracting States of the Convention.

(b) Reiterating that “special features” may establish a jurisdictional link bringing the procedural obligation imposed by Article 2 into effect, even in the absence of an investigation or proceedings having been instituted in a Contracting State (*Güzelyurtlu and Others*, cited above, § 190), the Grand Chamber considered that this also applied in respect of extraterritorial situations, outside the legal space of the Convention and in respect of events occurring during the active hostilities phase of an armed conflict (see, in respect of the latter aspect, *Georgia v. Russia (II)*¹¹) and it went on to find such special features in the present case: (i) Germany was obliged under customary IHL to investigate the airstrike (it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime), which reflected the gravity of the alleged offence; (ii) the Afghan authorities were, for legal reasons, prevented from instituting a criminal investigation (according to the ISAF Status of Forces Agreement the troop-contributing States had exclusive jurisdiction over personnel contributed to the ISAF in respect of any criminal or disciplinary offences on the territory of Afghanistan); and (iii) the German prosecution authorities were obliged under domestic law (related to Germany's ratification of the Rome Statute) to investigate any liability of German nationals for, *inter alia*, war crimes (as in the majority of Contracting States participating in military deployments overseas). In sum, the fact that Germany retained exclusive jurisdiction over its troops with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted “special features” which, combined, triggered the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2 of the Convention.

(ii) Although it did not have to consider whether there was a jurisdictional link as regards any substantive obligation under Article 2 (it was not relied on by the applicant), the Court clarified that the

11. *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 329-32, 21 January 2021. See also under Article 2 of Protocol No. 4 (Freedom of movement) and Article 33 (Inter-State cases) below.

mere establishment of a jurisdictional link in relation to the procedural obligation did not mean that the substantive act fell also within the jurisdiction of a State or that the said act was attributable to that State and, consequently, the Court did not call into question *Banković and Others v. Belgium and Others*¹² or *Behrami v. France and Saramati v. France, Germany and Norway*¹³, both cases concerning the substantive limb of Article 2 of the Convention.

In the inter-State application *Ukraine v. Russia (re Crimea)*¹⁴ (Article 33) the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 26 August 2015 in the course of which the region of Crimea (including the city of Sevastopol) was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the “jurisdiction” of the Russian Federation within the meaning of Article 1. It also addressed the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another (as opposed to its military occupation or the provision of political/military support for a separatist entity), and clarified the standard of proof applicable at the admissibility stage to the question of jurisdiction.

Having clarified that the question of the respondent State’s “jurisdiction” under Article 1 of the Convention had to be examined to the “beyond reasonable doubt” standard of proof, the Grand Chamber determined that “jurisdiction” question by examining two periods separately: before and after 18 March 2014, that being the date on which the Russian Federation, the “Republic of Crimea” and the City of Sevastopol signed a “Treaty of Unification” providing for the incorporation of Crimea into Russia. In this regard, the Grand Chamber stated that it would follow the recent approach of the International Court of Justice, of several international arbitral tribunals and of the Swiss Federal Court, in declaring that it was not called upon to decide in the abstract on the legality *per se* under international law of a purported “annexation” of Crimea or of the consequent legal status of that territory. These questions had not been referred to the Court and did not constitute

12. *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

13. *Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

14. *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021. See also under Article 33 (Inter-State cases) below.

the subject matter of the dispute before it. The Grand Chamber went on to find that the facts of the case fell within the “jurisdiction” of the respondent State, during both periods, for the following reasons:

(a) As to the period prior to 18 March 2014, the Grand Chamber followed the usual approach defined in *Al-Skeini and Others v. the United Kingdom*¹⁵, which amounted to an exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State over the area in question. The Court based its conclusion on a detailed assessment of the evidence related to the particular facts of the case, evaluating both the strength and the actual conduct of the Russian military forces in Crimea. On the first point (strength), the Grand Chamber considered, *inter alia*, that the question whether the increase of the respondent State’s military presence in Crimea at the time was formally in compliance with the existing bilateral agreements between the two States was not decisive: more weight had to be given to the relative size, strength and combat potential of the respondent State’s armed forces in that territory, as well as to the purported justification for increasing their presence there. As to the second point (actual conduct), the Grand Chamber took into account the degree of active involvement of Russian military servicemen in the impugned events in Crimea, as well as the public statements of several high-ranking officials of the respondent State.

(b) As to the period after 18 March 2014, the Grand Chamber considered that, while Article 19 of the Convention did not empower the Court to pass formal judgment on the legality/legitimacy of any transfer of sovereignty under international law, the Court could not entirely eschew the question since it was necessary to consider the nature or legal basis of the respondent State’s jurisdiction over Crimea in relation to some specific complaints (under Article 6 § 1 of the Convention and Article 2 of Protocol No. 4 taken alone and in conjunction with Article 14 of the Convention). In the present case, the Court relied on the fact that, in the first place, both Contracting States had ratified the Convention in respect of their respective territories within the internationally recognised borders at that time; secondly, no change to the sovereign territories of both countries had been accepted or notified by either State; and thirdly, a number of States and international bodies had refused to accept any change to the territorial integrity of Ukraine in respect of Crimea within the meaning of international law. Accordingly, for the purposes of this admissibility decision, the aforementioned

15. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 133-40, ECHR 2011.

circumstances enabled the Court to proceed on the basis of the assumption that the applicant State's territorial jurisdiction continued to extend to the entirety of its territory, including Crimea, whereas the jurisdiction of the respondent State over that region was in the form or nature of "effective control over an area" (rather than in the form or nature of territorial jurisdiction).

*Carter v. Russia*¹⁶ concerned the targeted killing abroad of a Russian political defector and dissident. The judgment is noteworthy primarily because of the development of the Court's case-law on the respondent State's jurisdiction (under the procedural and substantive limbs of Article 2) and the attribution of responsibility for a targeted killing abroad under the substantive limb of Article 2.

Admissibility (Articles 34 and 35)

Six-month period (Article 35 § 1)

In *E.G. v. the Republic of Moldova*¹⁷, the Court examined the issue of the applicability of the six-month rule in the context of an amnesty and the ineffective execution of a sentence for the offence of sexual abuse.

The applicant was the victim of sexual abuse by three individuals. Relying on Articles 3 and 8, she complained about the authorities' decision to grant an amnesty to one of her abusers and about their failure to effectively execute his sentence of imprisonment. The Court found a violation of Articles 3 and 8 of the Convention.

The judgment is noteworthy because it clarifies the Court's case-law regarding compliance with the six-month time-limit in the context of this continuous situation.

As to applying the six-month time-limit to continuous situations, the Court reiterated that not all continuing situations are the same (*Mocanu and Others v. Romania*¹⁸). While there were therefore obvious distinctions between different continuing situations, the Court stressed that applicants must introduce their complaints "without undue delay" once it is apparent that there is no realistic prospect of a favourable

16. *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final). See also under Article 2 (Right to life) and Article 38 (Obligation to furnish all necessary facilities) below.

17. *E.G. v. the Republic of Moldova*, no. 37882/13, 13 April 2021. See also under Article 3 (Positive obligations) and Article 8 (Positive obligations) below.

18. *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 262, ECHR 2014 (extracts).

outcome or progress domestically (*Sokolov and Others v. Serbia*¹⁹). In the present case, the Court responded to the Government's argument that the applicant should have lodged her application within six months of the decision granting the amnesty.

Abuse of the right of application (Article 35 § 3 (a))

In its decision in *Zambrano v. France*²⁰ the Court examined the abusive nature of an activist approach which had led to a massive influx of identical applications with the stated aim of "paralysing" the Court.

The applicant complained about the French laws on the management of the public-health crisis caused by the COVID-19 pandemic, and in particular the introduction of a "health pass".

The applicant, a university lecturer, set up a movement to protest against the health pass, which he considered to be in violation, primarily, of Articles 3, 8 and 14 of the Convention. In particular, he invited visitors to his Internet site to replicate his application and made available an automatically generated and standardised application form. The stated aim was to lodge a kind of collective application by making multiple applications in order to "paralyse" the Court's operations, to "create a relationship of power" in order to "negotiate" with the Court, and to "derail the system". Almost eighteen thousand applications had already been sent to the Court as a result of this procedure on the date of delivery of this decision.

The Court declared this application inadmissible for failure to exhaust domestic remedies (in particular, judicial review – see *Graner v. France*²¹ and *Charron and Merle-Montet v. France*²²), and because it amounted to an abuse of the right of application within the meaning of Article 35 §§ 1 and 3. The Court also noted the abstract nature of the application, which did not explain how the impugned measures were likely to affect the applicant directly and to target him on account of any personal characteristics. The Court further indicated that these conclusions were likely to apply to the thousands of other standardised applications which had been lodged as a result of the applicant's initiative and which, in addition, did not fulfil all of the conditions laid down in Rule 47 § 1 of the Rules of Court; it was therefore likely that they would not be examined.

19. *Sokolov and Others v. Serbia* (dec.), nos. 30859/10 and 6 others, § 31 *in fine*, 14 January 2014.

20. *Zambrano v. France* (dec.), no. 41994/21, 21 September 2021. See also under Article 3 (Inhuman or degrading treatment) below.

21. *Graner v. France* (dec.), no. 84536/17, 5 May 2020.

22. *Charron and Merle-Montet v. France* (dec.), no. 22612/15, 16 January 2018.

This decision is noteworthy in that the Court was dealing with an unprecedented situation: a purely activist petition lodged by an individual who had caused a massive influx of identical applications through an Internet campaign, with the declared intention of “paralysing” the Court’s operations. While the Court found that this application represented an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention, it also considered it essential, in the specific circumstances of this case, to examine other grounds of inadmissibility.

In finding an abuse of the right of individual application in this unprecedented situation, the Court noted that the objective pursued by the applicant, expressed in unambiguous terms, was not to win his case in the context of the normal exercise of this right, but to deliberately seek to undermine the Convention system and the functioning of the Court. His approach, in attempting to artificially create mass litigation, was manifestly contrary to the purpose of the right of individual application and, more generally, to the spirit of the Convention and the objectives pursued by it. The Court thus drew a clear dividing line between a massive influx of applications such as those pursuing the objective set by the applicant and the mass litigation which it has already been dealing with for nearly two decades, arising out of different structural or systemic problems in the Contracting States. The Court emphasised in this connection that, in spite of the constant pressure created by the latter type of litigation, it sought to ensure the long-term effectiveness of the human rights protection system set up by the Convention, while maintaining the right of individual petition, the cornerstone of this system, and access to justice.

In this connection, the Court referred to Article 17, the provisions of which were also intended to protect the Convention mechanism (see *Lawless v. Ireland (no. 3)*²³). The Court’s conclusions in the present case, seen in the light of the applicant’s approach, were therefore driven by a concern to maintain its ability to fulfil its mission under Article 19 in relation to other applications, lodged by other applicants, which met the criteria for allocation to judicial formations and, prima facie, the admissibility conditions, including that of not abusing the right of application.

23. *Lawless v. Ireland (no. 3)*, 1 July 1961, pp. 45-46, § 7, Series A no. 3.

“CORE” RIGHTS

Right to life (Article 2)

Obligation to protect life

The judgment in *Kurt v. Austria*²⁴ concerned the scope and content of the Osman positive operational (substantive) obligation in the context of domestic violence.

In 2011 the applicant’s husband was convicted of causing her bodily harm: a barring order was made against him, with which he complied. In 2012 the applicant filed for divorce and reported her husband to the police for rape, domestic violence (including slapping their children) and dangerous threats. On the same day, criminal proceedings were opened against him and a new fourteen-day barring order was made against him prohibited him from returning to their home and the surrounding areas. His keys were seized. Three days later, he shot their son at school and committed suicide. The applicant unsuccessfully brought official liability proceedings, claiming that her husband should have been held in pre-trial detention. The Grand Chamber found no violation of Article 2.

The Grand Chamber judgment is noteworthy in that it clarifies the scope, and develops the content, of the Osman positive obligation (to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, *Osman v. the United Kingdom*²⁵) both generally and in the specific context of domestic violence.

(i) Regarding the content of the Osman positive obligation taken generally, the Court for the first time specified that the assessment of the nature and level of risk constituted an integral part of the duty to take preventive operational measures. It followed that an examination of the State’s compliance with Article 2 under the Osman test had to comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken. As to the scope of the Osman positive obligation, the Court clarified that it was an obligation of means, not of result. Thus, in circumstances where the competent authorities have responded to the identified real and immediate risk by taking appropriate measures

24. *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021.

25. *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII.

within their powers, the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. Furthermore, a given case in which a real and immediate risk materialised had to be assessed from the point of view of what was known to the competent authorities at the relevant time.

(ii) The Court then proceeded to clarify what this meant for the application of the *Osman* test, taking account of the specific context and dynamics of domestic violence. Regarding the first limb of this test (risk), the Court reiterated that the authorities' response to any such allegations must be immediate and marked by special diligence. Relying on the submissions of GREVIO (independent expert body responsible for monitoring the implementation of the *Istanbul Convention*), the Court went on to outline some requirements for the risk assessment in this context, notably:

- Autonomous and proactive approach, requiring the authorities not to rely solely on the victim's perception of the risk, but to collect all the information and conduct their own assessment;

- Comprehensiveness, which can be facilitated through the use of standardised, internationally recognised checklists indicating specific risk factors that have been developed on the basis of sound criminological research and best practices; the relevant authorities should receive regular training and awareness-raising, particularly in respect of such tools; any risk assessment must be apt to systematically identify and address all the potential victims – direct or indirect – keeping in mind the possibility that the outcome could be a different level of risk for each of them. The Court observed that violence against children belonging to the common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner;

- Basic documenting of the conduct of the risk assessment, given the urgent nature of interventions and the necessity of sharing relevant information among all the authorities involved;

- Providing information to the victims on the outcome of the risk assessment and available legal and operational protective measures; and

- Taking due account of the particular context of domestic violence cases, their special features and the ways in which they differ from *Osman*-type incident-based situations. Notably, the "immediacy" of the risk should be evaluated taking into account the common trajectory of the escalation of violence in such cases and the comprehensive research in this area. The risk of a further escalation must be assessed even after

the issuance of a barring and protection order. However, an impossible or disproportionate burden must not be imposed on the authorities.

As to the second limb of the Osman test (measures), the Court developed some requirements relating to preventive operational measures:

- Such measures must be adequate and proportionate to the level of the risk assessed. This requirement is directed at both the decision-making process and the legal framework, which must give the authorities involved a range of sufficient measures to choose from, including treatment programmes for perpetrators and even a deprivation of liberty, where specific circumstances so require (the “measures within the scope of their powers” aspect of the Osman test);

- Coordination among multiple authorities, including risk-management plans, coordinated support services for victims and the rapid sharing of information. If children are involved or found to be at risk, the child protection authorities should be informed as soon as possible, as well as schools and/or other childcare facilities; and

- A careful weighing of the competing rights at stake and other relevant constraints at both general policy and individual level. To the extent that they have an impact on the alleged perpetrator, any measures taken must remain in compliance with the States’ other obligations under the Convention, including the need to ensure that the police exercise their powers in a manner which fully respects due process and other safeguards, notably the guarantees contained in Articles 5 and 8. The nature and severity of the assessed risk will always be an important factor with regard to the proportionality of any measures to be taken, whether in the context of Article 8 or Article 2 of Protocol No. 4. Any measure entailing a deprivation of liberty will have to fulfil the requirements of domestic law as well as the specific conditions set out in Article 5 and the Court’s case-law pertaining to it. The Grand Chamber judgment provides, in this regard, a useful summary of its case-law principles developed under Article 5 §§ (b) and (c) in the context of preventive measures.

On the facts of the instant case, the Court found no issue with the domestic assessment, which had identified no real and immediate lethal risk to the children, but only a certain level of non-lethal risk in the context of the domestic violence primarily targeting their mother. The measures ordered were considered to have been adequate to contain that risk, and no obligation arose to take further measures, whether in private or public spaces, such as issuing a barring order for their school.

*Ribcheva and Others v. Bulgaria*²⁶ concerned the death of a law-enforcement officer at the hands of a private individual during a police operation. In its judgment, the Court set out the scope and content of the substantive (preventive) and procedural obligations for States in this context.

The applicants were the family members of an officer of the anti-terrorist squad (Ministry of Internal Affairs) who was killed during a planned operation against an individual who was considered unstable and dangerous. The perpetrator was tried and convicted of, *inter alia*, aggravated murder, sentenced to life imprisonment and ordered to pay damages to the applicants. In addition, the applicants also urged the authorities to investigate whether officials had contributed to their relative's death by incorrectly ordering and planning the operation. Although a separate criminal investigation was not launched, the latter issue was examined in two internal investigations by the above-mentioned Ministry. The applicants complained under Articles 2 and 13 that the authorities had failed to protect the life of their relative and to investigate effectively any negligence in relation to his death. The Court found no violation of the substantive limb of Article 2 and a violation of its procedural limb, finding that there was no need to examine separately the complaint under Article 13 of the Convention.

The judgment is noteworthy because the Court set out, for the first time, the scope and content of substantive and procedural obligations on a State when a law-enforcement officer is killed during a planned operation by the subject of that operation.

(i) As regards the substantive obligation under Article 2 and, more particularly, as regards the application of the *Osman* positive operational obligation (to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, *Osman v. the United Kingdom*²⁷) to this very specific context, the Court clarified as follows:

(a) It held that this positive operational obligation also applied to the death of a law-enforcement officer during a planned operation. Accordingly, and when deciding to involve the present applicants' relative in the operation in his capacity as a specialised officer tasked with dealing with dangerous individuals, the authorities had a positive duty to do what could reasonably be expected of them to protect him from the risks of such an operation. The Court proceeded to examine

26. *Ribcheva and Others v. Bulgaria*, nos. 37801/16 and 2 others, 30 March 2021.

27. *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII.

the standard to which compliance with that duty had to be assessed. Drawing on its well-established case-law, it emphasised that the standard of reasonableness in relation to this positive obligation (Article 2 § 1) was not as stringent as that in respect of the negative obligation (Article 2 § 2) to refrain from using no more force than is “absolutely necessary” (a strictly proportionate use of force excluding any margin of appreciation). Rather, the scope and content of the positive operational obligation in issue had to be defined in a way which does not impose an impossible or disproportionate burden on the authorities given the choices they face (priorities and resources) and given the unpredictability of human conduct (see, *inter alia*, *Osman*, cited above, § 116; *Öneriyıldız v. Turkey*²⁸; *Finogenov and Others v. Russia*²⁹; *Lambert and Others v. France*³⁰; and *Gerasimenko and Others v. Russia*³¹).

In this respect, the Court explained as follows:

- the scope/content of the positive obligation to protect law-enforcement personnel against risks to their lives should not make it impossible to require them to engage in active operations against armed and dangerous individuals or make it unduly onerous for the authorities to organise them;
- while law-enforcement officers who had freely engaged to serve (especially in specialised units dealing with terrorists/dangerous individuals) surely had to be aware that this might on occasion put them in situations where they would face lethal threats which might be difficult to contain, the authorities had a duty to ensure that these officers were properly trained and prepared; and
- the authorities had, in addition, to fully comply with their negative obligation under Article 2 § 2 to any person targeted or, indeed, directly affected by the operation.

(b) Based on the above considerations, the Court held that, although the authorities had made mistakes in the planning and execution of the operation, the steps they had taken to minimise the risk to the officer’s life could be seen as reasonable. While the operation had been unduly rushed and the likely degree of the target’s resistance had been underestimated, the authorities had taken reasonable precautions: they had obtained intelligence about the target and drawn up plans as to how to go about arresting him and seizing his firearms; they had deployed a number of specially trained officers; and they had acted in a

28. *Öneriyıldız v. Turkey* [GC], no. 48939/99, § 107, ECHR 2004-XII.

29. *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, § 209, ECHR 2011 (extracts).

30. *Lambert and Others v. France* [GC], no. 46043/14, §§ 144-48, ECHR 2015 (extracts).

31. *Gerasimenko and Others v. Russia*, nos. 5821/10 and 65523/12, § 96, 1 December 2016.

coordinated manner with an unbroken chain of command at all times. The Court did not take issue with the equipment and firearms made available to the anti-terrorist squad: it was for the national authorities (who are better placed to evaluate the relevant needs and take responsibility for the choices which have to be made between worthy needs) to decide how their limited resources should be allocated and the officers were not manifestly ill-equipped for their task. It stressed that it had to be extremely cautious about revisiting any of the choices that the authorities had made in those respects with the wisdom of hindsight (caution already applied even when the Court examined whether the authorities had used more force than was “absolutely necessary”; where, as noted above, a much stricter standard applied).

(ii) As to the procedural obligation under Article 2 to carry out an effective investigation, the Court, relying on the established principles set out in its case-law (*inter alia*, *Mastromatteo v. Italy*³², and, more recently, *Kotilainen and Others v. Finland*³³), found that the authorities had been required to investigate not only the responsibility of the person directly responsible for killing the applicants’ relative, but also whether any officials had contributed to his death through negligence in the planning and conduct of the operation. The Court confirmed that this investigative duty, which arose when lives had been lost in circumstances potentially engaging the responsibility of the State due to alleged negligence, also applied in the context of police officers killed by private persons while performing their duties. On the facts, the Court found that the authorities had not properly discharged that duty due to two serious flaws in the internal investigations conducted: one of the investigations had not been opened at the authorities’ initiative (but was rather prompted by the deceased’s mother’s complaint) and, more importantly, there had been a complete lack of publicity and involvement of the applicants in both investigations.

The targeted killing abroad of a Russian political defector and dissident was examined in *Carter v. Russia*³⁴.

The applicant is the widow of Mr Litvinenko, a Russian political defector and dissident who had been granted asylum in the United Kingdom (UK). Having met with two Russian nationals (A.L. and D.K.)

32. *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 89-90 and 94-96, ECHR 2002-VIII.

33. *Kotilainen and Others v. Finland*, no. 62439/12, § 91, 17 September 2020.

34. *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final). See also under Article 1 (Jurisdiction of States) above and Article 38 (Obligation to furnish all necessary facilities) below.

in London several times in October and November 2006, Mr Litvinenko suddenly fell ill. On 3 November 2006 he was admitted to a hospital in London: tests revealed he had been contaminated with polonium and on 23 November 2006 he died. An investigation conducted in the UK (police and prosecution service) determined that there was sufficient evidence to charge A.L. and D.K. with Mr Litvinenko's murder by poisoning. International arrest warrants were issued for their arrest and extradition from Russia. The Russian Constitution prohibited the extradition of Russian nationals and A.L., who had become a member of the Russian Parliament in the meantime, had acquired parliamentary immunity. The Russian authorities launched a criminal investigation into the case. At the same time, an inquiry into the death was also conducted by a High Court judge in the UK ("the Litvinenko Inquiry"): the inquiry found, to the criminal standard of proof ("beyond reasonable doubt"), that Mr Litvinenko had been fatally poisoned by A.L. and D.K., who had acted under the direction of the Russian authorities. The applicant complained that the killing of her husband had been perpetrated on the direction, or with the acquiescence or connivance, of the Russian authorities and that the Russian authorities had failed to conduct an effective investigation into the murder. The Court found a violation of the substantive and procedural limbs of Article 2 of the Convention.

The judgment is noteworthy primarily because of the development of the Court's case-law on the respondent State's jurisdiction (under the procedural and substantive limbs of Article 2) and the attribution of responsibility for a targeted killing abroad under the substantive limb of Article 2. It is also of interest as to the manner in which the Court treated the admissibility of the Litvinenko Inquiry report as evidence in the proceedings before it.

(i) With respect to the latter aspect of the judgment, the Russian Government challenged the admissibility of the Litvinenko Inquiry report as evidence in the proceedings before the Court based on objections to the inquiry proceedings and the content of the report. While reiterating that it is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence or any procedural barriers to the admissibility of evidence in the proceedings before it (*inter alia*, *Ireland v. the United Kingdom*³⁵, and *Merabishvili v. Georgia*³⁶), the Court considered it important to examine in detail the different aspects of the Litvinenko Inquiry report. On the basis of that assessment, the Court found that there was no reason to

35. *Ireland v. the United Kingdom*, 18 January 1978, §§ 209-10, Series A no. 25.

36. *Merabishvili v. Georgia* [GC], no. 72508/13, § 315, 28 November 2017.

doubt the quality of the investigative process, or the independence, fairness and transparency of the inquiry proceedings. It decided to admit the inquiry report into evidence.

(ii) As regards the respondent State's jurisdiction under the procedural limb of Article 2 (examined before the substantive limb), the Court noted that the Russian authorities had instituted their own criminal investigation into the death of Mr Litvinenko, thus establishing a "jurisdictional link" with regard to the Russian State (*Güzelyurtlu and Others v. Cyprus and Turkey*³⁷). In addition, the Court referred to the fact that the suspects were Russian nationals who enjoyed in Russia a constitutional protection from extradition, which had prevented the UK authorities from pursuing the criminal prosecution. In this connection, the Court stressed that "[w]hereas the possibility that a State may refuse a request for extradition of its own national is not as such incompatible with the obligation to conduct an effective investigation, the fact that the Government retained exclusive jurisdiction over an individual who is accused of a serious human rights violation constitutes a 'special feature' of the case" establishing a jurisdictional link under the procedural limb of Article 2 (compare *Hanan v. Germany*³⁸).

On the merits, the Court relied, in particular, on the fact that the Government's unjustified refusal to submit requested documentation from the domestic proceedings (which was also found to be in breach of Article 38 of the Convention) meant that they had failed to discharge their burden of proof so as to demonstrate that the Russian authorities had carried out an effective investigation. The Court accordingly found a violation of the procedural limb of Article 2 of the Convention.

(iii) As to the respondent State's jurisdiction and responsibility under the substantive limb of Article 2, the Court relied on the line of case-law concerning control over individuals on account of incursions and targeting of specific persons by armed forces or police of a respondent State abroad, which brought the affected persons "under the authority and/or effective control of the respondent State through its agents" (*Issa and Others v. Turkey*³⁹; *Isaak and Others v. Turkey*⁴⁰; *Pad and Others v. Turkey*⁴¹; *Andreou v. Turkey*⁴²; *Solomou and Others v. Turkey*⁴³; for a recent

37. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 191, 29 January 2019.

38. *Hanan v. Germany* [GC], no. 4871/16, § 142, 16 February 2021.

39. *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.

40. *Isaak and Others v. Turkey* (dec.), no. 44587/98, 28 September 2006.

41. *Pad and Others v. Turkey* (dec.), no. 60167/00, 28 June 2007.

42. *Andreou v. Turkey* (dec.), no. 45653/99, 3 June 2008.

43. *Solomou and Others v. Turkey*, no. 36832/97, 24 June 2008.

Grand Chamber assessment of that case-law, see *Georgia v. Russia (II)*⁴⁴). While the Court noted that this case-law concerned the actions of the respondent States' armed forces on or close to their borders, it stressed the following:

130. ... [I]n the view of the Court, the principle that a State exercises extraterritorial jurisdiction in cases concerning specific acts involving an element of proximity should apply with equal force in cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State outside of the context of a military operation. This approach is consistent with the wording of Article 15 § 2 of the Convention which allows for no derogations from Article 2, except in respect of deaths resulting from lawful acts of war.

On the facts of the case, the Court first examined whether the assassination of Mr Litvinenko amounted to the exercise of physical power and control over his life in a situation of proximate targeting. The Court found this to be the case: it established that the assassination had been carried out by A.L. and D.K. following a planned and complex operation aimed at the assassination of Mr Litvinenko. The Court next examined whether A.L. and D.K. had acted as State agents. Noting the existence of prima facie evidence of State involvement, which the respondent Government had failed to displace, the Court found that A.L. and D.K. had acted as State agents and the act complained of was thus attributable to Russia. As the Government had not sought to argue that the killing of Mr Litvinenko could be justified by reference to any of the exceptions in the second paragraph of Article 2, the Court found that there had been a violation of the substantive limb of that provision.

Effective investigation⁴⁵

*Hanan v. Germany*⁴⁶ concerned the existence of a "jurisdictional link" and the procedural obligation under Article 2 to investigate an airstrike (UN Security Council multinational military operation), and any impact of international humanitarian law (IHL) on the requirements of an effective investigation of deaths during extraterritorial active hostilities.

44. *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 120-24 and 131-35, 21 January 2021.

45. See also, under Article 33 (Inter-State cases) below, *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021, and, under Article 2 (Right to life) above, *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final).

46. *Hanan v. Germany* [GC], no. 4871/16, 16 February 2021. See also under Article 1 (Jurisdiction of States) above.

On 4 September 2009 a German Colonel K (acting in an International Security Assistance Force (ISAF) under a mandate given under Chapter VII of the UN Charter), ordered an airstrike against two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan, killing and injuring both insurgents and civilians. A German prosecutor began and then discontinued an investigation on the basis of a lack of grounds for the criminal liability of Colonel K (or the Staff Sergeant assisting): liability under the Code of Crimes against International Law was excluded because Colonel K. did not have the necessary intent; and liability under the Criminal Code was excluded because the lawfulness of the airstrike under international law served as an exculpatory defence. The applicant complained under Article 2 about a lack of an effective investigation into the airstrike that killed, inter alios, his two sons and that he had not had an effective remedy to challenge the decision to discontinue the investigation. The Grand Chamber found that there were “special features” triggering the existence of a “jurisdictional link” in relation to the procedural obligation to investigate under Article 2 and, on the merits, found no violation of Article 2 since the investigation had complied with the requirements of that Article.

The Grand Chamber judgment is noteworthy in two respects. It develops the “jurisdictional link” case-law as regards the obligation to investigate under Article 2 as regards deaths occurring during active hostilities in an extraterritorial armed conflict. In addition, it clarifies the requirements of such an investigation where the Government invoke IHL as the *lex specialis* before the Court.

(i) The Grand Chamber first examined the existence of a “jurisdictional link”, in relation to the Article 2 obligation to investigate, for the purposes of Article 1 on the basis of the principles set out in *Güzelyurtlu and Others v. Cyprus and Turkey*⁴⁷.

(ii) Since there was no substantive normative conflict in respect of the requirements of an effective investigation under the applicable rules of IHL and under Article 2 of the Convention (see also *Georgia v. Russia (II)*⁴⁸), the Grand Chamber did not have to address whether the requirements, allowing it to take account of the context and rules of IHL when interpreting and applying the Convention in the absence of a formal derogation under Article 15, were met and it confined itself to an analysis of compliance with its case-law under Article 2. In this regard, the Grand Chamber considered that the challenges for and constraints on the investigation authorities, given that the deaths

47. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 188-90, 29 January 2019.

48. *Georgia v. Russia (II)* [GC], no. 38263/08, § 325, 21 January 2021.

occurred during active hostilities in an (extraterritorial) armed conflict, affected the investigation as a whole so that the standards to be applied to the investigation conducted by the civilian prosecution authorities in Germany should be guided by those established in respect of investigations into deaths in an extraterritorial armed conflict (*Al-Skeini and Others v. the United Kingdom*⁴⁹, and *Jaloud v. the Netherlands*⁵⁰). On the facts of the case, the Grand Chamber found that the investigation by the German authorities complied with these requirements. The cause of death of the applicant's sons and the person(s) responsible for it, were known and the facts surrounding the airstrike, including the decision-making and target verification process, had been established in a thorough and reliable manner to determine the legality of the use of force. The Federal Prosecutor General's assessment of Colonel K.'s potential criminal liability was primarily based on Colonel K.'s subjective assessment at the time of ordering the airstrike and his account (he had operated on the assumption that no civilians were present) was credible and corroborated by evidence that had been immediately secured and could not be tampered with (audio recordings of the relevant radio traffic and thermal images from infrared cameras). Lastly, since the Federal Constitutional Court, which had expressly found that the Federal Prosecutor General's investigation had complied with the standards of Article 2, would have been able to set aside the discontinuation decision, the Grand Chamber considered that the applicant had at his disposal a remedy to challenge the effectiveness of the investigation.

Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)⁵¹

Inhuman or degrading treatment

*Bivolaru and Moldovan v. France*⁵² concerned the surrender of the applicants under European arrest warrants, the Bosphorus presumption of equivalent protection and a systemic problem of conditions of detention in the State which issued the arrest warrants.

The Romanian authorities issued European arrest warrants (EAWs) in respect of each of the applicants, who were in France at the material

49. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 163-67, ECHR 2011.

50. *Jaloud v. the Netherlands* [GC], no. 47708/08, § 186, ECHR 2014.

51. See, under Article 8 (Private life) below, *F.O. v. Croatia*, no. 29555/13, 22 April 2021, and Article 8 (Positive obligations) below, *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021.

52. *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, 25 March 2021.

time, so that they would serve their custodial sentences in Romania. The applicants unsuccessfully argued before the French courts that their surrender would breach Article 3 of the Convention. They were subsequently surrendered to Romania. The Court found a violation of Article 3 in respect of one applicant (Mr Moldovan), finding that the French authorities had had sufficient evidence before them that there was a real risk that he would be exposed to inhuman and degrading treatment because of the detention conditions he would face in Romania, and no violation of Article 3 in respect of the other applicant.

The judgment is noteworthy for two reasons. In the first place, the Court found that the presumption of equivalent protection in the legal system of the European Union applied to the surrender of the applicants in execution of EAWs (developing thereby its case-law on the margin of manoeuvre open to States), and it also found for the first time that presumption to have been rebutted because the protection of Convention rights was considered to have been manifestly deficient in the particular circumstances of one of the applicant's case. Secondly, the case is interesting in that it addresses how an executing judicial authority is to approach the assessment of an individualised real risk of treatment contrary to Article 3 in the case of a systemic problem (conditions of detention) in the State issuing the EAW as well as the corresponding obligation on an applicant to substantiate such risk.

(i) The Court first examined whether the presumption of equivalent protection in the legal system of the European Union (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*⁵³, and *Avotiņš v. Latvia*⁵⁴) applied in this context. The application of that presumption is subject to two conditions: the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. In respect of the first condition, the Court noted that the case-law of the Court of Justice of the European Union (CJEU) on the execution of EAWs (see *Aranyosi and Căldăraru*⁵⁵) authorised the executing judicial authority, in exceptional circumstances, to derogate from the principles of mutual trust and mutual recognition and to postpone or even refuse the execution of a EAW. The Court also noted the convergence – as regards the establishment by the executing judicial authority of a real

53. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

54. *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016.

55. Judgment of the Court of Justice of the European Union of 5 April 2016 in *Aranyosi and Căldăraru*, C-404/15 and C-659/15, ECLI:EU:C:2016:198.

and individual risk – of the requirements laid down by the CJEU and by its own case-law on Article 3. While the French courts therefore had a power of appreciation (to refuse to execute the EAW in the event of their finding such a real and individual risk of treatment contrary to Article 3), this power was exercised within the framework strictly defined by CJEU case-law to ensure the execution of a legal obligation in full compliance with EU law. In these circumstances, the Court found that the executing judicial authority could not be regarded as having had an autonomous margin of manoeuvre, which could lead to the non-application of the presumption of equivalent protection. Since the second condition was also satisfied (there was no serious difficulty which could have made necessary a request to the CJEU for a preliminary ruling), the presumption of equivalent protection applied in the present case.

(ii) As to whether that presumption had been rebutted because the protection of Convention rights was manifestly deficient in the particular circumstances of the case, the Court examined whether the executing judicial authority had had sufficient factual information before it to find that the execution of the EAW would entail a real and individual risk that the applicants would be exposed to treatment contrary to Article 3 in view of the conditions of their detention in Romania.

(a) The Court noted that Mr Moldovan had submitted serious and precise evidence attesting to systemic or generalised deficiencies in the detention conditions in the issuing State, including in Gherla Prison, where the Romanian authorities envisaged his imprisonment. In view of the evidence produced by the applicant, the executing judicial authority requested supplementary information from the issuing judicial authority in Romania regarding the foreseen detention conditions of the applicant to assess whether there was a real risk that he would be exposed to inhuman and degrading treatment. Upon receipt of that information, the French executing judicial authority held that there was no real risk of an Article 3 violation in the applicant's case.

However, the Court considered that the executing judicial authority had had sufficient factual information to recognise the existence of a real risk that the applicant would be exposed to inhuman and degrading treatment because of the conditions of his detention in Romania. In the first place, the Court found that the information provided by the Romanian authorities had not been sufficiently considered in the light of this Court's case-law concerning the endemic overcrowding of, and insufficient personal space in, Gherla Prison (for example,

*Axinte v. Romania*⁵⁶, delivered prior to the applicants' surrender, and the pilot judgment in *Rezmiveş and Others v. Romania*⁵⁷, delivered after). The executing judicial authority had had information relating to the personal space reserved for the applicant that gave rise to a strong presumption of a violation of Article 3. Secondly, the Romanian authorities' commitments in relation to other aspects of the conditions in Gherla Prison (which would have been capable of excluding a real risk of an Article 3 violation) had been formulated in a stereotypical manner and these commitments had not been taken into account in the risk assessment. Thirdly, the recommendation by the executing judicial authority that he be detained in a prison offering identical or better conditions (the Romanian authorities had not ruled out that the applicant would be detained in a prison other than Gherla), was not sufficient to rule out a real risk of inhuman and degrading treatment: it did not allow for a risk assessment in respect of a specific prison and the evidence attested to systemic deficiencies as regards the conditions of detention in prisons in the receiving State. The Court therefore found that the presumption of equivalent protection had been rebutted in Mr Moldovan's case because the protection of Convention rights was manifestly deficient in the particular circumstances of his case. It concluded that there had been a violation of Article 3 in respect of him.

(b) By contrast, the Court found that Mr Bivolaru had not made sufficiently detailed and substantiated submissions before the executing judicial authority about the detention conditions he would face in Romania in the event of his surrender. In such circumstances, it was not incumbent on the executing judicial authority to request supplementary information from the Romanian authorities in order to identify whether he would have faced a relevant real and individual risk of treatment contrary to Article 3 because of the conditions of his detention. The Court concluded that the executing judicial authority did not have a solid factual basis to determine that there was a real risk of a violation of Article 3 as regards Mr Bivolaru or, therefore, to refuse to execute the warrant on that basis. There had, therefore, been no violation of Article 3 in relation to this applicant.

56. *Axinte v. Romania*, no. 24044/12, 22 April 2014.

57. *Rezmiveş and Others v. Romania*, nos. 61467/12 and 3 others, 25 April 2017.

In its decision in *Zambrano v. France*⁵⁸, the Court examined the French laws on the management of the public-health crisis caused by the COVID-19 pandemic, and in particular the introduction of a “health pass”.

The health pass is required of adults wishing to make certain journeys or to access certain premises, establishments, services or events, and for the staff working in these premises. Penalties may be imposed on the public for failure to present a health pass or for fraudulent use of a pass, and on the business owners and staff responsible for checking health passes should they fail to comply with this requirement. Vaccination against COVID-19 was also made compulsory, except where there was a recognised medical contraindication, for persons working in the health and social-care sectors.

The applicant, a university lecturer, set up a movement to protest against the health pass, which he considered to be in violation, primarily, of Articles 3, 8 and 14 of the Convention.

In its decision declaring the application inadmissible, the Court addressed the applicant’s argument that the health-pass system breached Article 3 of the Convention in that it was intended primarily to coerce individuals into consenting to vaccination.

In the Court’s opinion, the applicant had not shown that any coercion had been exercised on him (an individual who did not wish to be vaccinated) likely to come within the scope of this provision. The contested laws did not impose any general obligation to be vaccinated. In addition, the applicant had not submitted evidence that he worked in one of the specific occupations subject to compulsory vaccination under Law no. 2021-1040⁵⁹. Nor did this Law impose vaccination on persons wishing to undertake certain journeys or to be able to access certain premises, venues, services or events. On the contrary, it specifically provided for the possibility of showing the document of one’s choice from three options: a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate showing recovery from COVID-19. Lastly, the Law also envisaged the option of obtaining a document indicating a medical contraindication to vaccination.

58. *Zambrano v. France* (dec.), no. 41994/21, 21 September 2021. See also under Article 35 § 3 (a) (Abuse of the right of application) above.

59. See, in this connection, *Thevenon v. France*, no. 46061/21, application communicated on 7 October 2021.

Positive obligations

*X and Others v. Bulgaria*⁶⁰ concerned the States' positive obligations as regards allegations of sexual abuse of minors in public care, and their procedural obligations which are to be interpreted in the light of the Lanzarote Convention.

The applicants, three siblings born in Bulgaria, were adopted by an Italian couple. Shortly thereafter the children gave accounts to their adoptive parents of their sexual abuse while in an orphanage in Bulgaria. The parents lodged complaints with the Italian authorities who transmitted them to the Bulgarian authorities. They also contacted an Italian investigative journalist, who published an Article alleging large-scale sexual abuse of children in the orphanage which received media attention in Bulgaria. Investigations were opened in Bulgaria: all were discontinued for lack of evidence that a criminal offence had been committed. The Grand Chamber considered that the complaints should be examined under Article 3 of the Convention only and it went on to find no violation of the substantive limb of this provision and a violation of its procedural (investigation) limb.

This Grand Chamber judgment is noteworthy because it clarifies the content of the positive obligations on a State in the context of sexual abuse of minors in public care.

(i) As to the positive obligations under the substantive limb of Article 3, the Grand Chamber, relying on *O'Keeffe v. Ireland*⁶¹ and *Nencheva and Others v. Bulgaria*⁶² (an Article 2 case), reiterated that States had a heightened duty of protection towards children placed in public care, as they were in a particularly vulnerable situation. In this respect, the judgment makes a clear distinction between, on the one hand, an obligation to put in place a legislative and regulatory framework of protection and, on the other, an obligation to take operational measures to protect specific individuals, in certain well-defined circumstances, against a risk of ill-treatment. In the instant case:

The manner in which the *regulatory framework* (including relevant criminal-law provisions, as well as reporting and detection mechanisms) had been implemented did not give rise to a violation of Article 3. In particular, and importantly, no systemic issue concerning the sexual abuse of young children in residential facilities had been established, such as to require more stringent measures on the part of the authorities.

60. *X and Others v. Bulgaria* [GC], no. 22457/16, 2 February 2021.

61. *O'Keeffe v. Ireland* [GC], no. 35810/09, ECHR 2014 (extracts).

62. *Nencheva and Others v. Bulgaria*, no. 48609/06, 18 June 2013.

Since the applicants had been placed in the sole charge of the public authorities, the obligation on the latter to take preventive operational measures was heightened and required them to exercise particular vigilance. However, having applied the test set out in *Osman v. the United Kingdom*⁶³, the Grand Chamber found that its first limb was not established: there was insufficient information to find that the Bulgarian authorities had known, or ought to have known, of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to the above obligation to protect them against such a risk.

(ii) As regards the procedural obligation under Article 3 to carry out an effective investigation into arguable allegations of child sexual abuse, the Grand Chamber made two key clarifications concerning its scope and content:

In the first place, such a procedural obligation must be interpreted in the light of obligations arising from applicable international instruments and, more specifically, the *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (“Lanzarote Convention”).

Secondly, by analogy with its case-law under Article 2 (*Güzelyurtlu and Others v. Cyprus and Turkey*⁶⁴), and referring to the Lanzarote Convention, the Grand Chamber considered the duty to cooperate with the authorities of another State to be a component of the procedural obligation under Article 3 in abuse cases with a transnational context such as the present one.

From this standpoint, the Grand Chamber considered that the Bulgarian investigating authorities – who had not made use of the available investigation and international cooperation mechanisms – had not taken all reasonable measures to shed light on the facts and had not undertaken a full and careful analysis of the evidence before them. In particular and *inter alia*:

- They had not attempted to contact the applicants’ (adoptive) parents in order to provide them with the necessary information and support in good time, so as to enable them to take an active part in the various proceedings;
- The interviews with other children from the orphanage had not always been adapted to their age and maturity and had not been video-recorded;
- The Bulgarian authorities had failed to assess the need to request interviews with the applicants and their parents. In this connection, they

63. *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII.

64. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

could have put measures in place to assist and support the applicants in their dual capacity as victims and witnesses, and could have travelled to Italy in the context of mutual legal assistance or requested the Italian authorities to interview the applicants again. Even if they had not sought to interview the applicants directly, they could at least have requested from their Italian counterparts the video-recordings of the applicants' accounts for the purpose of assessing their credibility. The various psychologists who had spoken with the applicants in Italy would also have been in a position to have provided relevant information;

- Similarly, the Bulgarian authorities could, again in the context of international judicial cooperation, have requested that the applicants undergo a medical examination;

- The Bulgarian authorities had not attempted to interview all the children named by the applicants who had allegedly either been victims of abuse, or committed abuse, some of which amounted to ill-treatment and thus was covered by the procedural obligation to shed light on those alleged facts;

- The authorities had also failed to consider progressive and proportionate implementation of investigative measures of a more covert nature, such as surveillance of the orphanage perimeter, telephone tapping or the interception of telephone and electronic messages, as well as the use of undercover agents;

- Despite allegations that a photographer had produced images, the investigators had not considered searching his studio and seizing the media on which they might have been stored.

In sum, the omissions observed were sufficiently serious for the Grand Chamber to consider that the investigation had not been effective for the purposes of Article 3, interpreted in the light of other applicable international instruments and, in particular, the Lanzarote Convention.

An amnesty and the ineffective execution of a sentence for the offence of sexual abuse were examined in *E.G. v. the Republic of Moldova*⁶⁵.

The applicant was the victim of sexual abuse by three individuals. In December 2009 the three assailants (who were at large during the criminal proceedings) were convicted by a court of appeal and sentenced to imprisonment. After sentencing, two of them were immediately arrested and detained. In May 2010 the authorities issued a search warrant concerning the third one (V.B.). While at large, V.B. asked

65. *E.G. v. the Republic of Moldova*, no. 37882/13, 13 April 2021. See also under Article 35 § 1 (Six-month period) above and Article 8 (Positive obligations) below.

(through his lawyer) to be exonerated from the sentence in application of the Amnesty Act 2008. His request was initially dismissed at first-instance (as had the request of one of the other assailants been) but the court of appeal subsequently (in May 2012) accepted his appeal and granted an amnesty. The amnesty was subsequently quashed and granted again in several decisions. In the meantime, V.B. had been arrested but was released on the basis of the decision of the court of appeal of May 2012. Finally, on 18 November 2013 a decision dismissing V.B.'s amnesty request was adopted and at the end of January 2014 the prosecutor informed the police that V.B.'s amnesty had been quashed and requested that he be located. However, it was later found that, on 16 November 2013, V.B. had left the country for Ukraine. Despite an international arrest warrant (issued in 2015), he has not been located to this day. Relying on Articles 3 and 8, the applicant complained about the authorities' decision to grant an amnesty to V.B. and about their failure to effectively execute V.B.'s sentence of imprisonment. The Court found a violation of Articles 3 and 8 of the Convention.

The judgment is noteworthy because it clarifies the Court's case-law regarding: (i) compliance with the six-month time-limit in the context of this continuous situation; (ii) the application of an amnesty in a private violence context; and (iii) the procedural obligation to execute a criminal sentence in this context.

(i) As to applying the six-month time-limit, in the present case, in response to the Government's argument that the applicant should have lodged her application within six months of the decision granting the amnesty in May 2012, the Court noted that the central tenet of her complaints under Articles 3 and 8 concerned the *de facto* impunity enjoyed by V.B. for the crime of sexual violence against her. The specific shortcomings identified by her in this regard (the application of an allegedly unlawful amnesty and the later inactivity of the authorities as regards searching for V.B.) were inextricably linked, which meant that the entire period of non-enforcement of the criminal sanction could be viewed as a whole for the purposes of the six-month rule. Nothing suggesting to the Court that the execution of V.B.'s sentence during the relevant domestic proceedings had become unrealistic, the Court dismissed the Government's objection.

(ii) With respect to the application of an amnesty, the Court referred to its case-law developed in the context of ill-treatment by State agents, according to which amnesties and pardons should not

be tolerated (*Mocanu and Others v. Romania*⁶⁶), which the Court had already applied in a private party context, in so far as the treatment complained of reaches the threshold under Article 3 (*Pulfer v. Albania*⁶⁷). However, the Court also reiterated that pardons and amnesties are primarily matters of the domestic law of States and are, in principle, not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights (*Marguš v. Croatia*⁶⁸, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*⁶⁹).

In the present case, the Court considered that the sexual abuse of the applicant amounted to a grave breach of her physical and moral integrity so that the grant of the amnesty to V.B. was susceptible of running counter to the State's obligations under Articles 3 and 8 of the Convention, under which the present case fell to be examined (see also, for instance, *Y v. Bulgaria*⁷⁰). In this connection, the Court observed that there was a lack of consistency by the domestic courts in their application of amnesties under the 2008 Act: an amnesty had not been granted to another assailant of the applicant who was in a similar situation to V.B. The Court also noted that, while the amnesty had been annulled in the end, the fact that V.B. had benefited from an amnesty for a year and then used the opportunity to escape was contrary to the State's procedural obligation under Articles 3 and 8 of the Convention.

(iii) As regards the duty to execute a criminal sentence, the Court referred to its case-law under Article 2 according to which the enforcement of a sentence imposed must be regarded as an integral part of the State's procedural obligation (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*⁷¹; *Akeliėnė v. Lithuania*⁷²; and *Makuchyan and Minasyan*, cited above, § 50). The Court considered that the same applied in the present context concerning a conviction for sexual abuse falling under Articles 3 and 8 of the Convention.

On the facts, the Court noted that there had been a lack of coordination between the authorities concerning the different decisions granting and annulling V.B.'s amnesty. It also noted significant unjustified delays in the actions (the police search and the international arrest

66. *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts).

67. *Pulfer v. Albania*, no. 31959/13, § 83, 20 November 2018.

68. *Marguš v. Croatia* [GC], no. 4455/10, § 139, ECHR 2014 (extracts).

69. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 160, 26 May 2020.

70. *Y v. Bulgaria*, no. 41990/18, §§ 63-64, 20 February 2020.

71. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, §§ 32-33, 13 October 2016.

72. *Akeliėnė v. Lithuania*, no. 54917/13, § 85, 16 October 2018.

warrant) taken to locate V.B. (see, by contrast, *Akeliéné*, cited above, §§ 91-93). The Court therefore found that the measures taken by the authorities to execute V.B.'s sentence had been inadequate and failed to fulfil the State's procedural obligation under Articles 3 and 8 of the Convention in this context.

Expulsion

*Savran v. Denmark*⁷³ concerned the expulsion of a seriously ill alien and the need to apply the threshold test set out in *Paposhvili v. Belgium*⁷⁴ to ascertain the applicability of Article 3.

The applicant, a Turkish national diagnosed with paranoid schizophrenia, entered Denmark in 1991 (when he was six years old). Although he was convicted of an offence in 2008, the competent court exempted him from punishment because of his mental illness, committed him to forensic psychiatric care and issued an expulsion order (with a permanent ban on re-entry). In 2014 the City Court of Copenhagen held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In 2015 that decision was reversed by the High Court and he was deported to Turkey.

The applicant complained about his expulsion under Articles 3 and 8 of the Convention. The Grand Chamber applied the *Paposhvili* criteria and found no violation of Article 3 since the treatment did not reach the high threshold required for it to fall within the scope of that Article. It found a violation of Article 8.

The Grand Chamber judgment is noteworthy in that the Court reaffirmed the standard and principles concerning Article 3, with regard to the expulsion of seriously ill aliens, as established in *Paposhvili* (cited above), clarifying thereby a number of issues: in the first place, the scope of the application of this standard; secondly, whether it is possible to assess the returning State's compliance with its obligations in this context without first ascertaining, with the help of the threshold test, the applicability of Article 3; thirdly, the relevance of the threshold test in the context of the removal of mentally ill aliens; fourthly, the manner in which this test is to be applied; and, lastly, the nature of the States' obligations in this domain.

(i) Noting that there had been no further development in the relevant case-law since the judgment in *Paposhvili*, the Court confirmed

73. *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021. See also under Article 8 (Expulsion measures) below.

74. *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016.

that it offered a comprehensive standard taking account of all the considerations that were relevant for the purposes of Article 3 of the Convention in this context.

(ii) The Court further clarified that the Paposhvili threshold test should be applied systematically to ascertain whether the circumstances of the alien to be expelled fell within the scope of Article 3 of the Convention, and it reiterated that, for this test to be met, the evidence adduced must be

“capable of demonstrating that there are substantial grounds” for believing that as a “seriously ill person”, the applicant “would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”.

It is only after this high threshold has been met, and thus Article 3 is applicable, that the returning State’s compliance with its obligations under this provision, as set out in *Paposhvili*, can be assessed.

(iii) The Court went on to confirm the relevance of the threshold test in the context of the removal of mentally ill aliens. Indeed, while referring to a “seriously ill person”, the standard does not specify, and thus is not limited to, any specific category of illness and it may extend to any category, including mental illnesses, provided that the situation of the ill person is covered by the Paposhvili criteria taken as a whole. In so far as the test broadly refers to a wider concept of the “irreversibility” of the “decline in [a person’s] state of health”, it is capable of encompassing a multitude of factors, including the direct effects of an illness as well as its more remote consequences. More generally, in the Court’s view, the standard is sufficiently flexible to be applied in all situations involving the removal of a seriously ill person which would constitute treatment proscribed by Article 3, irrespective of the nature of the illness.

(iv) The Court further proceeded to clarify the manner in which the threshold test is to be applied. In particular, the situation of the relevant ill person should be assessed on the basis of all the elements of the test taken together and viewed as a whole. It would indeed be wrong to dissociate its various fragments from each other: a “decline in health” is linked to “intense suffering”.

(v) The Court also emphasised the procedural nature of a State’s obligations in cases involving the expulsion of seriously ill aliens. The Court does not itself examine the applications for international protection or verify how States control the entry, residence and

expulsion of aliens. It is therefore incumbent on the national authorities to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3 of the Convention.

On the facts of the case, the Court found that the applicant's removal to Turkey had not exposed him to a risk reaching the high threshold required for Article 3 to be applicable. Schizophrenia, though a serious mental illness, could not in itself be regarded as sufficient in this regard. While the worsening of his psychotic symptoms was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others", those effects could not be described as "resulting in intense suffering" for the applicant himself. In particular, no risk had been shown of the applicant harming himself.

A duty to carry out a full and *ex nunc* risk assessment in expulsion cases was imposed in the judgment in *K.I. v. France*⁷⁵, which also clarified that the relevant Convention test remained unchanged by EU law.

The applicant, a Russian national of Chechen origin, arrived in France in 2011. In 2013 he was recognised as a refugee by the Office for the Protection of Refugees and Stateless Persons (OFPRA). In 2015 he was convicted of acts of terrorism and sentenced to five years' imprisonment: it was established that he had gone to a combat zone in Syria after being granted refugee status. In 2015 a decision was taken to expel the applicant to the Russian Federation. In 2016 OFPRA revoked his refugee status on the basis of a domestic law which had transposed Article 14 § 4 of [Directive 2011/95/EU](#) ("the Qualification Directive"): given his final conviction for acts of terrorism, he constituted a danger to French society (he had participated in a transnational network linked to the Chechen Islamist movement and had raised funds for fighters in Syria, where he himself had been armed and trained). There followed two separate but concurrent proceedings: one concerning the legal consequences of the revocation and the other assessing risk on expulsion. As regards the revocation of his refugee status, in January 2019 the National Court of Asylum (CNDA) confirmed OFPRA's decision. In his appeal against that decision, the applicant relied on the judgment of the Court of Justice of the European Union of 14 May 2019 in *M v Ministerstvo vnitra and X and X v Commissaire général aux réfugiés et aux apatrides*⁷⁶ which clarified that

75. *K.I. v. France*, no. 5560/19, 15 April 2021.

76. Judgment of the Court of Justice of the European Union of 14 May 2019 in *M v. Ministerstvo vnitra and X and X v. Commissaire général aux réfugiés et aux apatrides*, C-391/16, C-77/17 and

a revocation, pursuant to Article 14 § 4 of the Qualification Directive, of refugee status did not mean that the person concerned was no longer a refugee (“*qualité de réfugié*”) for the purposes of Article 2 (d) of that Directive and Article 1A of the 1951 [Convention relating to the Status of Refugees](#): provided he or she continued to satisfy the material conditions of the definition of refugee, he or she would be entitled to protection against *refoulement*. In July 2020 the *Conseil d’État* rejected that appeal, although it confirmed he was still a refugee (because the CNDA had not applied the exclusion clause contained in Article 1F of the 1951 Geneva Convention). In the meantime, and in the second set of proceedings, an administrative court rejected (May 2019) his appeal against the order for his expulsion to the Russian Federation, finding that he would not run a real risk of treatment contrary to Article 3 in the event of his removal there. That judgment became final.

The applicant complained under Article 3 about his proposed expulsion. The Court considered that the authorities had not sufficiently assessed the risks he alleged he would face in the Russian Federation when they ordered and reviewed his expulsion, and concluded that it would breach Article 3 if he were to be removed without a full and *ex nunc* assessment of the alleged risks.

The judgment is noteworthy because it reaffirms the absolute protection of Article 3 which, despite a changed refugee status and the need of the expelling State to manage security risks associated with convicted terrorists, requires a full and *ex nunc* assessment of real risk on expulsion of treatment contrary to Article 3 in the receiving State. It also addresses the interaction between Article 3 of the Convention, EU law and the 1951 Geneva Convention and, in doing so, clarifies the effect of the above-cited judgment of the CJEU of 14 May 2019.

(i) Reiterating that it was not competent to examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Jeunesse v. the Netherlands*⁷⁷), the Court observed that it had, to date, not ruled on the distinction made in EU and domestic law (the above-cited judgment of the CJEU) between refugee status, on the one hand, and being a refugee (“*qualité de réfugié*”), on the other. It reiterated that neither the Convention nor its Protocols protected, as such, the right to asylum: the Convention protection was confined to the rights enshrined therein, in particular in Article 3. In that respect, the Court embraced the prohibition of *refoulement* under the 1951 Geneva Convention (*N.D. and*

C-78/17, ECLI:EU:C:2019:403.

77. *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014.

*N.T. v. Spain*⁷⁸) and confirmed its well-established case-law principles: the nature of the protection afforded by Article 3 is absolute so that any considerations as to whether an applicant presented a risk to the national security of the respondent State are irrelevant for the examination of whether substantial grounds have been shown for believing that there is a real risk that he or she will face treatment contrary to Article 3 in the receiving State were the expulsion to be implemented (for example, *Saadi v. Italy*⁷⁹; *Auad v. Bulgaria*⁸⁰; and *O.D. v. Bulgaria*⁸¹), with a full and *ex nunc* evaluation being required in that regard.

The present applicant alleged a real risk of ill-treatment on removal to the Russian Federation on two grounds: the grounds which led OFPRA to grant him refugee status (his alleged detention and torture in the Russian Federation because of his family ties with individuals in favour of the Chechen guerrilla and his refusal to collaborate with the authorities) and, in addition, the alleged knowledge of the Russian and Chechen authorities of his criminal conviction in France and his links with a jihadist group in Syria. Noting that the revocation of his refugee status had no bearing on whether he continued to be a refugee, which the *Conseil d'État* had confirmed he continued to be but which the authorities had failed to take into account when ordering and reviewing his removal to the Russian Federation, the Court considered that there had not been an adequate domestic assessment of the risks alleged by the applicant on expulsion and it also noted that the domestic authorities had failed to consider that the applicant had been identified as belonging to a targeted group when he was recognised as a refugee after his arrival in France. The Court concluded that it would breach Article 3 if the applicant were removed without the necessary full and *ex nunc* assessment of all of the risks he alleged he would face in the Russian Federation.

(ii) While this is the first time the Court has adjudicated on the merits of an Article 3 complaint about a removal of a Russian national of Chechen origin who argued that he would run a real risk of treatment contrary to Article 3 on account of his criminal conviction of acts of terrorism in the respondent State, the Court's finding of a violation was exclusively of a procedural nature and it did not therefore exclude the possibility that the French authorities, after a full and *ex nunc* evaluation of all of the circumstances, could come to the conclusion that the

78. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 188, 13 February 2020.

79. *Saadi v. Italy* [GC], no. 37201/06, §§ 140-41, ECHR 2008.

80. *Auad v. Bulgaria*, no. 46390/10, §§ 100-01, 11 October 2011.

81. *O.D. v. Bulgaria*, no. 34016/18, §§ 46-47, 10 October 2019.

applicant would not run a real risk of treatment contrary to Article 3 in the event of his removal to the Russian Federation.

Prohibition of slavery and forced labour (Article 4)

Positive obligations

*V.C.L. and A.N. v. the United Kingdom*⁸² concerned the positive obligation to protect victims of trafficking (Article 4) and the impact on the fair trial of such victims (Article 6 § 1).

The applications were lodged by two Vietnamese men who, while still minors, were charged with – and subsequently pleaded guilty to – drug-related offences after they were discovered working as gardeners in cannabis factories in the United Kingdom. Following their convictions, they were recognised as victims of trafficking by the designated competent authority responsible for making decisions on whether a person has been trafficked for the purpose of exploitation: this authority identifies potential victims of modern slavery and ensures they receive the appropriate support. Although the prosecution service subsequently reviewed its decision to prosecute as a result of the authority's decision, it concluded that they were not victims of trafficking. The Court of Appeal subsequently considered whether the decision to prosecute was an abuse of process but found on the facts that the decision to prosecute had been justified. The applicants complained about their convictions under Articles 4 and 6 of the Convention and the Court found violations of both provisions.

The judgment is noteworthy because the Court for the first time: (i) elaborated on the question whether, and in what circumstances, the prosecution of a victim, or potential victim, of trafficking raises an issue from the perspective of the States' positive obligations under Article 4 of the Convention; and (ii) whether, in this context, a breach of the State's positive obligation under Article 4 could amount to the denial of a fair trial within the meaning of Article 6 § 1 of the Convention.

(i) As to the State's positive obligation under Article 4 of the Convention, the Court reiterated that this obligation must be construed in the light of the [Council of Europe Convention on Action against Trafficking in Human Beings](#) ("the Anti-Trafficking Convention") and the manner in which it has been interpreted by the Group of Experts on

82. *V.C.L. and A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, 16 February 2021. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Fairness of the proceedings) below.

Action against Trafficking in Human Beings (GRETA). In this connection, the Court had regard, in particular, to Article 26 of the Anti-Trafficking Convention, which requires Contracting States to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to act as they did.

Against this background, the Court held that the prosecution of victims, or potential victims, of trafficking might, in certain circumstances, be at odds with the State's duty under Article 4 to take operational measures to protect them. The Court therefore stressed that the early identification of victims or potential victims of human trafficking was of paramount importance. In particular, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking. That assessment should be based on the criteria identified in the United Nations [Palermo Protocol](#) and the Anti-Trafficking Convention.

The Court also stressed that, given that an individual's status as a victim of trafficking might affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – in so far as possible – only be taken once a trafficking assessment has been carried out by a qualified person. Any subsequent prosecutorial decision would have to take that assessment into account. While the Court accepted that the prosecutor might not be bound by the findings made in the course of such a trafficking assessment (see *S.M. v. Croatia*⁸³, concerning the distinction between an administrative and criminal justice recognition of such victim status), he or she would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.

On the facts of the cases, the Court found that despite the applicants being discovered in circumstances which indicated that they had been victims of trafficking, they had been charged with a criminal offence to which they pleaded guilty on the advice of their legal representatives, without their case first being assessed by the competent authority. Even though they were subsequently recognised by the competent

83. *S.M. v. Croatia* [GC], no. 60561/14, § 322, 25 June 2020.

authority as victims of trafficking, the prosecution service, without providing adequate reasons for its decision, disagreed with that assessment and the Court of Appeal, relying on the same inadequate reasons, found that the decision to prosecute was justified. The Court considered this to be contrary to the State's duty under Article 4 to take operational measures to protect the applicants, either initially as potential victims of trafficking or subsequently as persons recognised by the competent authority as being victims of trafficking.

(ii) With respect to the fair trial issue under Article 6 § 1 of the Convention, the Court considered that the proceedings as a whole had been unfair, in breach of Article 6 § 1 of the Convention.

Right to liberty and security (Article 5)⁸⁴

Deprivation of liberty (Article 5 § 1)

The decision in *Terheş v. Romania*⁸⁵ concerned whether Article 5 § 1 is applicable to a general lockdown imposed by the national authorities in the context of a pandemic.

On account of the COVID-19 pandemic, a state of emergency on public-health grounds was put in place throughout Romania. Citizens were prohibited from leaving their homes, on pain of a fine, except in exhaustively listed circumstances and with a document attesting to valid reasons. The applicant, who stated that he had not been infected with or in contact with the virus, complained under Article 5 § 1 (e) of the Convention that the fifty-two-day lockdown to which he had been subjected in these conditions amounted to a "deprivation of liberty". The Court held that Article 5 § 1 was not applicable and that there was thus no need to examine whether the measure in question had been justified under sub-paragraph (e) of that provision. It found that the degree of intensity of the restrictions on the applicant's freedom of movement had not been such that the general lockdown could be regarded as a deprivation of liberty.

The decision is noteworthy as this is the first time that the Court has examined the applicability of Article 5 to the ordering of a national lockdown on public-health grounds. The decision was delivered five months after the lodging of the application, with the COVID-19 pandemic still ongoing. The Court acknowledged that the pandemic

84. See also, under Article 2 (Obligation to protect life) above, *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021.

85. *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021.

was liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an “exceptional and unforeseeable context”.

The decision is of interest in that it applies the general case-law principles (*Austin and Others v. the United Kingdom*⁸⁶ and *De Tommaso v. Italy*⁸⁷) to the unprecedented context of this pandemic and to the specific circumstances of the case. It sets out considerations leading to the finding that the level of restrictions imposed on citizens’ freedom of movement did not amount to a “deprivation of liberty” within the meaning of the Convention.

In the present case the Court noted, firstly, that the measure had been a general one applicable to everyone in the country. Secondly, the applicant had been free to leave home for various reasons expressly set out in the legislation and could go to different places, at whatever time of day the situation required. Thirdly, he had not been subject to individual surveillance by the authorities and did not claim to have been forced to live in a cramped space, nor had he been deprived of all social contact. Hence the conditions of the lockdown could not be equated with house arrest amounting to a “deprivation of liberty” for the purposes of the Court’s case-law. The Court also stressed the fact that the applicant had not claimed that, owing to the exhaustive list of reasons for leaving home provided for by the legislation, he had been confined to his home for the entire duration of the state of emergency. The application was therefore declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention.

The Court added that, in the context of the COVID-19 pandemic, Romania had announced its intention to derogate under Article 15 of the Convention from the obligations flowing from Article 2 of Protocol No. 4 guaranteeing freedom of movement, a right which the applicant had not asserted before the Court. Given that Article 5 § 1 was not applicable in the present case, the Court also considered it unnecessary to examine the validity of the derogation notified to the Council of Europe by Romania (see the [notifications by member States under Article 15 of the Convention in the context of the COVID-19 pandemic](#)).

86. *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, ECHR 2012.

87. *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017.

Confinement in psychiatric hospital without consent (Article 5 § 1 (e))

The judgment in *Denis and Irvine v. Belgium*⁸⁸ pertained to the link between the offences committed by persons “of unsound mind” and the lawfulness of their ensuing compulsory confinement.

After committing, respectively, the offences of theft and attempted aggravated burglary, the applicants were found to lack criminal responsibility and placed in compulsory confinement on account of their mental disorders. In 2016 a new law, the Compulsory Confinement Act, came into force, reserving compulsory confinement to the most serious categories of offences involving an assault on the “physical or mental integrity” of third parties. The applicants applied for final discharge arguing that the acts they had committed no longer fulfilled the conditions for confinement under the new law. Their applications were dismissed on the grounds that their mental disorders were not sufficiently stabilised and that they had not completed the three-year probationary period prescribed by the new law in order to benefit from final discharge.

The Grand Chamber found no violation of Article 5 §§ 1 (e) and 4.

The judgment is noteworthy in that the Grand Chamber clarified two issues with regard to the compulsory confinement of offenders with mental disorders. In the first place, the Court elucidated the link between the offences committed by persons “of unsound mind” and the lawfulness of their ensuing detention under Article 5 § 1 (e). Secondly, the Court indicated whether the requirement to complete a probationary period as a condition for discharge from compulsory confinement can in itself thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it is proved unlawful.

In order to resolve the question whether the lawfulness of the applicants’ detention, based on final court orders, was affected by the intervening change in legislation whereby the specific acts which had led to their confinement no longer gave rise to the imposition of such a measure, the Court proceeded using a two-step approach.

In the first place, it analysed the manner in which the domestic courts had applied the new legislation in the applicants’ cases and found that their approach, consistent with the legislature’s intention as shown in the drafting history of the new law, was neither arbitrary nor manifestly unreasonable. Noting the two successive phases in the Belgian system of compulsory confinement (imposition and enforcement), the new legislation was considered to apply only to the enforcement phase,

88. *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, 1 June 2021. See also under Article 5 § 4 (Review of lawfulness of detention) below.

during which the detainees could request a change in practical arrangements or their discharge. Given that the applicants had not been granted final discharge, their confinement continued to be validly based on the court orders which, though issued under the previous legislation, maintained their binding force.

Secondly, the Court examined the compatibility of the domestic court's approach with Article 5 § 1 (e). It began by observing that this provision does not specify the possible acts, punishable under criminal law, for which an individual may be detained as being "of unsound mind". Nor does it identify the commission of a previous offence as a precondition for detention. Compulsory confinement was a security measure, the purpose of which was preventive rather than punitive.

The Court proceeded to find that all three of the minimum conditions for an individual to be validly detained as being of "unsound mind" (set out in *Winterwerp v. the Netherlands*⁸⁹) had been satisfied in the present case: it had been reliably shown that the applicants were of unsound mind; that their mental disorders were of a kind or degree warranting compulsory confinement; and that the disorders persisted throughout the entire period of the confinement. As to this third and last condition, the Court reiterated that the assessment carried out by the domestic courts had to take into account any changes to the mental condition of the detainee following the adoption of the compulsory-confinement order and it did not require the authorities to take into account the nature of the acts committed by the individual concerned which had given rise to his or her compulsory confinement. In assessing the applicants' requests for final discharge, the competent authorities had considered whether their mental disorders had stabilised to a sufficient degree (and found they had not) and they did not take into account the nature of the punishable acts the applicants had committed. Accordingly, the applicants' confinement continued to have a valid legal basis, despite the legislative change in question, and was compatible with Article 5 § 1 (e) of the Convention.

Review of lawfulness of detention (Article 5 § 4)

The judgment in *Denis and Irvine v. Belgium*⁹⁰ pertained to the link between the offences committed by persons "of unsound mind" and the lawfulness of their ensuing compulsory confinement under Article 5 §§ 1 (e) and 4 (for the facts, see Article 5 § 1 (e) above).

89. *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33.

90. *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, 1 June 2021. See also under Article 5 § 1 (e) (Confinement in psychiatric hospital without consent) above.

The Grand Chamber found no violation of Article 5 § 4.

The judgment is noteworthy in that the Grand Chamber clarified, with regard to the compulsory confinement of offenders with mental disorders, whether the requirement to complete a probationary period as a condition for discharge from compulsory confinement can *in itself* thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it is proved unlawful.

Under the new law, final discharge could only be granted under two cumulative conditions: the completion of a three-year probationary period; and the mental disorder having sufficiently stabilised to ensure that it could no longer reasonably be feared that the person placed in confinement would commit fresh offences causing harm to, or threatening the physical or mental integrity of, third parties.

While the probationary-period requirement could, in principle, run counter to Article 5 § 4, the Court did not, however, consider it *in abstracto* and limited itself to verifying whether the manner in which the new law had been applied in the particular circumstances of the case complied with the Convention. In that regard, the probation condition had not been decisive since the applicants' state of mental health had not improved sufficiently to qualify for a discharge. Finding no breach of Article 5 § 4, the Court welcomed the fact that, in the meantime, the Court of Cassation had interpreted that condition in the light of Article 5 §§ 1 and 4, ruling that an individual who was no longer dangerous had to be granted final discharge, even if the three-year probationary period had not yet been completed.

PROCEDURAL RIGHTS

Right to a fair hearing in criminal proceedings (Article 6 § 1)⁹¹

Fairness of the proceedings

*V.C.L. and A.N. v. the United Kingdom*⁹² concerned the impact of the positive obligation (Article 4) to protect victims of trafficking on the fair trial of such victims (Article 6 § 1).

91. See also, under Article 37 (Striking out/restoring applications) below, *Willems and Gorjon v. Belgium*, nos. 74209/16 and 3 others, 21 September 2021, and, under Article 4 of Protocol No. 4 (Right not to be tried or punished twice) below, *Galović v. Croatia*, no. 45512/11, 31 August 2021.

92. *V.C.L. and A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, 16 February 2021. See also under Article 4 (Positive obligations) above.

The applications were lodged by two Vietnamese men who, while still minors, were charged with – and subsequently pleaded guilty to – drug-related offences after they were discovered working as gardeners in cannabis factories in the United Kingdom. Following their convictions they were recognised as victims of trafficking by the designated competent authority. Although the prosecution service subsequently reviewed its decision to prosecute as a result of the authority's decision, it concluded that they were not victims of trafficking. The Court of Appeal subsequently found on the facts that the decision to prosecute had been justified. The Court found violations of Articles 4 and 6 of the Convention.

The judgment is noteworthy because the Court elaborated for the first time on the question whether a breach of the State's positive obligation under Article 4 of the Convention could amount to the denial of a fair trial within the meaning of Article 6 § 1.

The Court considered that there had been a breach of the State's duty under Article 4 to take operational measures to protect the applicants, either initially as a potential victims of trafficking or subsequently as persons recognised by the competent authority as being victims of trafficking.

With respect to the fair trial issue under Article 6 § 1 of the Convention, the Court considered the following three questions: (a) did the failure to assess whether the applicants were victims of trafficking before they were charged and convicted of drug-related offences raise any issue under Article 6 § 1; (b) did the applicants waive their rights under that Article by pleading guilty; and (c) were the proceedings as a whole fair.

As to the first question, the Court stressed that evidence concerning an accused's status as a victim of trafficking should be considered as a "fundamental aspect" of the defence which he or she should be able to secure without restriction. In this connection, despite the passivity of the applicants' representatives who did not raise the issue of their status as victims of trafficking, the Court referred to the positive obligation on the State under Article 4 to investigate situations of potential trafficking. Accordingly, relying on its findings under Article 4, the Court considered that the lack of a proper assessment of the applicants' status as victims of trafficking prevented the authorities from securing evidence which may have constituted a fundamental aspect of their defence.

As regards the second question, the Court found, in particular, that in the absence of any assessment of whether the applicants were trafficked and, if so, of whether that fact could have had any impact on

their criminal liability, those pleas were not made “in full awareness of the facts”. Moreover, in such circumstances, any waiver of rights by the applicants would have run counter to the important public interest in combating trafficking and protecting its victims. The Court therefore did not accept that the applicants’ guilty pleas amounted to a waiver of their rights under Article 6 § 1.

Lastly, as regards the third question, the Court laid emphasis, in particular, on the Court of Appeal’s failure to examine the case from the relevant Article 4 perspective, which resulted in its failure to cure the defects in the proceedings which led to the applicants’ being charged and eventually convicted. The Court therefore considered that the proceedings as a whole had been unfair, in breach of Article 6 § 1 of the Convention.

Other rights in criminal proceedings

No punishment without law (Article 7)

In *Norman v. the United Kingdom*⁹³ the applicant – a prison officer at the relevant time – passed information about the prison where he worked to a tabloid journalist in exchange for money over the course of a number of years. The applicant was convicted of misconduct in public office and sentenced to twenty months’ imprisonment. He unsuccessfully appealed against his conviction and sentencing.

Before the Court, the applicant complained under Article 7 about the vague nature of the offence of misconduct. He also relied on Article 10. The Court found no violation of Article 7 of the Convention.

As regards the prosecution and conviction of the applicant, the Court was, in the first place, satisfied that the applicant ought to have been aware, if necessary with legal advice, that by providing internal prison information to a journalist in exchange for money on numerous occasions over a five-year period he had risked being found guilty of the offence of misconduct in public office. It stressed in that regard that such conduct did not fall outside the scope of the criminal law merely because it also constituted a disciplinary offence and further reiterated that Article 7 did not preclude the gradual clarification of the rules of criminal liability through judicial interpretation.

93. *Norman v. the United Kingdom*, no. 41387/17, 6 July 2021. See also under Article 10 (Freedom to receive and impart information) below.

Right of appeal in criminal matters (Article 2 of Protocol No. 7)

In *Kindlhofer v. Austria*⁹⁴ the Court assessed whether an offence can be considered “minor”, when it is punishable by potential imprisonment as a secondary sanction (in default of payment of a fine).

A fine of 200 euros (EUR) or four days’ imprisonment in default of payment was imposed on the applicant by the police for failure to report an accident in which only material damage had been caused. Under the Road Traffic Act, this offence was punishable by a fine of up to EUR 726 or by a term of up to two weeks’ imprisonment in default of payment. The Regional Administrative Court upheld the sanction imposed. Before the Court, the applicant complained, under Article 2 of Protocol No. 7, that he had been unable to challenge this decision: under domestic law, it was not amenable to appeal before the Supreme Administrative Court because the fine he risked incurring did not exceed EUR 750, no primary prison sentence could be imposed, and because the fine actually imposed had not exceeded EUR 400.

The Court found no violation of Article 2 of Protocol No. 7, considering that the offence of which the applicant had been convicted could be regarded as one of a “minor character” within the meaning of the second paragraph of this provision, and therefore falling under one of the exceptions to the right of review by a higher tribunal in criminal matters.

The judgment is noteworthy since the Court considered, for the first time, whether an offence could be considered “minor” for the purposes of Article 2 § 2 of Protocol No. 7 if the law prescribes a potential custodial sentence as a secondary punishment, in default of payment of a fine handed down as the main punishment.

The Court has repeatedly held, with reference to the Explanatory Report to Protocol No. 7, that if the law prescribes a custodial sentence as the *main* punishment, an offence cannot be described as “minor” within the meaning of the second paragraph of Article 2 of Protocol No. 7 (*Zaicevs v. Latvia*⁹⁵, *Galstyan v. Armenia*⁹⁶, *Gurepka v. Ukraine (no. 2)*⁹⁷ and *Stanchev v. Bulgaria*⁹⁸). As regards a custodial sentence as a *secondary* punishment, the Commission examined this issue in *Putz v. Austria*⁹⁹ and *Reinthal v. Austria*¹⁰⁰ and found that an offence “against the order in

94. *Kindlhofer v. Austria*, no. 20962/15, 26 October 2021 (not final).

95. *Zaicevs v. Latvia*, no. 65022/01, 31 July 2007.

96. *Galstyan v. Armenia*, no. 26986/03, 15 November 2007.

97. *Gurepka v. Ukraine (no. 2)*, no. 38789/04, 8 April 2010.

98. *Stanchev v. Bulgaria*, no. 8682/02, 1 October 2009.

99. *Putz v. Austria*, no. 18892/91, Commission decision of 3 December 1993, unreported.

100. *Reinthal v. Austria*, no. 19360/92, Commission decision of 20 January 1994, unreported.

court" carrying a sanction of a fine of up to EUR 726 (approximately), and up to eight days' imprisonment in default of payment, could be considered as one of "a minor character".

The Court did not, however, rule out that a possibility of converting the monetary sanction into a custodial sentence in the event of failure to pay could be a relevant factor in the assessment of this question. Indeed, when examining a serious financial penalty imposed for a customs offence, the Court recently pointed out that the impugned sanction could not be substituted by imprisonment in default of payment (*Saqueti Iglesias v. Spain*¹⁰¹). In that judgment, the Court concluded that the existence or absence of a custodial sentence, while an important factor, could not be decisive: the specific circumstances of the case had to be taken into account when determining whether or not an offence was minor. Attaching weight to the lack of a domestic assessment of the proportionality of the sanction imposed, the Court concluded in that case that the impugned offence could not be regarded as "minor" and thus went on to examine whether, consequently, an appeal should have been available to the applicant.

In the present judgment, the Court relied on the above approach to outline the criteria relevant for the examination of whether imprisonment in default of payment impacted on the qualification of a given offence as "minor". In particular, when taking account of the specific circumstances of a case, the Court will pay particular attention to the following elements:

(a) Whether the imprisonment in default lies within the discretion of the authorities and is likely to actually be enforced, and whether the domestic legal framework provides for procedural safeguards in that respect.

In the present case, once a conviction for an administrative fine became final, it was not within the discretion of the authorities to order imprisonment in lieu of payment of the fine. On the contrary, the authority had first to attempt to enforce payment of the fine or to make comprehensive inquiries into the financial situation of the convicted person. Furthermore, that person had to be informed of the imminent enforcement of the prison sentence and to be given the opportunity to avoid it by paying the amount of the fine due and to request to pay the fine in instalments. The Court was satisfied with these safeguards, considering that the impugned measure substantially differed from imprisonment as the primary sanction. It followed that a secondary

101. *Saqueti Iglesias v. Spain*, no. 50514/13, § 36 *in fine*, 30 June 2020.

punishment of this nature did not prevent the offence of which the applicant had been convicted of being regarded as “minor”.

(b) The amount of the fine imposed, seen also in the light of the applicant’s personal situation, and the maximum fine the applicant risked incurring.

In the present case, neither appeared, in itself, sufficient to consider that the offence was not minor. The applicant also did not claim that he was not able to pay the fine or that the amount of the fine imposed did not sufficiently take into consideration his financial situation.

(c) Whether the underlying offence was considered to be of a serious nature under domestic law.

The Court considered in the present case that this was not so: indeed, within the scale of the criminal sanctions provided for by law, the maximum sentence in issue in the present case was clearly one of the least serious.

Right not to be tried or punished twice (Article 4 of Protocol No. 7)

The judgment in *Sabalić v. Croatia*¹⁰² is noteworthy because the Court, for the first time, elaborated on how a failure to comply with the procedural obligation under Articles 3 and 14 may be considered to amount to a “fundamental defect” in those proceedings capable of setting aside their *res judicata* effect and allowing for their reopening to the detriment of an accused in accordance with Article 4 § 2 of Protocol No. 7 to the Convention.

The Court considered it important to reiterate that the principle of legal certainty in criminal matters was not absolute. Indeed Article 4 § 2 of Protocol No. 7 expressly permitted Contracting States to reopen a case to the detriment of an accused where, *inter alia*, a fundamental defect had been detected in the proceedings (compare *Taşdemir and Others v. Turkey*¹⁰³, in which the Court accepted that there may be *de facto* or *de jure* obstacles to reopening a case). Such a “fundamental defect” occurs where an accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings (*Mihalache v. Romania*¹⁰⁴). Furthermore, an issue under the *ne bis in idem* principle could not even arise as regards grave breaches of fundamental human rights from the erroneous

102. *Sabalić v. Croatia*, no. 50231/13, 14 January 2021. See also under Article 14 taken in conjunction with Article 3 below.

103. *Taşdemir and Others v. Turkey* (dec.), no. 52538/09, 12 March 2019.

104. *Mihalache v. Romania* [GC], no. 54012/10, §§ 129 and 133, 8 July 2019.

termination of the proceedings (*Marguš v. Croatia*¹⁰⁵). Moreover, the Court considered that it would have been possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level: in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way of, for instance, terminating or annulling the unwarranted set of proceedings and providing restitution for its effects, the Court may regard the situation as being remedied (*Sergey Zolotukhin v. Russia*¹⁰⁶).

Accordingly, in the present case, the Court found that both the failure to investigate the hate motives behind a violent attack or to take into consideration such motives in determining the punishment for violent hate crimes, amounted to “fundamental defects” in the proceedings within the meaning of Article 4 § 2 of Protocol No. 7. The Court also noted that the domestic authorities failed to remedy the impugned situation, although it could not be said that there were *de jure* obstacles to doing so: they could have offered the defendant appropriate redress by, for instance, terminating or annulling the unwarranted set of minor-offence proceedings, providing restitution for its effects and re-examining the case.

*Galović v. Croatia*¹⁰⁷ concerned dual proceedings in the context of domestic violence.

The applicant was convicted of several minor offences of domestic violence under the Protection against Domestic Violence Act in respect of two separate incidents which occurred in 2008. Subsequently, he was convicted of domestic violence (under the Criminal Code) in proceedings on indictment in respect of the period between February 2005 and November 2008. The applicant complained that he had been tried and convicted twice for the same offence contrary to Article 4 of Protocol No. 7 to the Convention. He also complained under Article 6 §§ 1 and 3 (b) and (c) that he had not had sufficient time to find a lawyer and to prepare his defence in the appeal proceedings, and under Article 6 §§ 1 and 3 (c) that he had been absent from the appeal court session. The Court found no violation of Article 4 of Protocol No. 7 (the *ne bis in idem* principle). It also found no violation of Article 6 §§ 1 and 3 (b) and (c) as regards the brevity of the period the applicant had had to prepare

105. *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014 (extracts).

106. *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 114-15, ECHR 2009.

107. *Galović v. Croatia*, no. 45512/11, 31 August 2021.

his defence before the appeal court session, and a violation of Article 6 §§ 1 and 3 (c) as regards his absence from the appeal court session.

The judgment is noteworthy because the Court applied, for the first time, the principles established in *A and B v. Norway*¹⁰⁸ regarding the conduct of dual proceedings to the particular context of domestic violence.

(i) While reiterating the States' positive obligation under Articles 3 and 8 to provide and maintain an adequate legal framework affording protection against acts of domestic violence (*Ž.B. v. Croatia*¹⁰⁹), the Court noted that there may be different approaches to the criminalisation of such acts in domestic legal systems. In that connection, the Court observed that domestic violence was rarely a one-off incident and could be understood as a particular form of continuous offence characterised by an ongoing pattern of behaviour in which each individual incident forms a building block of a wider pattern (relying on *Volodina v. Russia*¹¹⁰; *Kurt v. Austria*¹¹¹; *Rohlena v. the Czech Republic*¹¹²; and *Valiulienė v. Lithuania*¹¹³).

(ii) The Court then went on to apply the *A and B v. Norway* principles in order to determine whether the dual proceedings in question were "sufficiently closely connected in substance and in time", bearing in mind the specific context and dynamics of domestic violence:

(a) As regards the complementarity of the proceedings, the purpose of the minor-offence proceedings was to provide a prompt reaction to a particular incident of domestic violence in order to prevent, in a timely and effective manner, a further escalation of violence within the family, while the criminal proceedings were aimed at addressing an ongoing situation of violence in a comprehensive manner, by gradually intensifying the State's response;

(b) With respect to the foreseeability of the dual proceedings, the applicant should have been aware, having behaved violently towards close family members on a number of occasions, that his conduct could have entailed such consequences;

(c) As to the manner of conducting the proceedings, the Court observed that the criminal court took note of all of the previous minor-

108. *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 130-32, 15 November 2016.

109. *Ž.B. v. Croatia*, no. 47666/13, §§ 47 and 49, 11 July 2017.

110. *Volodina v. Russia*, no. 41261/17, § 86, 9 July 2019.

111. *Kurt v. Austria* [GC], no. 62903/15, § 164, 15 June 2021.

112. *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 72, ECHR 2015.

113. *Valiulienė v. Lithuania*, no. 33234/07, § 68, 26 March 2013.

offence judgments and used certain documentary evidence from those proceedings;

(d) With regard to the sanctions imposed, the criminal court deducted from the applicant's sentence the period which he had spent in detention on the basis of the two minor-offence convictions; and

(e) Finally, as regards the connection in time between the various sets of proceedings, after a number of incidents occurring relatively closely together in time (over a period of some three years) reached a certain degree of severity and "culminated" in the last incident, the authorities initiated the last set of minor-offence proceedings and, about a month thereafter, the criminal proceedings for the continuous offence of domestic violence.

In sum, the Court found that the dual proceedings in question formed a coherent and proportionate whole, which enabled both the individual acts committed by the applicant and his pattern of behaviour to be punished in an effective, proportionate and dissuasive manner, therefore not amounting to a duplication of punishment contrary to Article 4 of Protocol No. 7 to the Convention.

OTHERS RIGHTS AND FREEDOMS

Right to respect for one's private and family life, home and correspondence (Article 8)

Applicability

The judgment in *Lacatus v. Switzerland*¹¹⁴ concerned the applicability of Article 8 to begging, which is prohibited in the canton in question, and the criminal sanction imposed on a poor and vulnerable individual for unintrusive begging.

The applicant, a Romanian national belonging to the Roma community, was extremely poor. She was illiterate, had no work, was not in receipt of social benefits and did not appear to be supported by another person. During her stay in Switzerland she was found guilty of begging, which is prohibited outright in the canton concerned. She was ordered to pay a fine of 500 Swiss francs, to be replaced by a five-day custodial sentence in the event of non-payment. As she was unable to pay, she served the prison sentence. The Court found a violation of Article 8. It considered it unnecessary to examine separately

114. *Lacatus v. Switzerland*, no. 14065/15, 19 January 2021. See also under Article 8 (Private life) below.

the applicant's complaints under Article 10 and Article 14 taken in conjunction with Article 8.

This judgment is noteworthy because this is the first time that the Court has ruled on the issue whether a person penalised for begging can claim the protection of Article 8.

Regarding the applicability of Article 8, the Court referred to the notion of human dignity, which underlies the Convention and has been repeatedly referred to in the context of Article 8 (see, in particular, *Khadija Ismayilova v. Azerbaijan*¹¹⁵; *Beizaras and Levickas v. Lithuania*¹¹⁶; *Vinks and Ribicka v. Latvia*¹¹⁷; and *Hudorovič and Others v. Slovenia*¹¹⁸). The Court observed that human dignity was severely compromised if the person in question did not have sufficient means of subsistence. By begging, the applicant was adopting a particular way of life in a bid to deal with a humiliating and precarious situation. In cases of this kind the specific circumstances therefore had to be taken into consideration, and especially the reality of the person's economic and social situation. In the present case, by imposing a blanket prohibition on begging and convicting the applicant, the Swiss authorities had prevented her from approaching other people in order to obtain a form of help which, in her situation, was one possible means of meeting her basic needs. In the Court's view, the right to call on other people for assistance went to the very essence of the rights protected by Article 8.

*F.O. v. Croatia*¹¹⁹ concerned the harassment of a student by a teacher in a public school.

The applicant was on three occasions in the same month verbally abused by a mathematics teacher. The first incident (insults) was aimed at disciplining the applicant and his classmates for being late to school: on that occasion, the teacher said that the applicant was "a moron, an idiot, a fool, a hillbilly, a stupid cop [the applicant's father worked in the police]". The second occurred after the applicant had reported the insults to the head teacher: during a lesson, the teacher stated, *inter alia*, that "... when you say to a fool that he is a fool, that should not be an insult for him ...". The third incident occurred a few days later, the teacher again

115. *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, 10 January 2019.

116. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020.

117. *Vinks and Ribicka v. Latvia*, no. 28926/10, 30 January 2020.

118. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020.

119. *F.O. v. Croatia*, no. 29555/13, 22 April 2021. See also under Article 8 (Private life) below.

calling the applicant “a fool”. The applicant underwent psychological treatment related to the events in question.

Before the Court the applicant relied on Articles 3, 8 and 13 of the Convention. The Court examined the case under Article 8 and found a violation of that provision.

The judgment is noteworthy in particular because the Court developed its case-law concerning the applicability of Article 8 with respect to measures taken in the field of education.

The Court reiterated that, in order for Article 8 to come into play, an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one’s private life. In this connection, the Court referred to its case-law according to which measures taken in the field of education may, in certain circumstances, affect the right to respect for private life, but that not every act or measure which may be said to adversely affect the moral integrity of a person necessarily gives rise to such an interference (*Costello-Roberts v. the United Kingdom*¹²⁰). However, distancing itself from the finding in *Costello-Roberts*, according to which an instance of corporal punishment at school did not fall within the scope of the prohibition contained in Article 8, the Court stressed the following:

[S]ince *Costello-Roberts*, there has been an evolution of social attitudes and legal standards concerning the application of measures of discipline towards children, emphasising the need of protection of children from any form of violence and abuse. This is reflected in various international instruments ... and the Court’s case-law ...

The Court considered the following aspects of the present case to be important for the applicability of Article 8: there was no doubt that the insults to which the applicant was subjected entailed his emotional disturbance; the insults were uttered in the classroom in front of other students and were thus capable of humiliating and belittling the applicant in the eyes of others; the insults were particularly disrespectful to the applicant; and the insults were uttered by a teacher in a position of authority and control over the applicant.

120. *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C.

Private life

*Vavříčka and Others v. the Czech Republic*¹²¹ concerned the fine imposed on a parent and the exclusion of children from preschool for the refusal to comply with a statutory duty to vaccinate children.

One of the applicants was fined for failing to have his school-age children vaccinated in conformity with the statutory duty to do so. The other applicants, minors, were refused admission to preschools or nurseries on the same grounds.

The applicants complained mainly, under Articles 8 and 9 of the Convention and Article 2 of Protocol No. 1, of the consequences for them of their non-compliance with the vaccination duty. The Grand Chamber found no violation of Article 8. It held, in the first place, that the mandatory approach to vaccination remained within the authorities' wide margin of appreciation in this area and represented their answer, supported by relevant and sufficient reasons, to the pressing social need to protect individual and public health. Secondly, the impugned measures themselves, assessed in the context of the domestic system, were reasonably proportionate to the legitimate aims pursued. The Grand Chamber declared inadmissible the complaint under Article 9: the applicants had not shown that their critical opinion on vaccination was of sufficient cogency, seriousness, cohesion and importance as to constitute a conviction or belief attracting the guarantees of this provision. It further found no need to examine the case separately under Article 2 of Protocol No. 1.

The Grand Chamber's judgment is noteworthy in that it is the first time the Court has extensively addressed compulsory child vaccination and the consequences of non-compliance with such a duty from the standpoint of the right to respect for private life under Article 8. The judgment clarifies the breadth of the margin of appreciation afforded to States in this specific context and the factors to be taken into account when assessing the proportionality of the impugned measures. In so doing, the Court recognised the importance of childhood vaccination as a "key measure of public health policy" and linked it to the value of social solidarity and the best interests of children.

(i) Reiterating its case-law that healthcare policy matters came within the margin of appreciation of the national authorities (*Hristozov and Others v. Bulgaria*¹²²), the Court went on to find that the margin as regards compulsory child vaccination should be a wide one. On the one

121. *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021. See also under Article 9 (Freedom of thought, conscience and religion – Applicability) below.

122. *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 119, ECHR 2012 (extracts).

hand, the duty to vaccinate may be regarded as relating to the effective enjoyment of intimate rights (*Solomakhin v. Ukraine*¹²³) and thus as calling for a narrower margin of appreciation: however, this consideration was less significant here since no vaccinations had been, nor could have been, forcibly administered. On the other hand, the following factors leant in favour of a wider margin: (i) the general consensus among the Contracting Parties, strongly supported by international specialised bodies, was that vaccination was one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination; (ii) the absence of consensus over a single model of child vaccination and the existence of a spectrum of policies (one based wholly on recommendation, those that made one or more vaccinations compulsory and those that made it a legal duty to ensure the complete vaccination of children); and (iii) while childhood vaccination, as a fundamental aspect of contemporary public health policy, would not in itself raise sensitive moral or ethical issues, making vaccination obligatory could be regarded as raising such issues, including from the perspective of “social solidarity”, since the purpose of the obligation was to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination.

(ii) The Court acknowledged that the chosen mandatory approach to vaccination was supported by the relevant expert data and weighty public health rationale, especially seen in the light of a positive obligation, under Articles 2 and 8, to take appropriate measures to protect life and health. Vaccination of children being at issue, the Court drew upon its well-established case-law (*Neulinger and Shuruk v. Switzerland*¹²⁴) to set down an obligation on States to place the best interests of the child, and interestingly also those of children as a group, at the centre of all decisions affecting their health and development:

... When it comes to immunisation, the objective should be that every child is protected against serious diseases ... In the great majority of cases, this is achieved by children receiving the full schedule of vaccinations during their early years. Those to whom such treatment cannot be administered are indirectly protected against contagious diseases as long as the requisite level of vaccination coverage is maintained in their community, i.e. their protection comes from herd immunity. Thus, where the view is taken

123. *Solomakhin v. Ukraine*, no. 24429/03, § 33, 15 March 2012.

124. *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010.

that a policy of voluntary vaccination is not sufficient to achieve and maintain herd immunity, or herd immunity is not relevant due to the nature of the disease (e.g. tetanus), domestic authorities may reasonably introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases.

Based on such considerations, the respondent State's health policy was found to be consistent with the best interests of the children.

(iii) In its assessment of proportionality, the Court's examination focused on two aspects. The first was the relevant features of the domestic system and, in this regard, it examined the following features: the scope of the duty to vaccinate (diseases well known to medical science, against which vaccination was considered effective and safe); the possibility of exemptions and assessment of individual circumstances; the lack of forcible administration; the moderate severity of sanctions; the availability of procedural safeguards; a legislative framework allowing the authorities to react with flexibility to the epidemiological situation/developments in medical science and pharmacology; the transparency of the domestic system; the integrity of the policy-making process; the necessary precautions before vaccination (including routine check for contraindications and monitoring of the safety of vaccines in use); and the availability of compensation in case of injury (*Baytüre and Others v. Turkey*¹²⁵). As to the second aspect, the intensity of the impugned interferences, the Court noted that the fine imposed had not been excessive and there had been no repercussions on the education of the first applicant's (adolescent) children. As to the exclusion of the other applicants from pre-school, and while this meant the loss of an important opportunity to develop their personalities and to begin to acquire social and learning skills in a formative and pedagogical environment, they had not been deprived of all possibility of personal, social and intellectual development, even if this required additional effort and expense on their parents' part, and their subsequent admission to primary school had not been affected. In this context, the Court again emphasised the relevance of the value of social solidarity, considering that it was not disproportionate for a State to require those for whom vaccination represented a remote (very rare but potentially very serious) health risk to accept this universally practised protective measure, as a matter of legal duty, for the sake of the small number of vulnerable children who were unable to benefit from vaccination for medical reasons. The existence of a less prescriptive policy in some other European States

125. *Baytüre and Others v. Turkey* (dec.), no. 3270/09, 12 March 2013.

or the notional availability of less intrusive means to protect the health of the population did not detract from the validity or legitimacy of the choice of a mandatory approach to vaccination.

*Centrum för rättvisa v. Sweden*¹²⁶ concerned the bulk interception of cross-border communications and the safeguards against abuse under Article 8.

The applicant, a non-governmental organisation, considered that there was a risk that its communications through mobile telephones and mobile broadband had been or will be intercepted and examined by way of signals intelligence. The Grand Chamber found a violation of Article 8 of the Convention.

The Grand Chamber's judgment is noteworthy in that it sets out fundamental safeguards as regards, and defines the criteria for a global assessment of, the operation of bulk interception regimes¹²⁷.

(i) In previous cases dealing with bulk interception regimes (*Weber and Saravia v. Germany*¹²⁸ and *Liberty and Others v. the United Kingdom*¹²⁹) the Court applied the six minimum safeguards developed in targeted interception cases (set out for the first time in *Huvig v. France*¹³⁰ and *Kruslin v. France*¹³¹: (a) the nature of offences which may give rise to an interception order; (b) a definition of the categories of people liable to have their communications intercepted; (c) a limit on the duration of interception; (d) the procedure for examining, using and storing the data obtained; (e) the precautions to be taken when communicating the data to other parties; and (f) the circumstances in which intercepted data may or must be erased or destroyed).

The Grand Chamber found that those safeguards had to be adapted for two main reasons. The first was to take account of the very wide reach of surveillance achieved through technological developments in the

126. *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021. See also, under Article 10 (Freedom of expression) below, *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021.

127. This subject is also examined in *Big Brother Watch and Others v. the United Kingdom* (delivered on the same date as the present case), but it is described in the present summary only. The case of *Big Brother Watch and Others* also deals with bulk interception under Article 10 (Protection of journalistic sources) and develops safeguards under Article 8 with regard to the receipt of intelligence from foreign intelligence services (see under Article 10 (Freedom of expression) below).

128. *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI.

129. *Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008.

130. *Huvig v. France*, 24 April 1990, Series A no. 176-B.

131. *Kruslin v. France*, 24 April 1990, Series A no. 176-A.

past decades. The second was to reflect the specific features of a bulk interception regime, which were different from targeted interception in many important respects. For example, where specified individuals are “targeted” through bulk interception, their devices are not monitored: rather, strong selectors are applied to the communications intercepted in bulk by the intelligence services. Unlike targeted interception, bulk interception is generally directed at international communications and mainly used for foreign intelligence gathering and the identification of new threats. Its purpose being, in principle, preventive rather than the investigation of a specific target/offence, the first two of the six safeguards for targeted interception would not be readily applicable in a bulk interception context. Bulk interception is characterised by increasing degrees of intrusion with an individual’s Article 8 rights as the impugned operation moves through its various stages (namely, (a) interception and initial retention (of communications/related communications data); (b) application of specific selectors; (c) examination of a selection by analysts; and (d) subsequent retention and use of the “final product”, including sharing with third parties), which implies that the need for safeguards will be at its highest at the end of the process (where information about a particular person is analysed or the content of the communications is examined by an analyst).

(ii) The Court therefore expanded the range of safeguards to be clearly defined in the domestic legal framework (in *Big Brother Watch and Others*, cited above, the Court indicated that the same safeguards were applicable to the acquisition of related communications data (that is, the traffic data belonging to the intercepted communications), which was not necessarily less intrusive than the acquisition of content), providing also some explanations as to the content of certain of those safeguards:

(a) The grounds on which bulk interception might be authorised (in *Big Brother Watch and Others*, cited above, the Court noted that a regime which permitted bulk interception to be ordered on relatively wide grounds could still comply with Article 8, provided that, when viewed as a whole, sufficient guarantees against abuse were built into the system to compensate for that weakness. The closely related issue of whether there existed sufficient guarantees to ensure that the interception was necessary or justified was as important as the degree of precision with which the grounds on which authorisation might be given are defined);

(b) The circumstances in which an individual’s communications might be intercepted;

(c) The procedure to be followed for granting authorisation:

Authorisation should be given by a body independent of the executive (not necessarily judicial), which should be informed of both the purpose of the interception and the selection bearers or communication routes. At the very least, the types or categories of selectors to be used should be identified. The use of any strong selector linked to identifiable individuals must be justified with regard to the principles of necessity and proportionality and that justification should be scrupulously recorded and subject to a separate and objective verification.

(d) The procedures to be followed for selecting, examining and using intercept material;

(e) The precautions to be taken when communicating the material to other parties:

The transmission must be subject to independent control, limited to such material as had been collected and stored in a Convention compliant manner and accompanied by heightened safeguards where special confidentiality is called for (such as confidential journalistic material); the circumstances in which such a transfer may take place must be set out clearly in domestic law; the transferring State must ensure that the receiving State, in handling the data, had in place safeguards capable of preventing abuse and disproportionate interference (in particular, guaranteeing secure storage and restricting onward disclosure of the material). This does not necessarily mean that the receiving State must have comparable protection to that of the transferring State or give an assurance prior to every transfer.

(f) The limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed:

There should be a legal requirement to delete intercept material that has lost pertinence for intelligence purposes, regardless of whether it contains personal data or not, and especially so where keeping it may affect Article 8 rights.

(g) The procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance:

Each stage of the process should be subject to a sufficiently robust supervision by an independent authority, assessing the necessity and proportionality of the action with due regard to the corresponding level of intrusion into the Convention rights.

(h) The procedures for independent *ex post facto* review of such compliance and the powers vested in the competent body in addressing instances of non-compliance:

An effective remedy should be available. Where such a remedy does not depend on notification to the interception subject, it is imperative that it should be before a body which, while not necessarily judicial, is independent of the executive and ensures fairness of the proceedings, offering, in so far as possible, an adversarial process. Its decisions shall be reasoned and legally binding.

(iii) More generally, the Court defined the “cornerstone” of an Article 8 compliant bulk interception regime as follows:

[T]he process had to be subject to “end-to-end safeguards”, meaning that, at the domestic level, an assessment had to be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception had to be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation had to be subject to supervision and independent *ex post facto* review.

In particular, noting the considerable potential for abuse and the legitimate need for secrecy, the Court stressed that the margin of appreciation afforded to States in operating such a system must be narrower, while the importance of supervision and review would be amplified, when compared to targeted interception.

Finally, the Court outlined the key elements of the global assessment of such regimes: whether the domestic legal framework contained sufficient guarantees against abuse; whether the process was subject to “end-to-end safeguards”; whether the actual operation of the system included the checks and balances on the exercise of power; and whether there was any evidence of actual abuse.

*Lacatus v. Switzerland*¹³² concerned the applicability of Article 8 to begging, which is prohibited in the canton in question, and the criminal sanction imposed on a poor and vulnerable individual for unintrusive begging.

The Court found a violation of Article 8.

132. *Lacatus v. Switzerland*, no. 14065/15, 19 January 2021. See also under Article 8 (Applicability) above.

This judgment is noteworthy because it was the first time that the Court ruled on the issue whether a person penalised for begging can claim the protection of Article 8. In that connection, the Court defined the extent of the margin of appreciation allowed to the respondent State in this sphere. The judgment is also interesting because of the way in which the Court weighed up the interests at stake in this new factual situation.

The Court considered that the respondent State had a limited margin of appreciation in the present case, for two reasons. Firstly, the issue at stake for the applicant's existence was a fundamental one, and secondly, a blanket criminal-law ban such as the one in issue here appeared to be the exception in terms of the approaches adopted by the member States to deal with begging. While no consensus existed within the Council of Europe, there was nevertheless a certain trend towards limiting the prohibition of begging, and a willingness on the part of States to focus instead on effectively protecting public order through administrative measures. In that connection the Court found support in a comparative-law survey and in reports issued by United Nations, European and inter-American bodies.

In weighing up the interests at stake, the Court assessed this new factual situation in the light of the following criteria.

- The applicant's individual situation and vulnerability: The applicant was an extremely vulnerable person who in all likelihood had no other means of subsistence and hence no choice but to beg in order to survive.

- Involvement in a criminal network: There was no indication in the available material that the applicant belonged to such a network or was otherwise the victim of other persons' criminal activities. In that regard, while acknowledging the importance of combating human trafficking and the exploitation of children, and the obligation of the States Parties to the Convention to protect victims, the Court doubted that penalising the victims of these networks was an effective measure.

- The applicant's specific conduct: The authorities did not appear to have accused the applicant of engaging in aggressive or intrusive begging liable to infringe the rights of passers-by, residents or shopkeepers, nor had any complaints apparently been made to the police by third parties.

- Severity of the penalty: The imposition of a custodial sentence, which was liable to further increase an individual's distress and vulnerability, had been virtually automatic and almost inevitable in the applicant's case.

- Possibility of less restrictive measures: Given that the majority of Council of Europe member States provided for more nuanced restrictions than a blanket ban on begging, the Court was unable to subscribe to the Federal Court's argument that less restrictive measures would not have achieved a comparable result.

- Quality of the domestic courts' review: When it came to a measure as drastic as an outright ban on a certain type of conduct, compliance with Article 8 required particularly rigorous scrutiny by the domestic courts, which had to weigh up the various interests at stake. In the instant case the Court left open the question whether, despite the rigid nature of the applicable legislation, the Swiss courts could nevertheless have struck a fair balance between the competing interests.

On conclusion of this assessment, and emphasising the applicant's particular circumstances, the Court considered that the respondent State had overstepped its narrow margin of appreciation and that the penalty in question had not been proportionate either to the aim of combating organised crime or to the aim of protecting the rights of passers-by, residents and shopkeepers. It is significant that the Court, sharing the view of the United Nations Special Rapporteur on extreme poverty and human rights, did not regard the goal of making poverty less visible in a city and attracting investment as a legitimate aim. The Court concluded that the measure in question had infringed the applicant's human dignity and impaired the very essence of the rights protected by Article 8 of the Convention.

*F.O. v. Croatia*¹³³ concerned the harassment of a student by a teacher in a public school.

The applicant, a student in a public high school, was on three occasions in September 2011 verbally abused by a mathematics teacher. The first incident (insults) was aimed at disciplining the applicant and his classmates for being late to school: on that occasion, the teacher said that the applicant was "a moron, an idiot, a fool, a hillbilly, a stupid cop [the applicant's father worked in the police]". The second occurred after the applicant had reported the insults to the head teacher: during a lesson, the teacher stated, *inter alia*, that "... when you say to a fool that he is a fool, that should not be an insult for him ...". The third incident occurred a few days later, the teacher again calling the applicant "a fool". The applicant underwent psychological treatment related to the

133. *F.O. v. Croatia*, no. 29555/13, 22 April 2021. See also under Article 8 (Applicability) above.

events in question. His general practitioner gave a working diagnosis of post-traumatic stress disorder and a psychologist found that the applicant was suffering from an acute anxiety disorder. The applicant's father informed the school and various other domestic authorities of the applicant's harassment by the teacher, and requested protection for him. The school sought to settle the matter internally (interviews with the teacher, the applicant and his father); the relevant Ministry of Education agency found that the matter should be resolved by a discussion between the school authorities and the applicant's father; the State Attorney's Office rejected a criminal complaint (no elements of criminal-law responsibility); and the Constitutional Court declared his complaints inadmissible.

Before the Court, the applicant complained about harassment by the teacher and the failure of the domestic authorities to respond effectively to his complaints of harassment. He relied on Articles 3, 8 and 13 of the Convention. The Court examined the case under Article 8 and found a violation of that provision.

The judgment is noteworthy for the following reasons: the Court developed its case-law concerning the applicability of Article 8 with respect to measures taken in the field of education, and it clarified the nature of the State's obligations in this context.

With respect to the nature of the State's obligations in this context, the Court found that it would be impossible to reconcile any acts of violence or abuse by teachers and other officials in educational institutions with children's right to education and to respect for their private life. Moreover, the Court stressed that the primary duty of the education authorities is to protect students from any form of violence during the time in which they are under the authorities' supervision. Consistently with these principles, and the relevant international standards, the Court also found that the domestic authorities must put in place appropriate legislative, administrative, social and educational measures to prohibit unequivocally any form of violence or abuse in educational institutions against children at all times and in all circumstances, and thus to ensure "zero tolerance" of any violence or abuse in an educational setting. This also relates to the necessity of ensuring accountability through appropriate criminal, civil, administrative and professional avenues. In this context, the States enjoy a margin of appreciation in determining the manner in which to organise their systems to ensure compliance with the Convention.

On the facts of the case, the Court found that, while the teacher's first insults against the applicant had been aimed at disciplining him

and his classmates, the two subsequent occasions could not be seen as anything but gratuitous verbal abuse against the applicant. In any case, the Court considered that no justification for the teacher's conduct could be provided. While noting that the verbal abuse was not at a very high scale of intensity and had not degenerated into further more systemic harassment, the Court stressed that, having regard to a position of trust, authority and influence of teachers as well as their social responsibility, there was no room for tolerating any harassment by a teacher towards a student: frequency, severity of harm and intent to harm were not prerequisites for defining violence and abuse in an educational setting. The Court therefore found that the harassment by verbal abuse of the kind to which the applicant was subjected by the teacher amounted to an unacceptable interference with his right to respect for his private life, which was sufficient to find a violation of Article 8. However, the Court also considered it important to address the manner in which the domestic authorities responded to the applicant's allegations of harassment. In this regard, the Court did not consider that, in the circumstances of the present case, recourse to the criminal avenue was critical to fulfil the State's obligations under Article 8 so it went on to examine the manner in which his allegations had been addressed within the available administrative and professional avenues. The Court found both of these avenues to be ineffective as they failed to lead to resolute action to address the deficiencies in the teacher's approach. The Court also considered that the type of behaviour attributed to the teacher, and its effects on the applicant, required a more diligent investment of knowledge and resources in order to understand and address its consequences and implications.

Private and family life

*Polat v. Austria*¹³⁴ concerned the post-mortem examination of a newborn, carried out despite the parents' objections on religious grounds, and the information provided on the extent of the post-mortem performed.

While the applicant – a woman of Muslim faith – was pregnant, the foetus showed signs of a rare syndrome. She and her husband informed the hospital that, in the event of their child's death, they refused to consent to a post-mortem examination on religious grounds: they explained that, since they wished to ritually wash the corpse prior to a funeral, the corpse had to remain as unscathed as possible. The child died shortly after birth. Despite the applicant's objections, the public hospital

134. *Polat v. Austria*, no. 12886/16, 20 July 2021. See also under Article 9 (Manifest one's religion or belief) below.

performed a post-mortem to verify the cause of death and evaluate the risks for the applicant's future pregnancies: this was permitted for scientific purposes by domestic law. During the post-mortem, nearly all the child's organs were removed. While the applicant was informed of the post-mortem, she was not informed about the extent of the procedure: she only discovered this during the funeral ceremony and the ritual washing had therefore to be cancelled.

The applicant complained under Articles 8 and 9 that carrying out the post-mortem without taking into account her religious convictions had violated her right to respect for her private and family life and her right to freedom of religion. The Court found a breach of both Articles. She also complained under Article 8 that the public hospital had failed to inform her of the extent of the post-mortem and of the removal of the internal organs. The Court also found a violation of Article 8 in this respect.

The case concerned a novel issue: the regulation of post-mortem examinations in public hospitals and the question whether, and in which cases, close relatives of the deceased should have the right to object to a post-mortem examination for reasons related to private life and religion where the interests of public health clearly call for such an examination.

The judgment is noteworthy because, for the first time, the Court: (i) stated that religious beliefs and respect for private and family life, under Articles 8 and 9, should be balanced against the protection of public health when conducting post-mortem examinations; and (ii) considered, under Article 8, the nature of any positive obligation to inform parents about the extent of a post-mortem examination performed on their child where it interferes with religious beliefs.

(i) As regards the post-mortem, while the Court agreed with the Government that the protection of the health of others through the conduct of post-mortem examinations served a legitimate aim, it also attached weight to the relevance of the applicant's expressed interests (compare *Solska and Rybicka v. Poland*¹³⁵). As the case related to sensitive moral and ethical issues, it required a balance to be struck between competing private and public interests. The Court put emphasis on the fact that the domestic authorities ought to have conducted a balancing exercise between the competing, scientific and religious/private, interests at stake. Even though there had indeed been a scientific interest in performing the post-mortem examination, the Court noted that the applicable legislation left a certain scope of discretion to the

135. *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, 20 September 2018.

doctors, including as to the extent of the intervention “necessary” in any given case. While it could not therefore be excluded that a balancing of competing interests could or should have been carried out under domestic law, the domestic authorities did not appear to have engaged in any such exercise. Admittedly, the Supreme Court had addressed the proportionality of the interference with the applicant’s rights under Articles 8 and 9. Nonetheless, the Court observed that the Supreme Court had not sufficiently addressed the applicant’s individual rights under Articles 8 and 9 and the “necessity” of the post-mortem in the light of those rights.

(ii) As regards the information given to the applicant on the extent of the post-mortem and the removal of the internal organs, it was not common knowledge that all organs were removed during the post-mortem of a newborn. The Court indicated that the lack of clear domestic rules concerning the extent of information, to be given or not, did not in itself breach Article 8.

However, it stressed the specific and delicate circumstances faced by the applicant, given the recent death of her child and the lack of a legal right to object to the post-mortem examination. Her circumstances, therefore, required a high degree of diligence and prudence on the part of hospital staff (compare *Hadri-Vionnet v. Switzerland*¹³⁶). Given that the hospital was aware of the (religious) grounds for her objections, it had had an even greater duty to provide her with appropriate information regarding what had been done and what would be done with her child’s body. The applicant had made it clear that she wished to have a funeral in accordance with her beliefs, which required her son’s body to remain as unscathed as possible. The Court concluded that the hospital had been under a positive obligation to provide her with sufficient information, without undue delay, about the extent of her son’s post-mortem and the removal and whereabouts of his organs. The Court considered that the Supreme Court’s argument, according to which omitting to give detailed information would be less burdensome to the relatives, had ignored the applicant’s specific situation.

Family life

*Abdi Ibrahim v. Norway*¹³⁷ concerned the adoption of a child by foster parents with a religious faith different to that of the biological parent.

136. *Hadri-Vionnet v. Switzerland*, no. 55525/00, 14 February 2008.

137. *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021. See also under Article 9 (Manifest one’s religion or belief) and Article 2 of Protocol No. 1 (Right to education) below.

The applicant, a Somali national of Muslim faith, was granted refugee status in Norway in 2010; she was accompanied by her baby son. Later that year, the baby was placed initially in emergency care and then with a Christian family, despite the applicant's wish that he should go either to her cousins or to a Somali or Muslim family. The applicant was granted six supervised one-hour contact sessions per year. In 2013 the social welfare authorities applied to allow the foster family to adopt the child (meaning that the applicant would no longer have contact with him) and for her parental rights to be removed. The applicant appealed: she did not ask for the child's return but sought contact so that her son could maintain his cultural and religious roots. In 2015 the court of appeal dismissed her appeal and authorised the child's adoption.

The applicant complained to the Court under Articles 8 and 9 of the Convention; a Chamber of the Court considered that the applicant's submissions under Article 9 relating to her and her son's cultural and religious background fell to be examined under Article 8 of the Convention. Referring to the principles of *Strand Lobben and Others v. Norway*¹³⁸, it found a violation of Article 8, basing its conclusion on the case as a whole, including its religious aspects. The Grand Chamber also followed this approach and found a breach of Article 8 of the Convention, interpreted in the light of Article 9.

The Grand Chamber judgment is noteworthy because of its novel context: the biological mother's wish that her child, who was in foster care when still a baby, be brought up in line with her religious faith, which was different from that of the foster family (prospective adoptive parents). The Court had regard to the impact of the compulsory taking into care of a child on the scope of the biological parents' rights under Article 9 or Article 2 of Protocol No. 1. It clarified whether the religious aspect of the case warranted examination as a separate issue under Article 9, in addition to the usual Article 8 analysis and, in relation to the latter analysis, the Court stressed that due account had to be taken of the interests of the biological parent protected by Article 9. It also provided some indication as to how the domestic authorities could meet this requirement.

In the Court's view, a parent bringing his or her child up in line with his or her own religious or philosophical convictions may be regarded as a way to "manifest his religion or belief, in ... teaching, practice and observance" within the meaning of Article 9. By analogy with Article 2 of Protocol No. 1, the compulsory taking into care of a child, while entailing

138. *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019.

limitations, does not entirely preclude the exercise by a biological parent of his or her Article 9 rights. To some degree he or she may also be able to continue doing so, for example by assuming parental responsibilities or exercising contact rights aimed at facilitating family reunion.

The Court, however, did not find it necessary in the instant case to determine the scope of Article 9 and its applicability to the matters complained of: the applicant's complaint, relating to the adverse effect of the choice of foster home in regard to her wish that X be brought up in line with her Muslim faith, did not call for a separate examination under Article 9. In this regard, the Court reiterated its usual approach whereby it finds a complaint to be most appropriately characterised with reference to one Article, while acknowledging that the subject matter also touches upon interests protected by other Articles of the Convention. The Court therefore considered it appropriate to centre its examination of the present case on the compatibility of the impugned measures with the applicant's right to respect for her family life under Article 8 of the Convention, which had to be interpreted and applied in the light of Article 9. It followed that an important element of the Article 8 analysis in this context was the question whether the domestic authorities had had due regard to the applicant's interests protected by the Article 9 freedom.

With this in mind, the Court took particular note of the domestic court's reliance on Article 20 § 3 of the [United Nations Convention on the Rights of the Child](#). In accordance with this provision, when assessing possible solutions (adoption, foster care, etc.) for a child temporarily or permanently deprived of his or her family environment, "due regard [is to] be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background". The Court clarified that in substance this standard corresponded to and was in compliance with the requirements of the Convention.

The Court further considered the scope of the obligation incumbent on the authorities in accordance with this standard. In the first place, a biological parent's interests protected by Article 9 are only part of the various interests to be taken into account throughout the whole process in cases of this nature where the child's best interest must remain paramount. Secondly, as follows from the relatively broad agreement in international law, in this connection domestic authorities are bound by an obligation of means not one of result. This obligation could be complied with not only by ultimately finding a foster home which corresponded to a biological parent's cultural and religious background, but also through arrangements for regular contact with the child.

In the instant case, the authorities had indeed made efforts, which ultimately proved unsuccessful, to find from the outset a foster home for the applicant's son which would have been more suitable from the perspective of her Muslim faith. However, the arrangements made thereafter as to her ability to have regular contact with her child, culminating in the decision to allow for his adoption, had failed to take due account of the applicant's interest in allowing him to retain at least some ties to his cultural and religious origins. Considering the case as a whole, the Court concluded that the reasons advanced in support of the impugned decision had not been sufficient to demonstrate that the circumstances of the case had been so exceptional as to justify a complete and definitive severance of the ties between the applicant and her son, or that the decision to that effect had been motivated by an overriding requirement pertaining to his best interests.

Expulsion measures

*Savran v. Denmark*¹³⁹ concerned the expulsion of a seriously ill alien.

The applicant, a Turkish national diagnosed with paranoid schizophrenia, entered Denmark in 1991 (when he was six years old). Although he was convicted of an offence in 2008, the competent court exempted him from punishment because of his mental illness, committed him to forensic psychiatric care and issued an expulsion order (with a permanent ban on re-entry). In 2014 the City Court of Copenhagen held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In 2015 that decision was reversed by the High Court and he was deported to Turkey.

The applicant complained about his expulsion under Articles 3 and 8 of the Convention. The Grand Chamber found no violation of Article 3 since the treatment did not reach the high threshold required for it to fall within the scope of that Article. It found a violation of Article 8.

The Grand Chamber judgment is noteworthy because of the proportionality analysis of the expulsion measure under Article 8. The Court clarified the weight to be given to the first criterion set out in *Maslov v. Austria*¹⁴⁰ (the nature and seriousness of the offence committed by the alien concerned) in the very specific case where an applicant's criminal culpability has been excluded on account of his or her mental illness.

139. *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021. See also under Article 3 (Expulsion) above.

140. *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008.

In accordance with the recent Article 8 case-law (*Ndidi v. the United Kingdom*¹⁴¹, *Levakovic v. Denmark*¹⁴², *Narjis v. Italy*¹⁴³, and *Saber and Boughassal v. Spain*¹⁴⁴), the Court observed that serious criminal offences can constitute a “very serious reason” such as to justify the expulsion of a settled migrant, assuming that the other criteria set out in *Maslov* (cited above) are adequately taken into account at the domestic level. However, the Grand Chamber had to take into account that the present applicant’s criminal culpability had officially been excluded on account of the fact that he had been mentally ill when the criminal act had been perpetrated. It clarified that this fact should be adequately taken into account by the domestic courts as it might have the effect of limiting the weight to be attached to the first *Maslov* criterion in the overall balancing of interests required under Article 8 and, consequently, the extent to which a State could legitimately rely on the applicant’s criminal acts as the basis for his expulsion and permanent ban on re-entry.

On the facts, the Court found that no account had been taken of this factor. The domestic balancing exercise having been, moreover, deficient in respect of other relevant criteria, the Grand Chamber found a breach of Article 8 of the Convention.

Positive obligations

*M.A. v. Denmark*¹⁴⁵ concerned the waiting period for granting family reunification to foreigners who were beneficiaries of subsidiary or temporary protection.

The applicant is a Syrian national who fled the country in 2015. In Denmark, he was granted “temporary protection status” for one year and his residence permit was subsequently extended for one year at a time. Due to a lack of an individualised threat, he did not qualify for refugee status under the [UN Convention relating to the Status of Refugees](#) or “protection status”, for which residence permits were granted for five years. Five months after obtaining his first residence permit, the applicant requested family reunification with his wife, who had remained in Syria. His request was rejected because he had not been in possession of a residence permit for the previous three years, as required by law, and because there were no exceptional reasons to otherwise justify reunification. The applicant appealed unsuccessfully. In

141. *Ndidi v. the United Kingdom*, no. 41215/14, 14 September 2017.

142. *Levakovic v. Denmark*, no. 7841/14, 23 October 2018.

143. *Narjis v. Italy*, no. 57433/15, 14 February 2019.

144. *Saber and Boughassal v. Spain*, nos. 76550/13 and 45938/14, 18 December 2018.

145. *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021.

2018, having resided in Denmark for just over two years and ten months, the applicant submitted a new request, which was granted. The Grand Chamber found a breach of Article 8.

The Grand Chamber judgment is noteworthy in that the Court considered, for the first time, whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to persons who benefit from subsidiary or temporary protection status was compatible with Article 8. The Court specified the width of the margin of appreciation afforded to States in this respect and outlined procedural requirements for the processing of family-reunion requests, as well as substantive criteria for their assessment.

(i) Considering the margin of appreciation, the Court had regard to its subsidiary role in the Convention protection system and the lack of consensus at national, international and European levels in this area, as well as the legitimate nature of immigration control, which served the general interests of the economic well-being of a country. The Court concluded that the States should be accorded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who had not been granted refugee status but who enjoyed subsidiary protection or temporary protection. Nevertheless, the discretion enjoyed by the States in this field could not be unlimited and fell to be examined in the light of two factors. In the first place, the absolute nature of the right to protection against ill-treatment under Article 3, which did not allow for any exceptions, justifying factors or balancing of interests, even in a situation of an increased influx of migrants. In particular, the situation of general violence in a country might be so intense as to conclude that any returnee would be at real risk of ill-treatment solely on account of his or her presence there. In principle, that factor might reduce the latitude enjoyed by States in striking a fair balance between the competing interests of family reunification and immigration control under Article 8, albeit that, during periods of mass influx of asylum-seekers and substantial resource constraints, recipient States should be entitled to consider that it fell within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest of family reunification of some. Secondly, a State's discretion fell to be examined in the light of the proportionality of a particular measure. Following its usual approach, the Court would assess the quality of the parliamentary and judicial review of its necessity.

(ii) Regarding the length of a waiting period, the Court noted that [Directive 2003/86/EC of the European Union on the right to family](#)

reunification allowed a waiting period of two years, or, by way of derogation, even three years. While the Court saw no reason to question the rationale of a waiting period of two years, beyond such duration the insurmountable obstacles to enjoying family life in the country of origin progressively assumed more importance in the fair-balance assessment. In its view, a waiting period of three years, although temporary, was by any standard a long time to be separated from one's family, when the family member left behind remained in a country characterised by arbitrary violent attacks and ill-treatment of civilians, and the actual separation would inevitably be even longer than the waiting period.

(iii) The Court further held that considerations as to procedural requirements for the processing of family-reunion requests of refugees had to apply equally to beneficiaries of subsidiary protection, including to persons who were at risk of ill-treatment falling under Article 3 due to the general situation in their home country and where the risk was not temporary but appeared to be of a permanent or long-lasting character. In particular, the decision-making process had to sufficiently safeguard the flexibility, speed and efficiency required to comply with the applicant's right to respect for his or her family life (*Tanda-Muzinga v. France*¹⁴⁶, *Mugenzi v. France*¹⁴⁷, *Senigo Longue and Others v. France*¹⁴⁸). Furthermore, it should include an individualised fair-balance assessment of the interest of family unity in the light of the concrete situation of the persons concerned and the situation in their country of origin, with a view to determining the actual prospect of return or the likely duration of obstacles thereto.

(iv) Regarding the substantive requirements, the Court drew upon the criteria it had developed in its case-law relating to other types of situations raising issues on the extent of the State's obligations to admit to its territory relatives of persons residing there (*Jeunesse v. the Netherlands*¹⁴⁹, among other authorities), notably: (a) status in and ties to the host country of the alien requesting family reunion and his or her family member concerned; (b) whether the aliens concerned had a settled or precarious immigration status in the host country when their family life was created; (c) whether there were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting reunification; (d) whether children were involved; and (e) whether the person requesting reunion could demonstrate that

146. *Tanda-Muzinga v. France*, no. 2260/10, 10 July 2014.

147. *Mugenzi v. France*, no. 52701/09, 10 July 2014.

148. *Senigo Longue and Others v. France*, no. 19113/09, 10 July 2014.

149. *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014.

he or she had sufficient independent and lasting income, excluding welfare benefits, to provide for the basic cost of subsistence of his or her family members.

(v) Assessing the facts of the instant case, the Court proceeded in two steps. In the first place, it examined the domestic legislative and policy framework. The Court found no reason to question the distinction in respect of persons granted protection due to an individualised threat, namely refugee status or “protection status”, on the one hand, and persons granted protection due to a generalised threat, the so-called “temporary protection status”, on the other hand. The latter regime was justified by the need to control immigration and to ensure the effective integration of those granted protection. The Court noted, however, that the three-year rule had not been reviewed following the sharp fall in the number of asylum-seekers in 2016 and 2017. Furthermore, the legislation did not allow for an individualised assessment of whether a shorter waiting period than three years could be warranted by considerations of family unity in a given case. Nor did it provide for a review of the situation in the country of origin of the aliens concerned. Secondly, turning to the applicant’s individual circumstances, the waiting period had operated as a strict requirement for him to endure a prolonged separation from his wife of many years, irrespective of considerations of family unity in the light of the likely duration of the obstacles – considered insurmountable by the Supreme Court – to their cohabiting in Syria. The Court was therefore not satisfied, notwithstanding the margin of appreciation, that the authorities had struck a fair balance between the relevant interests at stake.

In *E.G. v. the Republic of Moldova*¹⁵⁰, the Court examined the issue of the applicability of the six-month rule in the context of an amnesty and the ineffective execution of a sentence for the offence of sexual abuse.

The applicant was the victim of sexual abuse by three individuals. In December 2009 the three assailants (who were at large during the criminal proceedings) were convicted by a court of appeal and sentenced to imprisonment. After sentencing, two of them were immediately arrested and detained. In May 2010 the authorities issued a search warrant concerning the third one (V.B.). While at large, V.B. asked (through his lawyer) to be exonerated from the sentence by the application of the Amnesty Act 2008. His request was initially dismissed

150. *E.G. v. the Republic of Moldova*, no. 37882/13, 13 April 2021. See also under Article 35 § 1 (Six-month period) and Article 3 (Positive obligations) above.

at first-instance (as had the request of one of the other assailants) but the court of appeal accepted (May 2012) his appeal and granted an amnesty. Several later decisions quashed and again granted V.B. an amnesty. In the meantime, V.B. had been arrested but was released on the basis of the decision of the court of appeal of May 2012. Finally, on 18 November 2013, a decision dismissing V.B.'s amnesty request was adopted and at the end of January 2014 the prosecutor informed the police that V.B.'s amnesty had been quashed and requested that he be located. However, it was later found that, on 16 November 2013, V.B. had left the country for Ukraine. Despite an international arrest warrant (issued in 2015), he has not been located.

Relying on Articles 3 and 8, the applicant complained about the authorities' decision to grant an amnesty to V.B. and about their failure to effectively execute V.B.'s sentence of imprisonment. The Court found a violation of Articles 3 and 8 of the Convention.

The judgment is noteworthy because it clarifies the Court's case-law regarding: (i) compliance with the six-month time-limit in the context of this continuous situation; (ii) the application of an amnesty in a private violence context; and (iii) the procedural obligation to execute a criminal sentence in this context.

With respect to the application of an amnesty, the Court referred to its case-law developed in the context of ill-treatment by State agents, according to which amnesties and pardons should not be tolerated (*Mocanu and Others v. Romania*¹⁵¹), which the Court had already applied in a private party context, in so far as the treatment complained of reaches the threshold under Article 3 (*Pulfer v. Albania*¹⁵²). However, the Court also reiterated that pardons and amnesties are primarily matters of the domestic law of States and are, in principle, not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights (*Marguš v. Croatia*¹⁵³, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*¹⁵⁴).

In the present case, the Court considered that the sexual abuse of the applicant amounted to a grave breach of her physical and moral integrity so that the grant of the amnesty to V.B. was susceptible of running counter to the State's obligations under Articles 3 and 8 of the Convention, under which the present case fell to be examined (see also,

151. *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts).

152. *Pulfer v. Albania*, no. 31959/13, § 83, 20 November 2018.

153. *Marguš v. Croatia* [GC], no. 4455/10, § 139, ECHR 2014 (extracts).

154. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 160, 26 May 2020.

for instance, *Y v. Bulgaria*¹⁵⁵). In this connection, the Court observed that there was a lack of consistency by the domestic courts in their application of amnesties under the 2008 Act: an amnesty had not been granted to another assailant of the applicant who was in a similar situation to V.B. The Court also noted that, while the amnesty had been annulled in the end, the fact that V.B. had benefited from an amnesty for a year and then used the opportunity to escape was contrary to the State's procedural obligation under Articles 3 and 8 of the Convention.

As regards the duty to execute a criminal sentence, the Court referred to its case-law under Article 2 according to which the enforcement of a sentence imposed must be regarded as an integral part of the State's procedural obligation (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*¹⁵⁶; *Akeliënė v. Lithuania*¹⁵⁷; and *Makuchyan and Minasyan*, cited above, § 50). The Court considered that the same applied in the present context concerning a conviction for sexual abuse falling under Articles 3 and 8 of the Convention.

On the facts, the Court noted that there had been a lack of coordination between the authorities concerning the different decisions granting and annulling V.B.'s amnesty. It also noted significant unjustified delays in the actions (the police search and the international arrest warrant) taken to locate V.B. (see, by contrast, *Akeliënė*, cited above, §§ 91-93). The Court therefore found that the measures taken by the authorities to execute V.B.'s sentence had been inadequate and failed to fulfil the State's procedural obligation under Articles 3 and 8 of the Convention in this context.

Freedom of thought, conscience and religion (Article 9)

Applicability

*Vavříčka and Others v. the Czech Republic*¹⁵⁸ concerned the fine imposed on a parent and the exclusion of children from preschool for the refusal to comply with a statutory duty to vaccinate children.

One of the applicants was fined for failing to have his school-age children vaccinated in conformity with the statutory duty to vaccinate

155. *Y v. Bulgaria*, no. 41990/18, §§ 63-64, 20 February 2020.

156. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, §§ 32-33, 13 October 2016.

157. *Akeliënė v. Lithuania*, no. 54917/13, § 85, 16 October 2018.

158. *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021. See also under Article 8 (Private life) above.

children. The other applicants, minors, were refused admission to preschools or nurseries on the same grounds.

The applicants complained mainly under Articles 8 and 9 of the Convention and Article 2 of Protocol No. 1. The Grand Chamber found no violation of Article 8. It declared inadmissible the complaint under Article 9: the applicants had not shown that their critical opinion on vaccination was of sufficient cogency, seriousness, cohesion and importance as to constitute a conviction or belief attracting the guarantees of this provision.

The Grand Chamber's judgment is noteworthy in that it is the first time the Court has addressed compulsory child vaccination and the consequences of non-compliance with such a duty from the standpoint of Article 9 of the Convention.

Manifest one's religion or belief

*Abdi Ibrahim v. Norway*¹⁵⁹ concerned the adoption of a child by foster parents with a religious faith different to that of the biological parent.

The applicant, a Somali national of Muslim faith, was granted refugee status in Norway in 2010; she was accompanied by her baby son. Later that year, the baby was placed initially in emergency care and then with a Christian family, despite the applicant's wish that he should go either to her cousins or to a Somali or Muslim family. The applicant was granted six supervised one-hour contact sessions per year. In 2013 the social welfare authorities applied to allow the foster family to adopt the child (meaning that the applicant would no longer have contact with him) and for her parental rights to be removed. The applicant appealed: she did not ask for the child's return but sought contact so that her son could maintain his cultural and religious roots. In 2015 the court of appeal dismissed her appeal and authorised the child's adoption.

The applicant complained to the Court under Articles 8 and 9 of the Convention; a Chamber of the Court considered that the applicant's submissions under Article 9 relating to her and her son's cultural and religious background fell to be examined under Article 8 of the Convention. Referring to the principles of *Strand Lobben and Others v. Norway*¹⁶⁰, it found a violation of Article 8, basing its conclusion on the case as a whole, including its religious aspects. The Grand Chamber also followed this approach and found a breach of Article 8 of the Convention, interpreted in the light of Article 9.

159. *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021. See also under Article 8 (Family life) above and Article 2 of Protocol No. 1 (Right to education) below.

160. *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019.

The Grand Chamber judgment is noteworthy because of its novel context: the biological mother's wish that her child, who was in foster care when still a baby, be brought up in line with her religious faith, which was different from that of the foster family (prospective adoptive parents). The Court had regard to the impact of the compulsory taking into care of a child on the scope of the biological parents' rights under Article 9 or Article 2 of Protocol No. 1. It clarified whether the religious aspect of the case warranted examination as a separate issue under Article 9, in addition to the usual Article 8 analysis and, in relation to the latter analysis, the Court stressed that due account had to be taken of the interests of the biological parent protected by Article 9. It also provided some indication as to how the domestic authorities could meet this requirement.

In the Court's view, a parent bringing his or her child up in line with his or her own religious or philosophical convictions may be regarded as a way to "manifest his religion or belief, in ... teaching, practice and observance" within the meaning of Article 9. By analogy with Article 2 of Protocol No. 1, the compulsory taking into care of a child, while entailing limitations, does not entirely preclude the exercise by a biological parent of his or her Article 9 rights. To some degree he or she may also be able to continue doing so, for example by assuming parental responsibilities or exercising contact rights aimed at facilitating family reunion.

The Court, however, did not find it necessary in the instant case to determine the scope of Article 9 and its applicability to the matters complained of: the applicant's complaint, relating to the adverse effect of the choice of foster home in regard to her wish that X be brought up in line with her Muslim faith, did not call for a separate examination under Article 9. In this regard, the Court reiterated its usual approach whereby it finds a complaint to be most appropriately characterised with reference to one Article, while acknowledging that the subject matter also touches upon interests protected by other Articles of the Convention. The Court therefore considered it appropriate to centre its examination of the present case on the compatibility of the impugned measures with the applicant's right to respect for her family life under Article 8 of the Convention, which had to be interpreted and applied in the light of Article 9. It followed that an important element of the Article 8 analysis in this context was the question whether the domestic authorities had had due regard to the applicant's interests protected by the Article 9 freedom.

With this in mind, the Court took particular note of the domestic court's reliance on Article 20 § 3 of the [United Nations Convention on](#)

the Rights of the Child. In accordance with this provision, when assessing possible solutions (adoption, foster care, etc.) for a child temporarily or permanently deprived of his or her family environment, “due regard [is to] be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”. The Court clarified that in substance this standard corresponded to and was in compliance with the requirements of the Convention.

The Court further considered the scope of the obligation incumbent on the authorities in accordance with this standard. In the first place, a biological parent’s interests protected by Article 9 are only part of the various interests to be taken into account throughout the whole process in cases of this nature where the child’s best interest must remain paramount. Secondly, as follows from the relatively broad agreement in international law, in this connection domestic authorities are bound by an obligation of means not one of result. This obligation could be complied with not only by ultimately finding a foster home which corresponded to a biological parent’s cultural and religious background, but also through arrangements for regular contact with the child.

In the instant case, the authorities had indeed made efforts, which ultimately proved unsuccessful, to find from the outset a foster home for the applicant’s son which would have been more suitable from the perspective of her Muslim faith. However, the arrangements made thereafter as to her ability to have regular contact with her child, culminating in the decision to allow for his adoption, had failed to take due account of the applicant’s interest in allowing him to retain at least some ties to his cultural and religious origins. Considering the case as a whole, the Court concluded that the reasons advanced in support of the impugned decision had not been sufficient to demonstrate that the circumstances of the case had been so exceptional as to justify a complete and definitive severance of the ties between the applicant and her son, or that the decision to that effect had been motivated by an overriding requirement pertaining to his best interests.

*Polat v. Austria*¹⁶¹ concerned the post-mortem examination of a newborn, carried out despite the parents’ objections on religious grounds.

While the applicant – a woman of Muslim faith – was pregnant, the foetus showed signs of a rare syndrome. She and her husband informed the hospital that, in the event of their child’s death, they refused to

161. *Polat v. Austria*, no. 12886/16, 20 July 2021. See also under Article 8 (Private and family life) above.

consent to a post-mortem examination on religious grounds: they explained that, since they wished to ritually wash the corpse prior to a funeral, the corpse had to remain as unscathed as possible. The child died shortly after birth. Despite the applicant's objections, the public hospital performed a post-mortem to verify the cause of death and evaluate the risks for the applicant's future pregnancies: this was permitted for scientific purposes by domestic law. During the post-mortem, nearly all the child's organs were removed.

The applicant complained under Articles 8 and 9 that carrying out the post-mortem without taking into account her religious convictions had violated her right to respect for her private and family life and her right to freedom of religion. The Court found a breach of both Articles.

The case concerned a novel issue: the regulation of post-mortem examinations in public hospitals and the question whether, and in which cases, close relatives of the deceased should have the right to object to a post-mortem examination for reasons related to private life and religion where the interests of public health clearly call for such an examination.

The judgment is noteworthy because, for the first time, the Court stated that religious beliefs and respect for private and family life, under Articles 8 and 9, should be balanced against the protection of public health when conducting post-mortem examinations.

As regards the post-mortem, while the Court agreed with the Government that the protection of the health of others through the conduct of post-mortem examinations served a legitimate aim, it also attached weight to the relevance of the applicant's expressed interests (compare *Solska and Rybicka v. Poland*¹⁶²). As the case related to sensitive moral and ethical issues, it required a balance to be struck between competing private and public interests. The Court put emphasis on the fact that the domestic authorities ought to have conducted a balancing exercise between the competing, scientific and religious/private interests, at stake. Even though there had indeed been a scientific interest in performing the post-mortem examination, the Court noted that the applicable legislation left a certain scope of discretion to the doctors, including as to the extent of the intervention "necessary" in any given case. While it could not therefore be excluded that a balancing of competing interests could or should have been carried out under domestic law, the domestic authorities did not appear to have engaged in any such exercise. Admittedly, the Supreme Court had addressed the proportionality of the interference with the applicant's rights under

162. *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, 20 September 2018.

Articles 8 and 9. Nonetheless, the Court observed that the Supreme Court had not sufficiently addressed the applicant's individual rights under Articles 8 and 9 and the "necessity" of the post-mortem in the light of those rights.

Freedom of expression (Article 10)

Freedom of the press

*Big Brother Watch and Others v. the United Kingdom*¹⁶³ concerned the bulk interception of cross-border communications and receipt of intelligence from foreign intelligence services and the safeguards against abuse.

The applicants, legal and natural persons, complained about the scope and magnitude of the electronic surveillance programmes operated by the respondent Government of which they considered they had likely been affected. The Grand Chamber found a breach of Article 8 (see also *Centrum för rättvisa v. Sweden*) and Article 10 in respect of the regimes for bulk interception and acquisition of communications data and no breach of both provisions as regards the receipt of intelligence from foreign intelligence services.

The Grand Chamber's judgment is noteworthy in that it sets out the fundamental safeguards required of a bulk interception regime under Article 8 (see also *Centrum för rättvisa*, cited above) and under Article 10, notably to ensure protection of confidential journalistic material. It also defines the requisite safeguards to ensure compliance with Article 8 of the receipt of intelligence from foreign intelligence services.

(i) Regarding Article 10 and access to confidential journalistic material by the intelligence services running a bulk interception operation, the Court distinguished two situations: intentional access through the deliberate use of selectors or search terms connected to a journalist or news organisation and unintentional access as a "bycatch" of such an operation. As to intentional access, the Court considered that preventive independent review was required given the significant degree of interference with journalistic communications: since such access would very likely result in the acquisition of significant amounts of confidential material, it could undermine the protection of sources to an even greater extent than an order to disclose a source, the interference being commensurate with that occasioned by the search

163. *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021. See also, under Article 8 (Private life) above, *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021.

of a journalist's home or workplace. The Court therefore stipulated the following safeguard:

... before the intelligence services used selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms had to be authorised by a judge or other independent and impartial decision-making body vested with the power to determine whether they had been "justified by an overriding requirement in the public interest" and, in particular, whether a less intrusive measure might have sufficed to serve the overriding public interest.

As regards unintentional access, it was considered to be materially different from the targeted surveillance of a journalist. In this connection, in *Weber and Saravia v. Germany*¹⁶⁴, the Court accepted that the initial interception, without examination of the intercepted material, did not constitute a serious interference with Article 10, as it was not aimed at monitoring journalists. In the present judgment, however, the Court revised this position, noting that surveillance which was not targeted directly at individuals had the capacity to have a very wide reach indeed owing to recent technological developments. In particular, the examination of a journalist's communications or related communications data by an analyst would be capable of leading to the identification of a source. At the same time, in unintentional access the degree of interference cannot be predicted at the outset, making it impossible to assess its proportionality at the authorisation stage. Keeping this particularity in mind, the Court framed the requisite safeguard, considering it imperative that

domestic law contain robust safeguards regarding the storage, examination, use, onward transmission and destruction of such confidential material. Moreover, even if a journalistic communication or related communications data have not been selected for examination through the deliberate use of a selector or search term known to be connected to a journalist, if and when it becomes apparent that the communication or related communications data contain confidential journalistic material, their continued storage and examination by an analyst should only be possible if authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether continued storage and examination is "justified by an overriding requirement in the public interest".

164. *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI.

Lastly, in finding a violation of Article 10, the Court took into account the weaknesses identified in its analysis of the bulk interception regime under Article 8 of the Convention.

(ii) With regard to receipt of intelligence from foreign intelligence services, the Court clarified that the interference with Article 8 did not lie in the interception itself, where it was carried out under the full control of foreign intelligence services and thus did not fall within the receiving State's jurisdiction. Rather, the interference lay, in the first place, in the initial request and, secondly, in the receipt of intercept material, followed by its subsequent storage, examination and use by the intelligence services of the receiving State. The Court indicated the requisite safeguards for each of the above two stages of the process, by drawing upon its case-law on the interception of communications by Contracting States (*Roman Zakharov v. Russia*¹⁶⁵).

As to the first stage (the initial request), the Court was concerned by the need to prevent States from circumventing their Convention obligations through interaction with non-Contracting States. The Court held that

where a request is made to a non-contracting State for intercept material the request must have a basis in domestic law, and that law must be accessible to the person concerned and foreseeable as to its effects ... It will also be necessary to have clear detailed rules which give citizens an adequate indication of the circumstances in which and the conditions on which the authorities are empowered to make such a request ... and which provide effective guarantees against the use of this power to circumvent domestic law and/or the States' obligations under the Convention.

Considering the second stage (the receipt of the intercept material), the Court indicated that

the receiving State must have in place adequate safeguards for its examination, use and storage; for its onward transmission; and for its erasure and destruction. ... If, as the Government contend, States do not always know whether material received from foreign intelligence services is the product of interception, then the Court considers that the same standards should apply to all material received from foreign intelligence services that could be the product of intercept.

... Finally, the Court considers that any regime permitting the intelligence services to request either interception or intercept

165. *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

material from non-Contracting States, or to directly access such material, should be subject to independent supervision, and there should also be the possibility for independent *ex post facto* review.

*Dareskizb Ltd v. Armenia*¹⁶⁶ concerned the unjustified ban on the publication of an opposition newspaper as a result of a state of emergency declared in the context of massive post-election protests.

In March 2008, and during massive protests that followed the announcement of the preliminary results of the presidential election, the incumbent President of Armenia adopted a decree declaring a state of emergency in Yerevan and imposing, *inter alia*, restrictions on the mass media. In addition, under Article 15 of the Convention, the Armenian authorities gave notice of a derogation from a number of Convention rights, including those protected by Article 10. During the state of emergency, the applicant company, which published a daily opposition newspaper, was prevented from doing so, with national security officers prohibiting the printing of the newspaper's edition on two occasions. The applicant company unsuccessfully challenged the measure before the domestic courts.

The Court considered that the derogation had failed to satisfy the requirements of Article 15, and it went on to find a breach of Article 10: the publication ban and the absence of any hate speech or incitement to violence had the effect of stifling political debate and silencing dissenting opinions, which had to be protected even in a state of emergency.

*Biancardi v. Italy*¹⁶⁷ concerned the liability of a newspaper editor of an online newspaper for a lengthy refusal to de-index a publication which contained personal data concerning private individuals.

The applicant, editor-in-chief of an online newspaper, published an article about a fight, followed by a stabbing, which had taken place in a restaurant, and the related criminal proceedings. One of the accused and the restaurant requested that the article be removed from the Internet. The applicant initially refused to do so, but eventually, eight months

166. *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021. See also under Article 15 (Derogation in time of emergency) below.

167. *Biancardi v. Italy*, no. 77419/16, 25 November 2021 (not final).

later, he de-indexed¹⁶⁸ the article in an effort to settle civil proceedings initiated against him. The civil courts nevertheless found the applicant liable because he had not de-indexed the article sufficiently quickly despite the plaintiffs' formal request, thus allowing anyone access to the information which concerned ongoing criminal proceedings by simply typing into the search engine the names of the restaurant or the accused. The applicant was ordered to compensate each plaintiff in the sum of 5,000 euros for the breach of their right to respect for their reputation.

In the Convention proceedings, he alleged under Article 10 of the Convention that the interference in his freedom of expression had been unjustified. The Court found no violation of this provision.

The judgment is noteworthy in view of the novel scope of the case: the civil sanctioning of a newspaper editor for a refusal over a period of time to de-index an article containing personal data of private individuals accessible online. The Court clarified two issues: in the first place, whether the obligation to de-index material can also be imposed on the administrators of newspaper/journalistic archives accessible through the Internet, as well as on Internet search engine providers; and, secondly, the relevant criteria for balancing the competing interests at stake (freedom of expression and the public interest in accessible information versus an individual's right to respect for his or her reputation and/or privacy, including to the protection of personal data).

(i) Relying on the domestic courts' findings, the Court delimited the scope of the case. In particular, it was considered not to concern:

- the content of an online publication (*Delfi AS v. Estonia*¹⁶⁹);
- the fact of its publication and/or maintenance online, for example in public Internet archives (*Węgrzynowski and Smolczewski v. Poland*¹⁷⁰);
- the way information is published, such as its qualification (*Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*¹⁷¹) or

168. The terms “de-indexing”, “de-listing” and “de-referencing”, often used interchangeably in different sources of European Union and international law, indicate the activity of a search engine consisting of removing, on the initiative of its operators, from the list of results displayed (following a search made on the basis of a person's name) Internet pages published by third parties that contain information relating to that person.

169. *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

170. *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, 16 July 2013.

171. *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, ECHR 2009.

anonymisation (*M.L. and W.W. v. Germany*¹⁷² and, more recently, *Hurbain v. Belgium*¹⁷³, pending before the Grand Chamber).

What was at stake was the length and ease of access to the material containing personal data, despite the formal request by the individuals concerned to remove it from the Internet.

(ii) The Court observed that de-indexing could be done by an editor by telling a search engine provider not to let specific content appear in the search engine's search results. The Court therefore concluded that the obligation to de-index material could be imposed, not only on Internet search engine providers (CJEU judgment in *Google Spain SL and Google Inc.*¹⁷⁴), but also on the administrators of newspapers or journalistic archives accessible through the Internet.

(iii) As to the assessment of the proportionality of the impugned interference, the Court clarified that a strict application of the criteria set out in *Von Hannover v. Germany (no. 2)*¹⁷⁵ and *Axel Springer AG v. Germany*¹⁷⁶ would be inappropriate for two reasons: the specific context of the instant case (not involving any requirement to permanently remove the publication from the Internet or to anonymise it); and the factual differences between those cases and the present one (*Axel Springer AG* concerned the publication, by the applicant company, of print articles reporting the arrest and conviction of a well-known television actor, whereas the present case dealt with the maintenance online, for a certain period of time, of an Internet article concerning a criminal case against private individuals). Indeed, two main features characterised and distinguished the present case:

- the period for which the online article had remained on the Internet and the impact thereof on the right of the private individual in question to respect for his reputation; and
- the nature of the data subject in question, a private individual not acting within a public context as a political or public figure.

On this basis, the Court identified the following criteria by which to balance the applicant's right to freedom of expression and the third parties' right to respect for their reputation in this very specific context:

172. *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, 28 June 2018.

173. *Hurbain v. Belgium*, no. 57292/16, 22 June 2021.

174. Judgment of the Court of Justice of the European Union of 13 May 2014 in *Google Spain SL and Google Inc.*, C-131/12, ECLI:EU:C:2014:317.

175. *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012.

176. *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.

(a) The length of time for which the material had been kept online, particularly in the light of the purpose for which the personal data was originally processed.

The criminal proceedings against one of the plaintiffs were still pending when the Supreme Court adopted its judgment in the present case. However, the information contained in the article had not been updated since the occurrence of the events in question. Moreover, despite the plaintiffs' formal request to remove the article from the Internet, it had remained online and easily accessible for eight months: the applicable domestic law, read in the light of international legal instruments, supported the idea that the relevance of the applicant's right to disseminate information decreased over the passage of time, compared to the plaintiffs' right to respect for their reputation.

(b) The sensitivity of the data and the circumstances in which the related material was published.

(c) The gravity of the sanction imposed.

The Court was mindful that the subject matter of the article in question had related to the ongoing criminal proceedings instituted against one of the plaintiffs. However, the applicant had been held liable under civil and not criminal law and the amount of compensation awarded could not be regarded as excessive in the circumstances.

In sum, the sanctioning of the applicant editor for a lengthy failure to de-index the article in issue was found to constitute a justifiable restriction of his freedom of expression.

*Standard Verlagsgesellschaft mbH v. Austria (no. 3)*¹⁷⁷ concerned a media company's duty to disclose data concerning the anonymous authors of online comments.

The applicant is a limited liability company which owns and publishes a daily newspaper published both in print format and in an online version. Its online news portal carries articles assigned to it by the editorial office, and discussion forums relating to those articles, on which registered users are allowed to post comments. Following the posting of offensive comments under two articles which the applicant company had published on its portal regarding two politicians and a political party, it was ordered to disclose the data of the authors of the comments. The domestic courts refused to consider the latter as journalistic sources.

177. *Standard Verlagsgesellschaft mbH v. Austria (no. 3)*, no. 39378/15, 7 December 2021 (not final).

The applicant company complained that this had infringed its right to freedom of expression under Article 10 and the Court found a violation of this provision.

The judgment is noteworthy in view of the novel scope of the case: a media company's duty to disclose data concerning anonymous authors of comments posted on its Internet portal. The Court clarified three issues: in the first place, whether authors of online comments could be considered a journalistic "source"; secondly, whether the lifting of the anonymity of those authors amounted to an interference with the press freedom of a media company; and, lastly, the level of scrutiny required from the domestic courts when conducting a balancing exercise in this particular context.

(i) In the Court's view, the comments posted on the forum by readers of the news portal constituted opinions and therefore information within the meaning of the [Recommendation on the right of journalists not to disclose their sources of information](#)¹⁷⁸. However, since they were clearly addressed to the general public rather than to a journalist, their authors could not be considered a journalistic "source" and the media company concerned could not rely on its editorial confidentiality in respect of them.

(ii) While ruling out therefore an interference on the basis of the disclosure of a journalistic source, the Court considered whether an obligation to disclose personal data of forum users could interfere with a media company's Article 10 rights in other ways. Two elements were key to its analysis: the specific role of the company concerned, and the effects of the lifting of anonymity.

As to the first element, the Court observed that its assessment of the existence of an interference could not depend on the legal categorisation of an applicant company – as a host provider or as a publisher – by the domestic courts. In this regard, the Court must take into account the circumstances of the case as a whole. The Court observed that the present applicant company's role and interlinked tasks extended beyond being a host provider: it published a daily newspaper and maintained a news portal which provided a forum for users; and it took an active role in guiding users to write comments which were at least partly moderated. It was thus apparent that the applicant company's overall function was to further open discussion and to disseminate ideas with regard to topics of public interest. It could therefore claim the protection of the freedom of the press.

178. Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.

As to the second element, the Court reiterated the function of anonymity as a means of avoiding reprisals or unwanted attention and its role in promoting the free flow of opinions, ideas and information (*Delfi AS v. Estonia*¹⁷⁹). It could thus indirectly serve the interests of a media company to award its users a certain degree of anonymity to protect their private sphere and freedom of expression. An obligation to disclose user data could have a chilling effect on forum users in general, deterring them from contributing to a debate through online posts. It followed that the lifting of anonymity and the effects thereof could also indirectly affect, and thus interfere with, a media company's right to freedom of the press. The Court pointed out that the existence of an interference in this context could be established irrespective of the outcome of any subsequent proceedings as to the content of the impugned comments.

(iii) Turning to the required scrutiny of the domestic courts, the Court noted that there was no absolute right to anonymity and that anonymity on the Internet, although an important value, had to be balanced against other rights and interests such as those of a potential victim of a defamatory statement, who had to be awarded effective access to a court in this respect. However, as also reflected in the relevant international-law materials concerning Internet intermediaries, the disclosure of user data had to be necessary and proportionate to the legitimate aim pursued. Therefore, the domestic courts, before deciding on such a measure, should – in accordance with their positive obligations under Articles 8 and 10 of the Convention – weigh all the conflicting interests at stake in a given case. In accordance with the Court's long-standing case-law, a sufficient balancing of interests was all the more important, where, as in the instant case, political speech and debates of public interest were concerned.

When determining the level of such scrutiny required in this context, the Court had regard to the weight of the impugned interference. It considered that the obligation to disclose user data weighed less heavily in the proportionality assessment than the interference in a case where a media company was held liable, under civil or criminal law, for the content of a particular comment by being fined or obliged to delete it (*Delfi AS*, cited above, and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*¹⁸⁰). Consequently, the Court accepted that a prima facie examination may suffice as regards the balancing exercise in

179. *Delfi AS v. Estonia* [GC], no. 64569/09, § 147, ECHR 2015.

180. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016.

domestic proceedings concerning the disclosure of user data, although even a prima facie examination required some reasoning and balancing.

On the facts of the case, the Court found that the domestic courts had failed to conduct any balancing at all between the competing interests at stake: on the one hand, the plaintiffs' right to protect their reputation and, on the other, the applicant company's right to freedom of the press, as well as its role in protecting the personal data of the authors of the comments and their freedom to express their opinions publicly. This was of particular concern, since the impugned comments could be characterised as political speech: they had been expressed in the context of a public debate on issues of legitimate public interest (the conduct of the relevant politicians acting in their public capacities) and in reaction to the comments of the politicians published on the same news portal. Moreover, though seriously offensive, the relevant comments had not amounted to hate speech or incitement to violence, nor had they been otherwise clearly unlawful. In sum, in the absence of the requisite balancing, the court order to disclose the data of the authors of the comments had not been supported by relevant and sufficient reasons to justify the interference with the right of the applicant company to freedom of the press.

Freedom to receive and impart information

*Norman v. the United Kingdom*¹⁸¹ concerned the voluntary disclosure of the identity of a public official as a journalistic source.

The applicant – a prison officer at the relevant time – passed information about the prison where he worked to a tabloid journalist in exchange for money over the course of a number of years. In 2011 a public inquiry (“the Leveson Inquiry”) was launched into the conduct of some journalists working for certain newspapers in the United Kingdom and the police launched a criminal investigation (“Operation Elveden”) into allegations of inappropriate payments by some journalists to public officials. In this context, the owner of a newspaper (Mirror Group Newspapers; “MGN”), on the basis of a Memorandum of Understanding (“MoU”) with the police, disclosed the name of the applicant to the police. The applicant was subsequently convicted of misconduct in public office and sentenced to twenty months' imprisonment. He unsuccessfully appealed against his conviction and sentencing.

Before the Court, the applicant complained under Article 7 about the vague nature of the offence of misconduct. He also complained, relying

181. *Norman v. the United Kingdom*, no. 41387/17, 6 July 2021. See also under Article 7 (No punishment without law) above.

on Article 10, that the disclosure by MGN of his identity to the police and his subsequent prosecution and conviction had violated his right to protection as a journalistic source. The Court found the complaint under Article 10 about the disclosure of his identity to be incompatible *ratione personae* and found no violation of that Article as regards his prosecution and conviction. The Court also found no violation of Article 7 of the Convention.

The case concerns a novel scenario: information was imparted to the journalist in exchange for payment over a significant period of time and the identity of the source was disclosed to the police by the journalist on the basis of an MoU with the police. The judgment is noteworthy for two reasons: (i) the Court examined for the first time the responsibility of the State for the protection of journalistic sources in the context of an agreement for disclosure between a newspaper and the police; and (ii) the Court's treatment of the applicant's status as a public official and a journalistic source as regards his prosecution and conviction for disclosing information entrusted to him in the course of his work.

(i) As regards the disclosure of the applicant's identity to the police, the Court clarified that in the absence of a court order compelling disclosure of the source's identity and of any compulsion on the journalist to disclose the latter's name, the disclosure could not be attributable to the respondent State. The Court distinguished in that regard between, on the one hand, the acts of requesting the information, agreeing an MoU or accepting the information, and, on the other hand, a compulsion to disclose the information. On this basis the Court found, as did the domestic courts, that the disclosure of the applicant's identity by the journalist was "truly voluntary". The Court stressed in that regard that the terms of the MoU had allowed the journalist to refuse to disclose information on Article 10 grounds, including the right to protect journalistic sources.

(ii) As regards the prosecution and conviction of the applicant, the Court was, in the first place, satisfied that the applicant ought to have been aware, if necessary with legal advice, that by providing internal prison information to a journalist in exchange for money on numerous occasions over a five-year period he had risked being found guilty of the offence of misconduct in public office. It stressed in that regard that such conduct did not fall outside the scope of the criminal law merely because it also constituted a disciplinary offence and further reiterated that the Convention – notably Article 7 – did not preclude the gradual clarification of the rules of criminal liability through judicial interpretation (the Court found no violation of Article 7 of the Convention).

The Court also put emphasis on the fact that the applicant had knowingly engaged in a course of conduct contrary to the requirements of his public office and that the scope and scale of his unlawful conduct was significant. The Court attached significant weight in that context to the serious harm caused to other prisoners, to staff and to public confidence in the prison as a result of the applicant's behaviour. There had therefore been a strong public interest in prosecuting him, in order to maintain the integrity and efficacy of the prison service and the public's confidence in it.

With respect to the content of the information and the motivation of the applicant, the Court noted that there had been no public interest in the majority of the information disclosed by the applicant, nor had he been primarily motivated by public-interest concerns. Instead, as found by the sentencing judge, the applicant had been motivated by money and by an intense dislike of the prison governor.

Moreover, since the applicant had not claimed before the Court to have acted as a whistle-blower, there was no need for the Court to enquire into the criterion which is central to the case-law on whistle-blowing (*Guja v. Moldova*¹⁸²), namely whether there had existed any alternative channels or other effective means for the applicant to remedy the alleged wrongdoing which he had intended to uncover. The Court, nonetheless, observed that the sentencing judge had pointed to the fact that, as a trade union representative, the applicant could have used official channels to disseminate information had the public interest been his sole concern. The Court thus considered that the reasons for the applicant's prosecution and conviction had been relevant and sufficient, and found no violation of Article 10 of the Convention.

Freedom of assembly and association (Article 11)

Freedom to form and to join trade unions

In *Yakut Republican Trade-Union Federation v. Russia*¹⁸³ the Court examined the rights of working prisoners to join and form trade unions.

The applicant, a trade-union federation, was ordered to expel a grass-roots union of working prisoners because of a statutory ban on the unionisation of prisoners.

182. *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.

183. *Yakut Republican Trade-Union Federation v. Russia*, no. 29582/09, 7 December 2021 (not final).

It complained about this statutory restriction under Article 11 of the Convention. The Court found no violation of this provision.

The judgment is noteworthy in that the Court has, for the first time, ruled on the question whether trade-union freedom, guaranteed by Article 11 of the Convention, is applicable to working prison inmates. It is interesting in three respects.

In the first place, the Court clarified that the applicant federation did not lack victim status because, as argued by the respondent Government, the impugned statutory restriction affected the prisoners' union it had been ordered to expel. In this respect, the Court reiterated that Article 11 protected both workers and unions. Just as a worker should be free to join a union, so should the union be free to choose its members (*Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*¹⁸⁴). In the Court's view, this principle implied, by extension, that just as a union should be free to join a federation, so should the federation be free to admit the union.

Secondly, the Court was called upon to determine whether, for the purpose of trade-union activity, prison work could be equated with "ordinary employment". Indeed, most of the trade-union freedom cases previously considered by the Court concerned employees and, more broadly, persons in an "employment relationship". In this regard, the Court reiterated that prison work differed from the work performed by ordinary employees in many aspects. Prison work served the primary aim of rehabilitation and resocialisation, was aimed at reintegration and was obligatory (*Stummer v. Austria*¹⁸⁵). It could therefore not be equated to ordinary employment (compare the finding in *Stummer* that a working prisoner was in a relevantly similar situation to an ordinary employee as regards any provision of an old-age pension).

Thirdly, and on the one hand, the Court confirmed that prisoners in general continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty, and that no occupational group was excluded from the scope of Article 11. On the other hand, Convention rights were intended to be practical and effective, and trade-union freedom might be difficult to exercise in detention. In those circumstances, the Court attached significant importance to the lack of sufficient consensus between the Council of Europe member States as regards the rights of prisoners to join and form trade unions. The Court therefore concluded that the order of

184. *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, 27 February 2007.

185. *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011.

the domestic courts to the applicant federation to expel the union of working inmates had not exceeded the wide margin of appreciation available to the national authorities in this sphere. However, relying on the “living instrument” doctrine, the Court did not exclude that developments in that field might at some point in the future necessitate the extension of trade-union freedom to working inmates, especially if they worked for a private employer.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 3

*Sabalić v. Croatia*¹⁸⁶ concerned the procedural obligation in respect of homophobic acts of violence.

The applicant was attacked in a nightclub by a man, M.M., who during the attack made a number of discriminatory statements concerning the applicant’s sexual orientation. In response, the police did not inform the competent State Attorney’s Office, which they were obliged to do under the domestic law, but instead to institute minor-offence proceedings against M.M. which did not deal with the hate-crime element of the incident. M.M. was found guilty of breaching public peace and order and sentenced to a fine of approximately 40 euros. The applicant was not informed of the minor-offence proceedings and received no information from the authorities. She therefore lodged a criminal complaint against M.M. with the State Attorney’s Office alleging criminal offences of violent hate crime and discrimination. Although the State Attorney’s Office instituted a criminal investigation, it eventually rejected the criminal complaint on the basis that M.M.’s conviction of minor offences had created a formal impediment to criminal prosecution on the basis of the *ne bis in idem* principle. The domestic courts upheld this decision.

The applicant complained to the Court about the lack of an appropriate response by the domestic authorities to the homophobic violence against her. The Court found a violation of the procedural limb of Article 3 of the Convention taken in conjunction with Article 14.

The judgment is noteworthy because, in the first place, it contains a comprehensive statement of the relevant principles under Articles 3 and 14 concerning the State’s procedural obligation when confronted with violent incidents triggered by suspected discriminatory attitudes. Secondly, the Court, for the first time, elaborated on how a failure to

186. *Sabalić v. Croatia*, no. 50231/13, 14 January 2021. See also under Article 4 of Protocol No. 7 (Right not to be tried or punished twice) above.

comply with the procedural obligation under Articles 3 and 14 may be considered to amount to a “fundamental defect” in those proceedings capable of setting aside their *res judicata* effect and allowing for their reopening to the detriment of an accused in accordance with Article 4 § 2 of Protocol No. 7 to the Convention.

(i) As regards the State’s procedural obligation under Articles 3 and 14, in the judgment the Court relied on the established principles set out in, for instance, *Identoba and Others v. Georgia*¹⁸⁷, *M.C. and A.C. v. Romania*¹⁸⁸, and *Škorjanec v. Croatia*¹⁸⁹. The judgment describes the three contexts in which the Court has, so far, found violations of the procedural obligation under these Articles:

(a) in the case of a failure by the domestic authorities to take all reasonable steps to effectively ascertain whether or not a discriminatory attitude might have played a role in the events;

(b) where the criminal proceedings are discontinued on formal grounds without the facts of the case being established by a competent criminal court, due to the flaws in the actions of the relevant State authorities; and

(c) in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level, fostering a sense that the acts of ill-treatment were ignored by the relevant authorities and that there was a lack of effective protection against ill-treatment.

In the present case, the Court found that the minor-offence proceedings against M.M. failed to meet the requisite standards of effectiveness under the Court’s case-law: they did not address in any way the hate-crime element of the physical attack on the applicant; and they resulted in a sanction which was manifestly disproportionate to the gravity of the ill-treatment in question.

(ii) With respect to the domestic authorities’ reliance on the *ne bis in idem* principle as a reason for discontinuing the criminal prosecution against M.M., the Court noted, firstly, that the domestic authorities had themselves brought about the situation in which they, by unnecessarily instituting the minor-offence proceedings, undermined the possibility of putting properly into practice the relevant provisions and requirements of the domestic criminal law.

The Court also considered it important to reiterate that the principle of legal certainty in criminal matters was not absolute. Indeed Article 4 § 2 of Protocol No. 7 expressly permitted Contracting States to reopen

187. *Identoba and Others v. Georgia*, no. 73235/12, §§ 66-67, 12 May 2015.

188. *M.C. and A.C. v. Romania*, no. 12060/12, §§ 108-15, 12 April 2016.

189. *Škorjanec v. Croatia*, no. 25536/14, §§ 52-57, 28 March 2017.

a case to the detriment of an accused where, *inter alia*, a fundamental defect has been detected in the proceedings (compare *Taşdemir and Others v. Turkey*¹⁹⁰, in which the Court accepted that there may be *de facto* or *de jure* obstacles to reopening a case). Such a “fundamental defect” occurs where an accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings (*Mihalache v. Romania*¹⁹¹). Furthermore, an issue under the *ne bis in idem* principle could not even arise as regards grave breaches of fundamental human rights from the erroneous termination of the proceedings (*Marguš v. Croatia*¹⁹²). Moreover, the Court considered that it would have been possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level: in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the unwarranted set of proceedings and providing restitution for its effects, the Court may regard the situation as being remedied (*Sergey Zolotukhin v. Russia*¹⁹³).

Accordingly, in the present case, the Court found that both the failure to investigate the hate motives behind a violent attack or to take into consideration such motives in determining the punishment for violent hate crimes, amounted to “fundamental defects” in the proceedings within the meaning of Article 4 § 2 of Protocol No. 7. The Court also noted that the domestic authorities failed to remedy the impugned situation, although it could not be said that there were *de jure* obstacles to doing so: they could have offered the defendant the appropriate redress by, for instance, terminating or annulling the unwarranted set of minor-offence proceedings, providing restitution for its effects and re-examining the case.

In sum, the Court found that by instituting the ineffective minor-offence proceedings and therefore erroneously discontinuing the criminal proceedings on formal grounds, the domestic authorities failed to discharge adequately and effectively their procedural obligation under Article 3 of the Convention taken in conjunction with Article 14.

190. *Taşdemir and Others v. Turkey* (dec.), no. 52538/09, 12 March 2019.

191. *Mihalache v. Romania* [GC], no. 54012/10, §§ 129 and 133, 8 July 2019.

192. *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014 (extracts).

193. *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 114-15, ECHR 2009.

Article 14 taken in conjunction with Article 8

The judgments in *Budinova and Chaprazov v. Bulgaria*¹⁹⁴ and *Behar and Gutman v. Bulgaria*¹⁹⁵ concerned the applicability of Article 8 and the criteria for determining whether negative stereotyping of a social group affects the “private life” of its members.

The applicants – Bulgarian nationals of Roma and Jewish ethnic origin – unsuccessfully sought a court order against a well-known journalist and politician compelling him to apologise publicly for a number of public anti-Roma and anti-Semitic statements he had made and to refrain from making such statements in the future.

They argued under Articles 8 and 14 that each of them, as a member of a minority group, had been personally affected by those statements. In the Court’s view, Article 8 was applicable and there had been a breach of this provision read in conjunction with Article 14.

The judgments are noteworthy because they considerably develop the principle laid down by the Grand Chamber in *Aksu v. Turkey*¹⁹⁶: they set out the relevant factors by which to assess whether negative public statements about a social group affect the “private life” of an individual member of that group to the point of triggering the application of Article 8 in relation to them.

In *Aksu*, cited above, the Grand Chamber established the principle that negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of its members: in that sense, it can be seen as affecting the private life of members of the group and thus trigger the application of Article 8 in relation to them.

In the present case, the Court developed the *Aksu* test by spelling out explicitly the considerations which might have a bearing on this assessment. To this end and in the first place, the Court was guided in its approach to the applicability of Article 8 by case-law requiring that a certain “threshold of severity” be demonstrably attained where a person’s “private life” is alleged to have been negatively affected by a statement or act (see, mainly, *Denisov v. Ukraine*¹⁹⁷, with further detailed references, and *Beizaras and Levickas v. Lithuania*¹⁹⁸, and *Hudorovič*

194. *Budinova and Chaprazov v. Bulgaria*, no. 12567/13, 16 February 2021.

195. *Behar and Gutman v. Bulgaria*, no. 29335/13, 16 February 2021.

196. *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, ECHR 2012.

197. *Denisov v. Ukraine* [GC], no. 76639/11, §§ 110-14, 25 September 2018.

198. *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 117, 14 January 2020.

*and Others v. Slovenia*¹⁹⁹). Secondly, the Court drew on other case-law, particularly *Perinçek v. Switzerland*²⁰⁰ and *Lewit v. Austria*²⁰¹, concerning comments made against groups. It went on to emphasise that the question whether a “certain level” (within the meaning of *Aksu*) had been reached could only be decided on the basis of the circumstances of the specific case and, in particular, on the basis of relevant factors, including but not necessarily limited to:

- (a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position *vis-à-vis* society as a whole);
- (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype); and
- (c) the form and context in which the statements were made, their reach (which may depend on where and how they [were] made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group’s identity and dignity.

It cannot be said that one of those factors invariably takes precedence; it is the interplay of all of them that leads to the ultimate conclusion on whether the “certain level” required under *Aksu* ... and the “threshold of severity” required under *Denisov* ... has been reached, and on whether Article 8 is thus applicable. The overall context of each case – in particular the social and political climate prevalent at the time when the statements were made – may also be an important consideration.

On the facts of both cases and applying the above criteria, the Court considered that the impugned statements had been capable of having a sufficient impact on the sense of identity of Jews and Roma in Bulgaria, and on their feelings of self-worth and self-confidence, to have reached the “certain level” or “threshold of severity” required, thus affecting the applicants’ “private life”. In the first place and regarding the characteristics of both groups targeted, Jews and Roma in Bulgaria could be seen as being in a vulnerable position. Secondly, in both

199. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, §§ 115 and 157, 10 March 2020.

200. *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts).

201. *Lewit v. Austria*, no. 4782/18, 10 October 2019.

cases, the content of the impugned statements had been virulent and amounted to extreme negative stereotyping meant to vilify those groups and to stir up prejudice and hatred towards them. In *Behar and Gutman*, they had rehearsed timeworn anti-Semitic narratives (including the denial of the Holocaust). In *Budinova and Chaprazov*, the statements, which were of a systematic nature, appeared to have been deliberately couched in inflammatory terms, visibly seeking to portray Roma in Bulgaria as exceptionally prone to crime and depravity. Thirdly, and considering the context and reach of the impugned statements, the applicants in both cases had lodged their claims against the politician at precisely the time when his political career had been on the rise and when his utterances had thus been gaining more notoriety. While the most virulent of his statements about Jews had been made in two books which had not been in wide circulation, his vehement anti-Roma stance, constituting a core component of his party's political message, had been repeated on many channels of communication, and had thus reached a wide audience. In view of all those factors, which pointed in the same direction and reinforced each other, Article 8, and therefore Article 14, were applicable.

On the merits, the Court found that by refusing to grant the applicants redress in respect of the politician's discriminatory statements, the Bulgarian authorities had failed to comply with their positive obligation to respond adequately to discrimination on account of the applicants' ethnic origin and to secure respect for their "private life". In particular, they had failed to assess the tenor of the politician's statements in an adequate manner and to carry out the requisite balancing exercise in line with the Court's case-law. While ascribing considerable weight to the politician's freedom of expression, they had downplayed the capacity of his statements to stigmatise both groups and arouse hatred and prejudice against them. In this connection, the Court reiterated that sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups deserved no or very limited protection under Article 10, read in the light of Article 17. For the Court, that was fully in line with the requirement, stemming from Article 14, to combat racial discrimination. The fact that the author of the impugned statements was a politician or that had spoken in his capacity as a member of parliament did not alter that.

Article 14 taken in conjunction with Article 1 of Protocol No. 1

*Jurčić v. Croatia*²⁰² concerned the refusal to provide an employment-related benefit to a woman who had undergone fertility treatment just before taking up a new job.

The applicant entered into an employment contract ten days after she had undergone *in vitro* fertilisation (IVF). When she subsequently went on sick leave for pregnancy-related complications, the relevant domestic authority re-examined her health insurance status and concluded that she had been medically unfit to take up employment at the material time due to the IVF she had undergone. It went on to find that, by taking up employment shortly after IVF, the applicant had sought to obtain pecuniary advantages related to employment status so that her employment was fictitious. Her application to be registered as an insured employee and to be paid sick leave compensation was therefore rejected. She complained that she had been discriminated against as a woman who had undergone IVF and the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention.

The judgment is noteworthy because the Court, for the first time, found that a woman had been discriminated against on grounds of pregnancy. Secondly, it identified a domestic practice of targeting pregnant women, who were frequently subjected to a review of the authenticity of their employment when entered into during pregnancy, even though under domestic law an employer was not allowed to refuse to employ a pregnant woman because of her condition. Thirdly, the Court expressed concern about gender stereotyping in this context.

(i) At the outset, the Court confirmed that, since only women could become pregnant, the applicant had been treated differently on grounds of sex, thereby reiterating the view expressed for the first time in the recent judgment in *Napotnik v. Romania*²⁰³ (a case leading to no violation following the termination of the applicant's diplomatic posting due to pregnancy).

(ii) In reply to the Government's argument that the revocation of the applicant's insurance status had pursued the legitimate aim of protecting public resources from fraudulent use, the Court stressed that a woman's pregnancy as such could not be considered fraudulent behaviour and, further, held that financial obligations on the State during a woman's pregnancy could not, of themselves, constitute sufficiently

202. *Jurčić v. Croatia*, no. 54711/15, 4 February 2021.

203. *Napotnik v. Romania*, no. 33139/13, 20 October 2020.

weighty reasons to justify a difference in treatment on the basis of sex, the Court referring in this regard to case-law of the Court of Justice of the European Union and relevant standards of the International Labour Organization (ILO).

(iii) As to whether the difference in treatment was justified, the Court emphasised that the introduction of maternity protection measures was essential to uphold the principle of equal treatment of men and women in employment and it reiterated that, as a matter of principle, even where the availability of an employee was a precondition for the proper performance of an employment contract, the protection afforded to a woman during pregnancy could not be dependent on whether her presence at work during maternity was essential for the proper functioning of her employer or by the fact that she was temporarily prevented from performing the work for which she had been hired.

In deciding the applicant's case, the domestic authorities had limited themselves to concluding that, due to IVF, the applicant had been medically unfit to take up the employment in question thereby implying that she should have refrained from doing so until her pregnancy was confirmed. This was in direct contravention of both domestic and international law and was tantamount to discouraging the applicant from seeking any employment due to her possible prospective pregnancy.

While the foregoing was sufficient for the Court to find that the applicant had been discriminated against on the basis of her sex, it went on to point to certain additional factors which made the present difference in treatment more striking, including the lack of any explanation as to how the applicant could have concluded a fraudulent contract if at the material time she could not have known whether or not her IVF would be successful and the fact that nothing indicated that women undergoing IVF would generally be unable to work during their fertility treatment or pregnancy.

(iv) Finally, the Court expressed concern about the overtones of the domestic authorities' conclusion – which implied that women should not work or seek employment during pregnancy or the mere possibility thereof – which the Court considered amounted to gender stereotyping presenting “a serious obstacle to the achievement of real substantive gender equality”, one of the major goals of the member States of the Council of Europe (citing *Carvalho Pinto de Sousa Morais v. Portugal*²⁰⁴) and which was not only a breach of domestic law, but was at odds

204. *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, §§ 48-54, 25 July 2017.

with relevant international gender equality standards (see the United Nations [Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\)](#), the [Istanbul Convention](#), the ILO's [Maternity Protection Convention 2000 \(No. 183\)](#) and the Appendix to the Council of Europe's [Recommendation Rec\(2019\)1](#) of the Committee of Ministers to member States on preventing and combating sexism.

Right to education (Article 2 of Protocol No. 1)²⁰⁵

Right to education

*Abdi Ibrahim v. Norway*²⁰⁶ concerned the adoption of a child by foster parents with a religious faith different to that of the biological parent.

The Grand Chamber judgment is noteworthy because of its novel context: the biological mother's wish that her child, who was in foster care when still a baby, be brought up in line with her religious faith, which was different from that of the foster family (prospective adoptive parents). The Court had regard to the impact of the compulsory taking into care of a child upon the scope of the biological parents' rights under Article 9 or Article 2 of Protocol No. 1.

In so far as Article 2 of Protocol No. 1 can be relevant in this particular context, the Court observed that most cases examined under this provision (and the related case-law principles) concerned the obligations of the State in relation to institutionalised education and teaching: the Convention organs had been called upon in very few cases to examine complaints made under this provision, in addition to a complaint under Article 8, in regard to the choice of foster home.

With regard to the impact of a care order, the case-law had considered that, although such an order did not result in a complete loss by the parents of their rights under Article 2 of Protocol No. 1, it inevitably led to a reduction in the content thereof (*Olsson v. Sweden (no. 1)*²⁰⁷, and *Tennenbaum v. Sweden*²⁰⁸). The Court observed, however, that the Convention institutions had not elucidated the reach of this provision beyond affirming that the authorities must have due regard to the parents' rights thereunder. In any event, as the applicant had, for

205. See also, under Article 8 (Private life) and Article 9 (Freedom of thought, conscience and religion – Applicability) above, *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021.

206. *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021. See also under Article 8 (Family life) and Article 9 (Manifest one's religion or belief) above.

207. *Olsson v. Sweden (no. 1)*, 24 March 1988, Series A no. 130.

208. *Tennenbaum v. Sweden*, no. 16031/90, Commission decision of 3 May 1993, unreported.

the first time, relied on this provision only before the Grand Chamber, the Court was unable to review the case from this standpoint. However, the Court did draw upon the above considerations when examining Article 9 of the Convention.

The Grand Chamber found a violation of Article 8 read in the light of Article 9.

Freedom of movement (Article 2 of Protocol No. 4)

The judgment in *Georgia v. Russia (II)*²⁰⁹ concerned internally displaced persons (IDPs) in the context of an international armed conflict.

In this inter-State case, the Grand Chamber examined for the first time the question of the rights of IDPs from the standpoint of Article 2 of Protocol No. 4, and not only under Article 8 of the Convention and Article 1 of Protocol No. 1, as it had done before (see, *inter alia*, *Cyprus v. Turkey*²¹⁰, and *Chiragov and Others v. Armenia*²¹¹).

OTHER CONVENTION PROVISIONS

Derogation in time of emergency (Article 15)²¹²

In *Dareskizb Ltd v. Armenia*²¹³ the Court considered the question whether massive post-election protests (with some violent episodes) amounted to a “public emergency threatening the life of the nation” within the meaning of Article 15.

In March 2008, and during massive protests that followed the announcement of the preliminary results of the presidential election, the incumbent President of Armenia adopted a decree declaring a state of emergency in Yerevan and imposing, *inter alia*, restrictions on the mass media. The necessity of the measures was confirmed by a parliamentary inquiry. In addition, under Article 15 of the Convention, the Armenian authorities gave notice of a derogation from a number of Convention rights, including those protected by Article 10. During the state of emergency, the applicant company, which published a daily opposition newspaper, was prevented from doing so, with national security officers

209. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021. See also under Article 1 (Jurisdiction of States) above and Article 33 (Inter-State cases) below.

210. *Cyprus v. Turkey* [GC], no. 25781/94, §§ 162-89, ECHR 2001-IV.

211. *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 188-208, ECHR 2015.

212. See also, under Article 2 (Right to life) above, *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final).

213. *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021. See also under Article 10 (Freedom of expression) above.

prohibiting the printing of the newspaper's edition on two occasions. The applicant company unsuccessfully challenged the measure before the domestic courts.

The Court considered that the derogation had failed to satisfy the requirements of Article 15, and it found a breach of Article 10.

The judgment is noteworthy in that the Court examined the validity of a derogation under Article 15 in a novel context²¹⁴, namely massive post-election opposition protests during which there were some violent episodes. The Court disagreed with the State's view as to the existence of a public emergency threatening the life of the nation (the Commission having done so in the "*Greek case*"²¹⁵). While the applicant company did not explicitly dispute the Government's argument as to the existence of a public emergency within the meaning of Article 15, this did not preclude the Court from examining the issue.

In the first place, the Court confirmed the principle that, notwithstanding the general approach of deference towards the assessment by the national authorities, their discretion was not unlimited (*Mehmet Hasan Altan v. Turkey*²¹⁶; see also the "*Greek case*", cited above, §§ 159-65 and 207). While accepting that weight had to be attached to the judgment of the State's executive and Parliament, the necessity of declaring a state of emergency and the particular measures involved had apparently never been subjected to any judicial scrutiny at the domestic level.

Secondly, and while tensions had been running high between demonstrators and law enforcement after the heavy-handed police dispersal of the peaceful protest at Freedom Square, the Court did not have at its disposal sufficient material to establish how the situation had evolved and eventually got out of hand so as to lead to an armed confrontation, damage of property and deaths. However, relying on its previous findings on the events in question (*Mushegh Saghatelyan v.*

214. In the context of terrorist activities, see, *inter alia*, *Ireland v. the United Kingdom*, 18 January 1978, §§ 205 and 212, Series A no. 25; *Aksoy v. Turkey*, 18 December 1996, § 70, *Reports of Judgments and Decisions* 1996-VI; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 181, ECHR 2009. In the context of an attempted military coup, see, *inter alia*, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, §§ 91-93, 20 March 2018, and *Şahin Alpay v. Turkey*, no. 16538/17, §§ 75-77, 20 March 2018.

215. *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "*Greek case*"), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12.

216. *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 91, 20 March 2018.

*Armenia*²¹⁷, and *Myasnik Malkhasyan v. Armenia*²¹⁸), the Court took into account the following factors:

- The planned or organised character of the events in issue: the relevant situation did not amount to planned and organised disorder or an attempted coup (compare, for example, *Mehmet Hasan Altan*, cited above): the dispersal of the assembly at Freedom Square, as well as a number of subsequent similar or uncontrollable events, might have played a role in the eventual escalation of violence.
- Extent of the violence: during the events in issue, the large crowd of several thousand people had remained peaceful throughout the relevant period; the violence that had taken place had been committed by small groups of protesters in a number of streets adjacent to the protest location.
- Use of weapons: no evidence had been submitted to demonstrate that the protesters who had committed violent acts had been armed with anything other than improvised objects as opposed to firearms or similar weapons as alleged by the Government.
- Causal link between the protesters' actions and casualties: there was no evidence to suggest that any of the deaths had occurred as a result of the deliberate or even unintentional actions of the protesters.

In the Court's view, there was therefore insufficient evidence to conclude that the opposition protests – protected under Article 11 of the Convention – even if massive and at times accompanied by episodes of violence, could be characterised as a public emergency “threatening the life of the nation” within the meaning of Article 15 or, therefore, as a situation justifying a derogation.

Restrictions not prescribed by the Convention (Article 18)

*Azizov and Novruzlu v. Azerbaijan*²¹⁹ concerned the applicability of Article 18 in conjunction with Article 5 § 3 to procedural safeguards.

The applicants, who were members of the non-governmental organisation NIDA (one of the most active youth movements in Azerbaijan), were arrested and remanded in custody on charges of illegal possession of narcotics and Molotov cocktails, having participated in a

217. *Mushegh Saghatelyan v. Armenia*, no. 23086/08, 20 September 2018.

218. *Myasnik Malkhasyan v. Armenia*, no. 49020/08, 15 October 2020.

219. *Azizov and Novruzlu v. Azerbaijan*, nos. 65583/13 and 70106/13, 18 February 2021.

series of peaceful anti-government demonstrations. They complained under Article 5 § 3 and the Court found a violation of this provision taken alone: the applicants' pre-trial detention had been extended on the basis of irrelevant grounds or stereotyped formula, without addressing case-specific facts and in disregard of the fact that one of the applicants was a minor. Having raised the issue of the application of Article 18 of its own motion, the Court found that the applicants' continued detention had pursued the ulterior purpose of punishing and silencing them for their active involvement in anti-government demonstrations and concluded as to a breach of Article 18 in conjunction with Article 5 § 3 of the Convention.

The judgment is noteworthy in that the Court has, for the first time, applied Article 18 in conjunction with Article 5 § 3, rather than with Article 5 § 1 as in many previous similar cases. This is also the first time, since *Merabishvili v. Georgia*²²⁰, that the Court examined the case from the standpoint of a potential plurality of purposes. In this latter connection, two aspects are interesting: the fact that the Court proceeded on the assumption that the applicants' pre-trial detention pursued a legitimate purpose; and the manner in which the Court distinguished between the elements relevant for each step of the two-tier test set out in *Merabishvili* (whether a given restriction pursued an ulterior purpose; and whether the established ulterior purpose was predominant).

(i) According to *Merabishvili* (cited above, § 287), Article 18 can only be applied in conjunction with an Article which sets out or qualifies Convention rights and freedoms (such as the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11). It remained to be confirmed whether or not this principle allowed the application of Article 18 to procedural safeguards (such as Article 5 §§ 2 to 5 and, in the present case, Article 5 § 3 of the Convention).

The question whether Article 18 could be invoked in conjunction with Article 5 § 3 was, for the first time, raised in the Grand Chamber judgment in *Selahattin Demirtaş v. Turkey (no. 2)*²²¹ (see also the Chamber judgment²²²). The Grand Chamber in that case, in contrast to the present case, found a lack of a reasonable suspicion in breach of Article 5 § 1 and that the pre-trial detention had pursued solely an ulterior purpose contrary to Article 18 taken in conjunction therefore with Article 5 § 1 (see

220. *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

221. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

222. *Selahattin Demirtaş v. Turkey (no. 2)*, no. 14305/17, 20 November 2018.

also *Navalnyy v. Russia*²²³ and, against Azerbaijan, *Aliyev v. Azerbaijan*²²⁴; *Natig Jafarov v. Azerbaijan*²²⁵; *Khadija Ismayilova v. Azerbaijan (no. 2)*²²⁶; and *Yunusova and Yunusov v. Azerbaijan (no. 2)*²²⁷, including, notably, the cases brought by other members of NIDA: *Rashad Hasanov and Others v. Azerbaijan*²²⁸ and *Ibrahimov and Mammadov v. Azerbaijan*²²⁹.

In the instant case and unlike in the above cases, the applicants' complaint under Article 5 § 1 regarding the absence of a "reasonable suspicion" of their having committed a criminal offence was rejected for a failure to exhaust domestic remedies. The Court went on to confirm that Article 18 can be invoked in conjunction with Article 5 § 3 of the Convention (compare with the Court's finding in *Ilgar Mammadov v. Azerbaijan (no. 2)*²³⁰ to the effect that the question whether Article 6 contains any express or implied restrictions which may form the subject of the Court's examination under Article 18 remained open).

(ii) A further feature of the instant case is also worth noting. The Court decided not to examine, *separately under Article 18*, the question whether the applicants' detention had pursued a legitimate purpose prescribed by Article 5 § 1 (c), since the complaint under this substantive provision had been found to be inadmissible (failure to exhaust domestic remedies, see above). The judgment focuses rather on Article 18 in conjunction Article 5 § 3 and proceeds therefore on the assumption that there had been a legitimate purpose, thus distinguishing the instant case from those concerning restrictions that had been applied solely for an ulterior purpose (*Rashad Hasanov and Others* and the other cases cited above). This led to the examination of the case on the basis of a potential plurality of purposes.

(iii) In this regard and in considering whether the applicants' pre-trial detention had also pursued an ulterior purpose (the first step of the *Merabishvili* test), the Court relied on the following elements:

– its findings in *Rashad Hasanov and Others* pinpointing specific targeting of NIDA and its members by law-enforcement authorities: it was clear from the latter's joint press statement that they had tried to link the applicants' alleged possession of narcotic substances to their

223. *Navalnyy v. Russia* [GC], no. 29580/12 and 4 others, 15 November 2018.

224. *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, 20 September 2018.

225. *Natig Jafarov v. Azerbaijan*, no. 64581/16, 7 November 2019.

226. *Khadija Ismayilova v. Azerbaijan (no. 2)*, no. 30778/15, 27 February 2020.

227. *Yunusova and Yunusov v. Azerbaijan (no. 2)*, no. 68817/14, 16 July 2020.

228. *Rashad Hasanov and Others v. Azerbaijan*, nos. 48653/13 and 3 others, 7 June 2018.

229. *Ibrahimov and Mammadov v. Azerbaijan*, nos. 63571/16 and 5 others, 13 February 2020.

230. *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, 16 November 2017.

NIDA membership, describing the organisation as a “destructive force” and qualifying its activities as illegal, without any reason or evidence;

- the authorities’ allegations regarding the applicants’ intention to incite violence and civil unrest, based on the leaflets found in the first applicant’s flat and worded “democracy urgently needed, tel: + 994, address: Azerbaijan”; and

- the timing of the institution of the criminal proceedings – following a series of demonstrations and on the eve of another one that was scheduled – suggesting the authorities’ intention to prevent the organisation of further protests against the government.

Having established, on the above grounds, the ulterior motive of punishing and silencing NIDA members for their active involvement in the anti-government demonstrations, the Court went on to analyse whether that purpose had been the predominant one (the second step of the *Merabishvili* test). The following considerations were key to its finding of a violation of Article 18:

- the case clearly belonged to the pattern of arbitrary arrest and detention of government critics, human rights defenders and civil society activists, through retaliatory prosecutions and misuse of the criminal law (as identified in the case of *Aliyev* and reaffirmed in subsequent judgments, including those concerning NIDA members);

- the authorities had apparently attached the utmost importance to their actions targeting NIDA as an organisation and its administration, aiming, in the first place, to prevent further protests through the measures against the applicants and, secondly, to paralyse NIDA’s activities through the detention of its four board members (*Rashad Hasanov and Others*);

- the manner in which the domestic courts had examined the extension of the applicants’ pre-trial detention: in particular, they had completely ignored the fact that the second applicant was a minor – a major element which, if taken into account, would probably have resulted in his rapid release.

Striking out/restoring applications (Article 37)

*Willems and Gorjon v. Belgium*²³¹ concerned the effects of a unilateral declaration by the Government and of a decision by the Court, acknowledging this declaration, to strike the application out of its list of cases.

231. *Willems and Gorjon v. Belgium*, nos. 74209/16 and 3 others, 21 September 2021.

The applicants each lodged an application before the Court, complaining about the inadmissibility of their appeals on points of law against the judgment convicting them of a criminal offence. By a unilateral declaration, the Government acknowledged that “the Court of Cassation’s decision to reject the applicants’ appeals on points of law as inadmissible, on the grounds that the lawyer signing the appeals had not referred to the fact that he held the requisite training certificate, did not comply with respect for their right of access to a court ...”. They also undertook to pay each of the applicants amounts in respect of non-pecuniary damage and of their costs and expenses. By a decision of 13 March 2018, the Court struck the applications out of its list of cases, indicating that it could decide to restore them to its list in the event of failure by the Government to comply with the terms of their declaration. On 7 November 2018 the Court of Cassation refused to reopen the proceedings, finding that the requests to that effect submitted by the applicants after the striking-out decision were unfounded. The Court of Cassation considered that it was not bound by either the Government’s unilateral declaration (by virtue of the principle of the separation of powers), or by the Court’s decision taking formal note of it. With regard to the Court’s decision, it noted that the Court had not examined the merits of the complaints in question and held that its decision to strike the applications out of its list did not therefore have the binding effect of interpretation. Lastly, the Court of Cassation ruled that the fact of requiring evidence that a lawyer held the necessary certification did not raise a problem in terms of the right of access to a court, and that its 2016 judgment declaring the appeals on points of law inadmissible had thus complied with the requirements of the Convention.

The Court subsequently restored these applications to its list of cases. In the present judgment it found a violation of Article 6 § 1, on the grounds that the Court of Cassation had displayed excessive formalism, impairing the right of access to a court.

The judgment is noteworthy in that it provides clarity on the effects of declarations by Governments and of decisions by the Court taking note of such declarations. The declaration in issue in this case was particular in that it had been made by the Government, but its implementation was in part dependent on a decision to be taken by an organ of judicial power, in this instance the Court of Cassation.

Firstly, the Court acknowledged that, in so far as it had not examined the admissibility and merits of the applicants’ complaints, its decision to strike their applications out of the list did not have the quality of *res judicata* or the binding effect of interpretation. As the decision had not

been a judgment finding a violation of the Convention, it did not come within the scope of Article 46.

Nonetheless, the Court considered it important to emphasise that, in the spirit of shared responsibility between the States and the Court for securing respect for the rights enshrined in the Convention, applicants were entitled to expect that the domestic authorities, including the national courts, would give effect in good faith to any undertaking by a Government contained in unilateral declarations and, *a fortiori*, in friendly settlements. This expectation would be all the stronger where the legal issues involved were part of the Court's established case-law concerning the respondent State or other generally applicable principles. In addition, however, in the present case there were parallels between the decision in question and a judgment finding a violation.

In this case, the Court had referred in its striking-out decision to its case-law on Article 46, according to which "reopening the proceedings in the domestic courts is the most appropriate, if not the only, means of ensuring *restitutio in integrum* and redressing the violations of the right to a fair trial". It had also noted that the domestic law did not in principle preclude the reopening of proceedings where the Court struck a case out of its list on the basis of a unilateral declaration by the Government.

As the applicants had requested the reopening of the criminal proceedings against them, the competent bodies, in this case the Court of Cassation, had been under an obligation to draw the consequences for the domestic legal order of the Government's unilateral declaration and the Court's decision taking note of it. This task formed part of the sharing of responsibilities between the national authorities and the Court with regard to securing the rights and freedoms defined in the Convention or its Protocols, and more specifically of the national authorities' primary responsibility in this area (*Guðmundur Andri Ástráðsson v. Iceland*²³²).

The effect of the Court of Cassation's refusal to grant the request for the reopening of the proceedings was that the Government's undertakings, contained in their unilateral declaration, had remained ineffective in the domestic legal order. This situation amounted to "exceptional circumstances" which had led the Court to restore the initial applications to its list of cases, at the applicants' request, and to examine the admissibility and merits of their initial complaints against the Court of Cassation's 2016 judgment ruling their appeals on points of law inadmissible.

232. *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 250, 1 December 2020.

Having found a violation of Article 6 § 1 in this regard, the Court noted, under Article 46, that the Code of Criminal Procedure allowed for the possibility of reopening the proceedings against a convicted person, in respect of criminal matters alone, if a final judgment of the Court had found that a breach of the Convention had occurred. The use of this possibility in the present case would be a matter for assessment, if appropriate, by the Court of Cassation, having regard to domestic law and to the particular circumstances of the case.

Obligation to furnish all necessary facilities (Article 38)

In the inter-State case in *Georgia v. Russia (II)*²³³ the Court held that there had been a failure to comply with the requirement under Article 38 of the Convention to cooperate with the Court.

In *Carter v. Russia*²³⁴, which concerned the targeted killing abroad of a Russian political defector and dissident, the Court also held that there had been a violation of Article 38 as a result of the Government's unjustified refusal to submit requested documentation from the domestic proceedings.

INTER-STATE CASES (ARTICLE 33)

The judgment in *Georgia v. Russia (II)*²³⁵ concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities; the relationship between Convention law and international humanitarian law (IHL) in the context of an armed conflict; the duty to investigate deaths occurring during the active combat phase; the definition of administrative practice; and the application of Article 2 of Protocol No. 4 to internally displaced persons (IDPs) (Articles 1, 2, 5 and 35 § 1 of the Convention and Article 2 of Protocol No. 4).

In this inter-State application (Article 33) the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely, before and after the ceasefire

233. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021. See also under Article 1 (Jurisdiction of States), Article 2 of Protocol No. 4 (Freedom of movement) above and Article 33 (Inter-State cases) below.

234. *Carter v. Russia*, no. 20914/07, 21 September 2021 (not final). See also under Article 1 (Jurisdiction of States) and Article 2 (Right to life) above.

235. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021. See also under Article 1 (Jurisdiction of States) and Article 2 of Protocol No. 4 (Freedom of movement) above.

agreement of 12 August 2008. It held that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction. On the merits, the Court found that there had been an administrative practice contrary to Articles 2, 3, 5 and 8 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4; a violation of the procedural limb of Article 2; and that there had been a failure to comply with the obligation to cooperate with the Court under Article 38 of the Convention.

This Grand Chamber judgment is novel in several respects. In particular, the judgment: clarifies the issue of jurisdiction in the context of an armed conflict: for the purposes of Article 1 of the Convention, military personnel and the civilian population of a country cannot be considered as falling within the “jurisdiction” of an attacking or invading State during the active combat phase of the hostilities (as distinct from the later phase of “military occupation”); and it sheds light on the methodology to be applied in cases of a *prima facie* conflict between Convention law and IHL.

(i) This is the first case, since the decision in *Banković and Others v. Belgium and Others*²³⁶, in which the Court has examined the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. The Grand Chamber did so in the light of two existing lines of case-law: on the one hand, the exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State of an area and/or on “State agent authority and control” over the direct victim of the alleged violation (*Al-Skeini and Others v. the United Kingdom*²³⁷); and, on the other hand, the general principle of *Banković and Others* according to which the provisions of Article 1 do not admit of a mere “cause and effect” notion of “jurisdiction” so that a State’s responsibility cannot be engaged by an “instantaneous extraterritorial act” (explicitly restated in *Medvedyev and Others v. France*²³⁸; see also *M.N. and Others v. Belgium*²³⁹). It also found that neither of the two conditions of extraterritorial jurisdiction (State agent authority and control over individuals or effective control over an area) are met in the case of military operations carried out during

236. *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

237. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 133-40, ECHR 2011.

238. *Medvedyev and Others v. France* [GC], no. 3394/03, § 64, ECHR 2010.

239. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, § 112, 5 May 2020.

an international armed conflict. The reality of fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no actual “control” either over that area or over the individuals therein. This interpretation is confirmed by the practice of the member States in not derogating under Article 15 in situations where they have engaged in an international armed conflict outside their own territory. Having regard to the fact that such situations are predominantly regulated by legal norms other than those of the Convention (namely, IHL) and that the Contracting Parties have not endowed the Court with the necessary legal basis for assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, the Grand Chamber concluded that it could not develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date. Accordingly, the events of the active phase of hostilities fell outside the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention.

(ii) Nevertheless, the Grand Chamber held that the respondent State had to be deemed to have had “jurisdiction” in respect of the complaint under the procedural limb of Article 2 of the Convention, even in respect of deaths which took place during the active phase of the military conflict. The Grand Chamber followed the case-law set out in *Güzelyurtlu and Others v. Cyprus and Turkey*²⁴⁰, according to which a jurisdictional link to the obligation to investigate under Article 2 may be established if the respondent State has begun an investigation or proceedings in accordance with its domestic law in respect of a death which occurred outside its jurisdiction or if there were “special features” in a given case. In the present situation, both of these conditions had been met: the fact that the Russian Federation had an obligation to investigate the events in issue in accordance with the relevant rules of international humanitarian law, that it had established “effective control” over the territories in question shortly after the hostilities and that Georgia had been prevented from carrying out an adequate and effective investigation into the allegations all constituted “special features” sufficient to establish Russia’s jurisdiction in respect of this specific complaint.

(iii) In accordance with the Court’s case-law (for example, *Al Skeini and Others*, cited above, §§ 138 and 142, with further references), from the time when a State exercises “effective control” over a foreign territory, it is also responsible for the actions of separatist forces (which,

240. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 188-90, 29 January 2019.

in the present case, included irregular militias) and internationally unrecognised authorities supported by it in those territories, without it being necessary to provide proof of “detailed control” of each of those actions.

(iv) The Grand Chamber also clarified the methodology to be applied in cases of a prima facie conflict between Convention law and IHL. It observed that, generally speaking, IHL applied in a situation of “occupation”: if there is “occupation” for the purposes of IHL there will also be “effective control” within the meaning of the Court’s case-law, although the Court’s term of “effective control” is broader and covers other situations as well. In this regard, the Grand Chamber restated the principles defined in *Hassan v. the United Kingdom*²⁴¹, according to which in the context of an armed conflict, the Convention must be interpreted in harmony with the relevant rules of IHL. The Grand Chamber went on to examine the interrelation between the two legal regimes with regard to each particular aspect of the case and each Convention Article alleged to have been breached, to ascertain each time whether there was a conflict between the two legal regimes. In the circumstances of the present case, it held that there was no conflict between Articles 2, 3 and 8 of the Convention and Articles 1 and 2 of Protocol No. 1, on the one hand, and the respective rules of IHL applicable in a situation of occupation, on the other hand. As for Article 5, the Grand Chamber reiterated that there might be such a conflict (*Hassan*, cited above, §§ 97-98); however, there was none in the present case since the justification for detaining civilians put forward by the respondent Government was not permitted under either set of rules.

(v) Regarding the definition of the concept of “administrative practice” violating the Convention, it has been repeatedly characterised in the case-law as comprising two elements: the “repetition of acts” and “official tolerance” (see, most recently, *Ukraine v. Russia (re Crimea)*²⁴²), the former being defined as “an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system” (see *Georgia v. Russia (I)*²⁴³, with further references). While these criteria defined a general framework, they did not indicate the number of incidents required to establish the existence of an administrative

241. *Hassan v. the United Kingdom* [GC], no. 29750/09, § 102, ECHR 2014.

242. *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021.

243. *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 122-24, ECHR 2014 (extracts).

practice: this was a question left for the Court to assess on a case-by-case basis.

(vi) Finally, the Grand Chamber examined for the first time the question of the rights of IDPs from the standpoint of Article 2 of Protocol No. 4, and not only under Article 8 of the Convention and Article 1 of Protocol No. 1, as it had done before (see, *inter alia*, *Cyprus v. Turkey*²⁴⁴, and *Chiragov and Others v. Armenia*²⁴⁵).

In the inter-State application *Ukraine v. Russia (re Crimea)*²⁴⁶ the Ukrainian Government make a series of complaints about the events of 27 February 2014 to 26 August 2015 in the course of which the region of Crimea (including the city of Sevastopol) was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the “jurisdiction” of the Russian Federation within the meaning of Article 1; it dismissed the respondent Government’s preliminary objections (incompatibility *ratione loci* with the provisions of the Convention, the alleged absence of the “requirements of a genuine application” and non-exhaustion of domestic remedies); and declared admissible the applicant Government’s complaints about an alleged administrative practice contrary to Articles 2, 3, 5, 6, 8, 9, 10 and 11 of the Convention, Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention taken in conjunction with Articles 8, 9, 10 and 11 of the Convention and Article 2 of Protocol No. 4.

The decision is interesting in several respects: the alleged absence of a “genuine application”; jurisdiction in the case of an “annexation”; the standard of proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice; and the duty to exhaust domestic remedies in the case of allegations of an administrative practice (Articles 1, 19, 33 and 35 § 1).

The Court addressed, for the first time, the relevance of any political motives for lodging an inter-State application and, importantly, the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another (as opposed to its military occupation or the provision of political/military support for a separatist entity). The decision also clarifies the standard of

244. *Cyprus v. Turkey* [GC], no. 25781/94, §§ 162-89, ECHR 2001-IV.

245. *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 188-208, ECHR 2015.

246. *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021. See also under Article 1 (Jurisdiction of States) above.

proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice. Finally, it references extensively the case-law of the International Court of Justice (ICJ).

(i) Following the approach of the ICJ to its own jurisdiction, the Grand Chamber held that any political motives for lodging an inter-State application, or any political implications of this Court's ruling, were of no relevance to the establishment of its jurisdiction under Article 19 of the Convention to adjudicate the legal issues submitted to it. It therefore dismissed the respondent State's objection as to the alleged absence of a "genuine application" amounting to an "abuse of process".

(ii) Having clarified that the question of the respondent State's "jurisdiction" under Article 1 of the Convention had to be examined to the "beyond reasonable doubt" standard of proof, the Grand Chamber determined that "jurisdiction" question by examining two periods separately: before and after 18 March 2014, that being the date on which the Russian Federation, the "Republic of Crimea" and the City of Sevastopol had signed a "Treaty of Unification" providing for the incorporation of Crimea into Russia. In this regard, the Grand Chamber stated that it would follow the recent approach of the ICJ, of several international arbitral tribunals and of the Swiss Federal Court, in declaring that it was not called upon to decide in the abstract on the legality *per se* under international law of a purported "annexation" of Crimea or of the consequent legal status of that territory. These questions had not been referred to the Court and did not constitute the subject matter of the dispute before it. The Grand Chamber went on to find that the facts of the case fell within the "jurisdiction" of the respondent State, during both periods.

(iii) Having established that the present case was expressly limited to general allegations of an "administrative practice" (as opposed to one requiring an individual assessment of specific incidents allegedly violating the rights of one or more clearly identified/identifiable person or persons (*Cyprus v. Turkey*²⁴⁷), the Grand Chamber clarified that the close interplay between the two admissibility issues which arose – the formal rule of the exhaustion of domestic remedies (Article 35 § 1) and the substantive admissibility of the complaint of an "administrative practice" (with its component elements of the "repetition of acts" and "official tolerance") – required the application of a uniform standard of proof to both. The Grand Chamber set this standard of proof at whether there was "sufficiently substantiated *prima facie* evidence",

247. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 43-45, ECHR 2014.

as opposed to the “beyond reasonable doubt” standard that would apply to the examination of the merits of the respective complaints. Accordingly, while the duty to exhaust domestic remedies did not apply to allegations of an “administrative practice”, without such prima facie evidence of an administrative practice, the complaint could not be admissible on substantive grounds unless there were other grounds (such as the ineffectiveness of domestic remedies) exempting the applicant Government from the exhaustion requirement.

ADVISORY OPINIONS

Advisory jurisdiction under Protocol No. 16 to the Convention

In its decision of 1 March 2021 on a request by the Supreme Court of the Slovak Republic for an advisory opinion²⁴⁸, the panel of five judges of the Grand Chamber considered that the question raised did not concern an issue on which the requesting court would need the Court’s guidance, and thus rejected the request.

This decision is noteworthy in that it represents the first time a request to the Grand Chamber for an advisory opinion has not been accepted on the grounds that the request did not meet the requirements of Article 1 of Protocol No. 16, namely that the highest courts or tribunals may request the Court to give advisory opinions on “questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention or the Protocols thereto”, “in the context of a case pending before [them]”.

It was observed in the decision, firstly, that the requesting court or tribunal had to consider that the opinion on the question of principle was necessary for its adjudication of the case.

In so far as this particular request related to the interpretation of Articles 2 and 3 of the Convention, there was no indication in the domestic procedural background or the arguments of the parties to the domestic proceedings, as described in the request, that the defendant or any other person had relied on the rights under those Articles. Therefore, in so far as it concerned the interpretation of Articles 2 and 3, the request did not appear to be related to points that were “directly

248. *Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention* [GC], request no. P16-2020-001, Supreme Court of the Slovak Republic, adopted on 14 December 2020 and delivered on 1 March 2021.

connected to proceedings pending at domestic level” for the purposes of Article 1 §§ 1 and 2 of Protocol No. 16.

With regard to Article 6, which was also relied on by the requesting court, it was noted in the decision that in a unifying opinion issued by its Criminal Law Bench in accordance with a related judgment of the Court, the Supreme Court had itself already provided relevant indications as to the answer to the question submitted to the Court.

It was concluded in the decision that the questions raised in this request for an advisory opinion, “on account of their nature, degree of novelty and/or complexity or otherwise, do not concern an issue on which the requesting court would need the Court’s guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it”. The request did not therefore meet the requirements of Article 1 of Protocol No. 16, which the Court was able to clarify in this decision, thus providing guidance for the highest domestic courts and tribunals that might be considering making use of this advisory procedure in the future.

Advisory jurisdiction under the Oviedo Convention

The Council of Europe’s Committee on Bioethics (“the DH-BIO”) sought an advisory opinion²⁴⁹ under Article 29 of the [Oviedo Convention](#)²⁵⁰. This provision provides that the Court may give “advisory opinions on legal questions concerning the interpretation of the present Convention”. The request posed two questions, both relating to the protection of persons who have a mental disorder:

1. In light of the Oviedo Convention’s objective to “guarantee everyone, without discrimination, respect for their integrity” (Article 1 of the Oviedo Convention), which “protective conditions” referred to in Article 7 of the Oviedo Convention does a member State need to regulate to meet minimum requirements of protection?
2. In case of treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm (which is not covered by Article 7 but falls within the remit of Article 26 § 1 of the Oviedo Convention),

249. *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention* [GC], Council of Europe’s Committee on Bioethics, request no. A47-2021-001, 15 September 2021.

250. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine

should the same protective conditions apply as those referred to in question 1?

In a decision of 15 September 2021, the Grand Chamber rejected the request, finding both questions to be outside the Court's competence.

This is the first occasion on which use has been made of the procedure provided for in Article 29 of the Oviedo Convention. The Court took the opportunity to consider, in general terms, the question of its jurisdiction in relation to that instrument. It then clarified the nature, scope and limits of that jurisdiction and, based thereon, ruled on its competence in respect of the present request.

(i) The Court recognised that it had jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention. While the European Convention on Human Rights ("the Convention") is silent regarding any jurisdiction for the Court outside the Convention system, its provisions (notably, Articles 19, 32 and 47) do not expressly preclude, nor is it necessary to interpret them as completely precluding, the granting of jurisdiction to the Court by and in relation to another closely-related human rights treaty concluded within the framework of the Council of Europe. Moreover, in interpreting the Convention, including its provisions on the jurisdiction of the Court, account must be taken of relevant rules of international law applicable in relations between the parties, in this context Article 29 of the Oviedo Convention. Finally, as emerged from the drafting history of Article 29, there was a common understanding among the relevant institutions that the intended advisory role for the Court was both legitimate and justified. The Court took note in this regard of the absence of conflict between the relevant provisions of both legal instruments and their shared concepts, as well as the agreement of the Contracting States as expressed by the Committee of Ministers when adopting the Oviedo Convention.

(ii) The Court went on to determine the nature, scope and limits of its advisory jurisdiction, both as regards the Oviedo Convention itself and relative to its jurisdiction under the Convention.

In the first place, referring to the drafting history of Article 29 of the Oviedo Convention, the Court considered that the meaning of its terms ("legal questions" and "interpretation" of the "present Convention") should be the same as in the context of Article 47 § 1 of the Convention: notably, from the relevant *travaux préparatoires*, the use of the adjective "legal" in Article 47 § 1 denotes the intention of the drafters to rule out any jurisdiction on the Court's part regarding matters of policy, as well as questions which would go beyond the mere interpretation of the text and tend, by additions, improvements or corrections, to modify

its substance. In the Court's view, a request under Article 29 of the Oviedo Convention is subject to a similar limitation. With reference to the other terms used therein – "interpretation" and "present Convention" – the Court clarified that this procedure entailed an exercise in treaty interpretation, applying the methods set out in Articles 31 to 33 of the [1969 Vienna Convention on the Law of Treaties](#). At the same time, while the Convention is treated as a living instrument to be interpreted in the light of present-day conditions, that particular interpretative approach, integral as it is to the Court's full contentious jurisdiction, had to be regarded as specific to the Convention and the Protocols thereto. There is no similar basis in Article 29 of the Oviedo Convention to take the same approach: rather, it is the "present Convention" that the Court may be requested to interpret. Compared to the Convention, the Oviedo Convention represents a different normative model, it being a framework instrument setting out the most important principles, to be developed further with respect to specific fields through protocols, that is, through a legislative exercise (Article 31 of the Oviedo Convention).

Secondly, the Court clarified the relationship between its advisory jurisdiction under the Oviedo Convention and its jurisdiction – contentious and advisory – under the Convention. In this regard, the Court emphasised that it could not operate the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47 § 2 of the Convention, which is to preserve its primary judicial function as an international court administering justice under the Convention. This was rooted in the concern to reduce the risk of an interpretation that might hamper the Court at a later stage if the request originated in domestic proceedings that subsequently led to an application under the Convention. It followed that the Court's advisory jurisdiction under the Oviedo Convention had to operate harmoniously with its jurisdiction under the Convention, above all with its contentious jurisdiction: in other words, the latter had to remain unaffected. At the same time, the advisory jurisdiction conferred on the Court by Protocol No. 16 is to be clearly distinguished from that granted by the Oviedo Convention. In particular, the limits which apply to the latter and which are designed to preserve the judicial function of the Court cannot apply in the same way to the Court's jurisdiction under Protocol No. 16, which serves the purpose of reinforcing the implementation of the Convention in concrete cases pending before national courts, thereby enhancing the implementation of the principle of subsidiarity.

(iii) The Court then considered whether the present request, which made no direct reference to any specific proceedings pending in a court,

respected the nature, scope and limits of the Court's advisory jurisdiction, as delimited above. The Court was asked to interpret the term "protective conditions"; as used in Article 7 of the Oviedo Convention, so as to specify the minimum requirements of protection that the Parties need to regulate under that provision. However, that term could not be further specified by a process of abstract judicial interpretation. It was clear that that provision reflected the deliberate choice of the drafters to leave it to the Parties to determine, in further and fuller detail, the protective conditions applying in their domestic law in that context. Given the nature of the Oviedo Convention, this required a legislative exercise at the international level and, in relation to non-consensual interventions for the purpose of treating persons with a mental disorder, that process was ongoing. The degree of latitude thus left to the States Parties could therefore not be restricted by an interpretation of the Court in the sense requested. The DH-BIO had intimated that the Court should have regard to the Convention and to the relevant case-law. However, the Court should not, as part of this exercise, interpret any substantive provisions or jurisprudential principles of the Convention. Even though the Court's opinions under Article 29 of the Oviedo Convention are advisory, that is, non-binding, a reply in such terms would still be an authoritative judicial pronouncement focused at least as much on the Convention itself as on the Oviedo Convention. The Court could not take such an approach, which had the potential to hamper its pre-eminent contentious jurisdiction under the Convention. Nor could it follow the suggestion of the intervening organisations and modify its case-law for the sake of aligning it with the [Convention on the Rights of Persons with Disabilities](#), and then interpret Article 7 of the Oviedo Convention in like manner. The request was therefore outside the Court's competence.

The Court nevertheless observed that the safeguards in domestic law that corresponded to the "protective conditions" of Article 7 of the Oviedo Convention needed to be such as to satisfy, at the very least, the Convention requirements, including those that imposed positive obligations on States, as developed through its extensive case-law, with the guidance of the evolving legal and medical standards, both national and international.