

ANNUAL REPORT

European Court of
Human Rights

2020



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

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

ANNUAL REPORT

European Court *of*
Human Rights

2020

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Foreword

The year 2020 will forever remain engraved on our memories as the year when a pandemic wrought global havoc. This public-health crisis, which has shaken us all with its dramatic economic and social consequences, has not spared the European Court of Human Rights.

Right from the start of lockdown the Court was forced to adapt to this unprecedented situation. A number of adjustments were needed. Exceptional measures were adopted to extend the time-limits for applying to the Court, for the first time in the history of the European mechanism for the protection of human rights. Our aim was to take account of the major difficulties facing the parties, while continuing to conduct our essential activities. At the same time, teams were set up to deal with continuing requests for interim measures under Rule 39 of the Rules of Court, a number of which were linked to the pandemic.

For us as an international court, the most notable change was undoubtedly the holding of Grand Chamber hearings by video-conference, which the outside world was thus able to follow online. This presented us with a major technical challenge. We organised a total of six online hearings this year. At most of the hearings the parties were not



present in our courtroom, and everything went off without a hitch. We thus managed to continue to perform our assigned task.

This period highlighted the extent to which new technologies have become indispensable. It was thanks to them that we were able to continue working, remotely, and in particular to carry on delivering judgments and decisions. For example, since the beginning of 2020 we have dealt with more than 37,000 applications (3% fewer than in 2019, when we had reached a total of almost 38,000 applications). With a 4% drop in the number of single-judge decisions, the overall result is a function of the fact that more cases have been adjudicated by the Chambers and Committees.

Looking exclusively at the number of applications decided by a judgment delivered by the Grand Chamber or the Chambers, there were 519 in 2020 and 426 in 2019, amounting to a 22% increase. That is testimony to our determination to prioritise the most important cases.

The number of cases pending currently totals 61,500, 75% of which concern five countries. The Russian Federation provides us with the greatest number of cases, with 13,800 applications, or 22.4% of the pending applications, followed by Turkey, with 18.1% or 11,150 applications, and Ukraine with 16.7%, or 10,250 applications. Next come Romania with 7,700 applications or 12.5% of the total number, and Italy with 3,400 applications or 5.5% of the total.

If I were asked to characterise our approach during this highly unusual period, I would say that the Court managed to adapt to the dramatic circumstances. That was made possible by the dedication of the judges and staff of the Court, who proved themselves equal to the situation. They have all showed exceptional commitment to the task in hand.

The crisis also demonstrated that our decision to invest in information technology was correct, and we shall continue along that path.

I have no hesitation in saying that the Court is now sufficiently prepared to react if the circumstances once again so require.

However, the year 2020 was not only a matter of statistics. A number of important judgments were delivered, some of them attracting a great deal of public attention. Similarly, at the request of the Armenian Constitutional Court, the Court issued a second advisory opinion, evidencing the fact that this procedure has been welcomed by the superior courts, which do not hesitate to avail themselves of it. Furthermore, two more requests were submitted to the Court in 2020, by Slovakia and Lithuania, which will be dealt with in 2021.

At the same time, the Superior Courts Network has continued to grow, and now includes ninety-three courts from forty member States.

No survey of the year 2020 would be complete if it failed to mention the 70th anniversary of the European Convention on Human Rights. Even in a time of COVID-19 it was vital that we celebrate that event and commemorate the inception of this instrument around which we are all united.

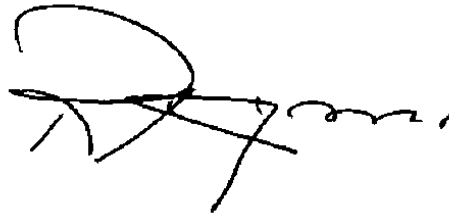
The first event at the beginning of the year was the publication of a highly original commemorative book. The work set out the history of the Court, accompanied by a wealth of previously unpublished photographs. For the first time ever a copy of the original text of the Convention was reproduced, together with portraits of all the judges elected to the Court since its inception. Moreover, forty-seven cases, one per State, were presented to highlight the judgments which have helped construct Europe, describing them from their origin to the impact they have had in the various States Parties to the Convention. The seminar organised for the opening of the Court's judicial year in fact addressed the theme of "The European Convention on Human Rights: living instrument at 70".

The Court held a conference on 18 September 2020 to mark the 70th anniversary of the Convention, on the theme of "The European Convention on Human Rights at 70 – Milestones and major achievements", which was a great success. Other conferences on important subjects were held at the Court by video-conference, one on the theme of "A 'living instrument' for everyone: the role of the European Convention on Human Rights in advancing equality for LGBTI persons" and the other on "Human rights and environmental protection". Furthermore, many member States organised national events to celebrate the anniversary.

Finally, the Greek Chairmanship of the Committee of Ministers also celebrated the 70th anniversary at a commemorative event held in the Athens Parliament in the presence of the President of the Hellenic Republic. I had the honour of attending.

On that occasion I reiterated that we were currently faced with major challenges to the rule of law, human rights and judicial independence. I consider that the most important message for the present time is that shared responsibility and subsidiarity are impossible without strong, independent and impartial national courts operating in the framework of a State governed by the rule of law. It is the duty and responsibility of every Council of Europe member State to guarantee this fundamental structural feature of the Convention system. As for the Strasbourg Court, it will continue to ensure respect for the rule of law, which is inherent in all the Articles of the Convention.

In 2020, the year of the 70th anniversary of the European Convention on Human Rights, it is our duty, our collective responsibility, as members of the present generation of guardians of the Council of Europe and the European Convention on Human Rights, to honour the undertakings of those who created that instrument and to do everything in our power, firmly and resolutely, to ensure that the rights and freedoms set out in the Convention continue to be guaranteed for all.

A handwritten signature in black ink, appearing to read 'R. Spano', with a large, stylized initial 'R' and a long, horizontal stroke extending to the right.

ROBERT SPANO
President of the European Court
of Human Rights



Chapter 1

Speeches

Opening of the judicial year, 31 January 2020



Linos-Alexandre Sicilianos
President of the European Court of Human Rights

Presidents of Constitutional Courts and Supreme Courts,
President of the Parliamentary Assembly,
Chair of the Ministers' deputies,
Madam Secretary General of the Council of Europe,
Your Excellencies,
Ladies and gentlemen,

I would like to thank you, on behalf of all my colleagues and also in my own name, for agreeing to attend the solemn hearing for the opening of the judicial year at the European Court of Human Rights. Your presence here bears witness to the strength of the bonds that unite us.

The tradition is that on this last day of January I can still wish you a Happy New Year for 2020. I would also like to take stock with you of the

many events in 2019, which was an important year for both the Court and the Council of Europe.

As regards the Council of Europe, I am particularly pleased to be able to welcome the Organisation's new Secretary General, Marija Pejčinović Burić, who has honoured us with her presence, for the first time, at our solemn hearing.

Madam Secretary General, you find yourself in an Organisation which is relaunching itself on very solid foundations, after an unprecedented political and financial crisis.

Right from the start of your term of office you emphasised your attachment to the Court. My colleagues and I are extremely grateful to you for this.

Dear Presidents of Superior Courts,

Over the past year our Superior Courts Network has undergone enormous expansion. It now comprises eighty-six courts from thirty-nine States, making it the biggest network of this type worldwide. The presence in our midst of Chantal Arens, First President of the Court of Cassation, and Bruno Lasserre, Vice-President of the *Conseil d'État*, is an opportunity for me to thank them for having welcomed us all to a very successful conference of superior courts held in Paris on 12 and 13 September. The event bore witness to the growing importance over the years of dialogue between judges. In receiving us all at the Élysée Palace on the occasion of the conference, President Emmanuel Macron clearly expressed his support for this gathering of judges, symbolising the rule of law Europe-wide.

2019 marked the completion of the Interlaken process, which began in 2010. During this process, far-reaching reforms were carried out in our structures and working methods. It really was the decade of reforms. Our Court showed its capacity for reform and for making good use of all the tools at its disposal.

The results of the policies implemented were conclusive, as you will see from the statistics which I would like to share with you.

Many of you will remember that at the end of 2011, as the Interlaken process was just beginning, we had 160,000 applications pending. That astronomical figure has been significantly reduced, and at the beginning of this year it stands at just under 60,000, which is most satisfying. I might add that in 2019 the Court examined and determined more than 40,000 cases. That is the result of the efforts expended by all the judges and the members of the registry, whom I thank.

However, the backlog situation still needs to be improved, and major efforts will be needed over the months and years to come.

The biggest challenge is that of the 20,000 pending Chamber cases. Even though in 2019 the number of such cases decreased slightly from their 2018 figure, they still make up the core group of our case list. It is vital that we manage to devote all the requisite attention to them. Indeed, many of them are major cases, sometimes raising very serious issues. The Court is fully aware of this and is constantly refining its working methods to address this issue. It will, however, require additional resources to do so.

One of the main events for the Court in 2019 was the first advisory opinion¹ issued pursuant to Protocol No. 16 in response to a request from the French Court of Cassation.

The case concerned the situation of a child born abroad by gestational surrogacy, conceived from the biological father's gametes. The father's parentage had been recognised under French law following the first few judgments delivered by our Court. Question marks remained over the status of the intended mother.

Our advisory opinion stated that the right to respect for the child's private life required domestic law to provide for the possibility of recognising the legal parent-child relationship with the intended mother. Such recognition could be achieved by means of adoption.

A few months after our advisory opinion, the Court of Cassation, sitting as a full court, finally opted for having foreign birth certificates registered in France in order to establish the parent-child relationship between such children and their intended mothers. It thus went even further than our opinion. This is a perfect example of the dialogue-based approach established under Protocol No. 16.

This Protocol is a challenge for our Court, because proceedings are pending when we receive the request, and we must therefore adjudicate very rapidly on highly sensitive matters. And that is what we did.

Protocol No. 16 is clearly not designed to be applied on a day-to-day basis. It must be confined to questions of principle. Nevertheless, because European justice must be an area of dialogue and complementarity, Protocol No. 16 is now the most advanced instrument available to us in this sphere. Its first application therefore marks a milestone in the history of the European system of human rights protection. A second request, this time from the Armenian Constitutional Court, has already been lodged and is under examination.

The second major legal development in 2019 concerned the execution of our judgments. We all know that the success of our whole

1. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

system relies on our judgments being fully complied with. The role of the Committee of Ministers, which is enshrined in the Convention in order to guarantee the effectiveness of their supervision, is therefore vital in safeguarding the credibility of the system. It is easy to imagine what happens to that credibility when a judgment is not complied with.

This shows the importance of the new infringement proceedings introduced under Article 46 § 4 of the Convention, which was applied for the first time in 2019.

In the framework of these first infringement proceedings² the Court was invited to determine whether Azerbaijan had refused to comply with a judgment delivered in 2014. The case concerned an imprisoned political opponent, Ilgar Mammadov. The question was whether the respondent State had failed in its obligations by refusing to release Mr Mammadov following our judgment.

Our Court considered that the State in question had indeed failed in its obligation to comply with a judgment previously delivered by the Court.

This first application of infringement proceedings, above and beyond the case in question, bears witness to the advanced institutional cooperation between the Court and the Committee of Ministers. The Committee of Ministers and the Court intervene in the system in different ways. One is political and the other legal. They nevertheless pursue the same aim, namely, ensuring the efficiency of the system. Infringement proceedings, implemented here for the first time, bring us closer together. They reinforce our shared responsibility, which is a vital component of the European mechanism for human rights protection.

The opening of the judicial year would not be complete without a round-up of the key cases of the past year.

Although the cases I have selected differ widely, they nevertheless all concern major issues which will most certainly increase in importance in the next decade: protecting children; preventing violence against women; migration issues; and protecting the environment.

The first is a Grand Chamber case, *Strand Lobben and Others v. Norway*³, which concerned the removal of a child from its mother. In it the Court pointed to the importance of the biological bonds between parents and their children, which must be protected. This judgment gave the Court the opportunity to clarify the meaning and scope of the concept of the “best interests of the child” and to harmonise the different approaches which exist at the pan-European level.

2. *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, 29 May 2019.

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

Our Court is also present on another front which has taken on cardinal importance, that is to say combating violence against women. As we have pointed out in one of our judgments, this kind of violence is a widespread problem confronting all member States, and is particularly alarming in contemporary European societies.

As you know, for several years now the Court has been delivering judgments on this subject. In fact, the *Opuz v. Turkey*⁴ judgment was clearly in line with the growing international awareness of the vital need for a specific convention. Thus *Opuz* led the way for the Council of Europe's [Convention on preventing and combating violence against women and domestic violence](#). *Opuz* is a good example of the synergy operating between the work of the Council of Europe and that of the Court. The so-called Istanbul Convention now constitutes an additional tool for the Court in safeguarding fundamental rights.

In 2019, for the first time in this sphere, the Court found a violation concerning Russia. In *Volodina v. Russia*⁵ it observed that Russian law did not recognise marital violence and therefore failed to provide for exclusion and protection orders. In our Court's view, these omissions showed clearly that the authorities had not acknowledged the seriousness of the problem of domestic violence and its discriminatory effects on women.

In 2019 the Court took on another of the challenges currently facing States. Over the last few years it has received many applications concerning the situation of migrants in Europe. Three major judgments were delivered in 2019 concerning different aspects of this difficult issue: first of all, the confinement of migrants in an airport transit zone (*Z.A. v. Russia*⁶); secondly, "chain refoulements" (*Ilias and Ahmed v. Hungary*⁷); and, lastly, the situation of unaccompanied children (*H.A. v. Greece*⁸). In these different cases the Court was careful, firstly, to protect the case-law *acquis* in the sphere of refugee law and, secondly, to map the way forward for the States' migration policy.

The last judgment I would like to mention also concerned a vital issue, albeit a global one. It was delivered in the case of *Cordella and Others v. Italy*⁹. In that case the applicants complained of the effects of the toxic emissions from a factory on the environment and on their health. The Court held that a continued situation of environmental pollution endan-

4. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

5. *Volodina v. Russia*, no. 41261/17, 9 July 2019.

6. *Z.A. v. Russia* [GC], nos. 61411/15 and 3 others, 21 November 2019.

7. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019.

8. *H.A. v. Greece*, no. 19951/16, 28 February 2019.

9. *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, 24 January 2019.

gered the health of the applicants and of the whole population of the areas affected. The Court therefore invited the Italian authorities to put into place, as quickly as possible, an environmental plan to ensure the protection of the population.

This judgment is tragically topical. A few months ago we all watched, dumbfounded, the images of Amazonia in flames. At the beginning of this year the bushfires in Australia have again reduced us to stunned silence. We have unfortunately entered the Anthropocene age in which nature is being destroyed by man.

In that context, now more than ever, it is right and proper for the Court to continue with its line of authority enabling it to enshrine the right to live in a healthy environment. However, the environmental emergency is such that the Court cannot act alone. We cannot monopolise this fight for the survival of the planet. We must all share responsibility.

That is why I would like to conclude this case-law round-up with a recent example from the Netherlands. At the end of last December, the Supreme Court of the Netherlands delivered a judgment which prompted an immediate reaction around the world. In that case the Supreme Court ordered the Dutch State to reduce greenhouse gas emissions by at least 25% by the end of 2020.

In giving this decision, which has been hailed as historic, the Dutch Supreme Court relied explicitly on the European Convention on Human Rights and the case-law of our Court.

By relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention on Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time.

The cases I have just mentioned clearly attest to the modernity and relevance of the Convention as interpreted by the Court. For sixty years now the Court has been using its case-law to promote the rule of law, democracy and human rights, the core values of the Council of Europe. This year, in 2020, we will celebrate the 70th anniversary of the Convention. The European Convention is no doubt one of the greatest peace projects in the history of humanity.

Today's formal opening session is in fact our first opportunity to commemorate this Treaty. It might therefore be useful to briefly take stock of the main achievements of the system.

The Court's case-law is based on the idea that the rule of law underpins the entire Convention. The rule of law is not the rule of just any law. It is the rule of law based on the values of the Convention.

In my view, there are three reasons for the universal success of the European mechanism for the protection of human rights.

First of all, the Convention permeates all the branches of law: criminal and civil law, private and public law, not to mention such new areas as environmental law and new technologies. It is, so to speak, present on all fronts. In short, this text provides answers to a wide variety of complex questions arising in our societies.

The second reason for this success has a great deal to do with its evolutive interpretation, first of all by our Court and then by your courts. This interpretative methodology is clearly in line with the wishes of the founding fathers. They had a perception of human rights which was not static or frozen in time but dynamic and future-oriented. The generic terms used by the Convention, together with its indeterminate duration, suggest that the parties wished the text to be interpreted and applied in a manner that reflects contemporary developments. This viewpoint is backed up by the Preamble to the Convention, which refers to not only the “maintenance” but also the “further realisation of human rights and fundamental freedoms”, in other words, their development.

This evolutive interpretation method has allowed the text of the Convention to be adapted to “present-day conditions”, without any need for formal amendments to the treaty.

This mode of interpretation has also been confirmed on several occasions by the case-law of the International Court of Justice.

And, most importantly, we have, all of us, in our respective courts, ensured the permanence of the Convention, since it is still incredibly modern in 2020.

The third reason for the Convention’s success over its seventy years of existence is the crafting of a specific European legal identity. By interpreting the Convention, the Court has helped to harmonise European rules in the sphere of rights and freedoms.

From its beginnings right up to the present day, the Court has reinforced respect for human dignity by guaranteeing observance of such fundamental safeguards as: the right to life and the abolition of the death penalty; prohibition of ill-treatment; and prohibition of slavery, servitude and human trafficking.

It has introduced safeguards protecting individuals against arbitrariness, injustice and abuse of power. It has ensured the protection of the dignity of persons deprived of their liberty. And it has also built up comprehensive case-law to protect private and family life.

As far as political rights are concerned, the Court has endeavoured to protect pluralistic democracy by guaranteeing respect for the basic democratic principles in such areas as participation in free elections and freedom of expression, religion, assembly and association. The concern

to promote tolerance and broad-mindedness has consistently underpinned the Court's case-law.

It is essential here to remember that democracy is the only political model envisaged by the European Convention on Human Rights and the only system compatible with it. No other international body has established in such a crystal-clear manner this link between democracy and human rights.

That is why the Court remains particularly vigilant when the foundations of democracy are imperilled, including any attempt at undermining the independence of judges. It should be noted that the Court of Justice of the European Union recently applied our principles in this sphere.

This also explains our Court's concern about cases of violation of Article 18 of the Convention concerning the misuse of power. In three politically sensitive cases in 2019, the Court found violations of that provision. Such cases are always symptomatic of regression on the part of the rule of law. Whether they involve attempts to silence an opponent or to stifle political pluralism, such cases run counter to the notion of an "effective political democracy" set out in the Preamble to the Convention.

As we can see, the work completed over these seventy years has been immense, covering a large number of fields. In 2020, a series of events and conferences will be held enabling us to go back over all these achievements. In order to mark this anniversary, a commemorative book has just been published. It looks at forty-seven judgments which have changed Europe, one for each member State. It also includes other documents from the Court archives as well as a number of stunning photographs. Copies will be available for you at the end of this hearing and I warmly invite you to take one.

Ladies and gentlemen,

Sixty years ago the first judgment delivered by the European Court of Human Rights, under the presidency of the illustrious René Cassin, was *Lawless v. Ireland*¹⁰. Indeed, our ties with Ireland are close and deep-rooted. Our early case-law includes several leading Irish judgments. We are all acquainted with *Open Door and Dublin Well Woman v. Ireland*¹¹, an important case concerning freedom of expression regarding abortion; *Norris v. Ireland*¹², which concerned the prohibition of same-sex relationships between consenting adults; the *Bosphorus Airways*¹³ case,

10. *Lawless v. Ireland (no. 1)*, 14 November 1960, Series A no. 1.

11. *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A.

12. *Norris v. Ireland*, 26 October 1988, Series A no. 142.

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

a case of cardinal importance in terms of relations between EU law and Convention law; and, of course, *Airey v. Ireland*¹⁴, which was fundamental as regards the right to a court.

In a common-law country, which benefits from a Constitution, the Convention has played a fundamental role in guaranteeing respect for human rights.

On several occasions the Irish political authorities have signalled their attachment to the Court, and we have been honoured to welcome here three Presidents of the Republic of Ireland.

Lastly, for several years now, thanks to Irish generosity, all our hearings are filmed and can be broadcast on the Internet. That obviously also applies to this solemn hearing marking the new judicial year.

For all these reasons I am delighted to welcome an Irish friend of the Court to this hearing. More than thirty years ago he was one of the lawyers in the famous *Open Door and Dublin Well Woman* case. But today, we are welcoming him in his capacity as President of the Supreme Court of Ireland. The friend in question is Chief Justice Frank Clarke.

Dear Chief Justice, you have the floor.

14. *Airey v. Ireland*, 9 October 1979, Series A no. 32.



Mr Justice Clarke
Chief Justice
of Ireland

President Sicilianos,
Colleagues of the European Court of Human Rights and of the
Constitutional and Superior Courts of the States of the Council of
Europe,

President of the Parliamentary Assembly, Madam Secretary General,
Distinguished guests,

President Sicilianos, can I thank you and your colleagues for the great honour which you have done me by asking me to make this address. My only complaint is that, by revealing that my last formal appearance before this Court was as advocate on behalf of Open Door almost three decades ago, you have made me feel and seem very old.

But more importantly, can I especially thank you for your kind comments about the contribution which Ireland has made to the Court both in practical terms, as you mentioned, and also through the important jurisprudence deriving from Irish cases. We are a small country but we like to think that we contribute more than our size might suggest. That we, to use an English phrase, punch above our weight.

That will be particularly important for us in the context of Brexit which will, of course, occur at midnight tonight. While the United Kingdom will remain a member of the Council of Europe and will continue to contribute to this Court, there will be additional challenges for Ireland, and not least for the Irish legal system, as we become the largest remain-

ing common-law country within the European Union. But we are also, as you pointed out Mr President, a legal system governed by a strong Constitution and thus our own national constitutional jurisprudence is richly informed both by the jurisprudence of this Court but also that of the supreme courts of other prominent common-law jurisdictions. I would like to think that the diversity of influences which that brings to bear enhances our understanding and protection of human rights.

President Sicilianos,

When we consider the development of the international legal order that includes human rights, it is important to note the progress made in seventy years. This Court, and the Convention which it applies, have a long tradition which guides the shared approach to human rights protection.

But the development of human rights protection is, of course, subject to many other national and international influences. In reflecting on the progress achieved over the past seventy years it will be useful to discuss the challenges which await us over the next seventy years.

One of those challenges is the problem posed by populism for the rule of law, the independence of the Court and the recognition of the Court's authority.

However, that challenge has already been the subject of discussions within each State and, while it is very important, I propose to address a different issue facing national courts, one which is more subtle but nevertheless significant.

Like many titles for papers and speeches which are intended to be clever, today's title "Who Harmonises the Harmonisers?" is an oversimplification and a potentially inaccurate description of one of the issues which is likely to face all courts charged with vindicating human rights over the next seventy years.

I appreciate that not all of the States represented in the Council of Europe and, therefore, on this Court, are members of the European Union. I also appreciate that the term "harmonisation" as used generally in EU law has a precise meaning which involves making the law in each member State of the European Union coincide with that in all other member States subject to whatever discretion may be left to the member States by the terms of certain directives.

In that context I know that the objective of the Convention and of this Court is not to harmonise human rights law in that strict sense but to ensure that minimum standards for the protection of human rights across the States of the Council of Europe are maintained while respecting the plurality of national and international fundamental rights

protections. But that too is a form of harmonisation, even though States may well be afforded, depending on the circumstances, a significant margin of appreciation and are, of course, also free to provide a higher level of protection for human rights under their national regimes.

But, in addition, many of the States who are represented on this Court have subscribed to other international human rights instruments. These include those of general or global application such as the International Bill of Rights, which is comprised of: the [Universal Declaration of Human Rights](#) (1948), which proclaimed a “common standard of achievement for all peoples and all nations”; the [International Covenant on Civil and Political Rights](#) (ICCPR, 1976); and the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR, 1976). Other international instruments relate to rights in specific areas or for particular beneficiaries including, for example, UN treaties such as the [Convention on the Rights of the Child](#) (CRC, 1989) and the [Convention on the Elimination of All Forms of Discrimination Against Women](#) (CEDAW, 1979), which are also complemented by the Council of Europe’s [European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#) (1987) and the [Convention on Action Against Trafficking in Human Beings](#) (2005).

Finally, it must also be acknowledged that the precise way in which human rights instruments potentially influence the decisions of national courts can vary depending on the national legal order. There are significant differences in the way in which international treaties are applied. In that context my own jurisdiction is, I think, at one end of the spectrum given that Article 29 § 6 of the Irish Constitution expressly states that no international agreement is to be part of the domestic law of Ireland except in a manner determined by the Irish Parliament.

Other States, to a greater or lesser extent, do regard international treaties as potentially forming part of domestic law without parliamentary intervention. On the other hand, for those States which are members of the European Union, the precise status of EU law, so far as national constitutional arrangements are concerned, may, notwithstanding its general primacy, also vary to some limited extent. My State is, again, towards a different end of this spectrum in that the Irish Constitution expressly recognises the primacy of EU law to a significant extent.

I appreciate, therefore, that the precise way in which the many international human rights instruments which potentially influence the outcome of national proceedings can affect the proper determination of those proceedings in accordance with national law may vary quite significantly. However, that does not seem to me to take away from the underlying issue which is that we, as national courts, are now faced with

a range of international human rights instruments which have at least the potential, in one way or another, to have a bearing on the result of individual cases and where, therefore, any potential differences, however subtle, between those instruments, may need to be considered.

I conduct that analysis against the background of the fact that, in almost all national proceedings, there must be a single result. A person claiming a breach of guaranteed rights will either win and obtain whatever remedy national law permits or will lose. A person who defends proceedings, perhaps brought by the State or its agencies, on the grounds of a breach of rights will either succeed in that defence or fail.

Where national courts have the competence to annul legislation or other State measures, proceedings will either result in annulment or they will not. While there may, in certain States and in certain circumstances, be types of proceedings which do not give rise to quite such clear-cut results, nonetheless national courts are ultimately called on, to a great extent, to come up with a single answer.

It follows that, whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order.

In analysing those issues it should, of course, first be recognised that the problem should not be exaggerated. It might be described as a first-world problem. Most international human rights instruments point in broadly the same direction. The kind of rights recognised are similar. It would be surprising, indeed, if we were to come across a State which had subscribed to two separate international regimes which pointed in different directions.

But those who are involved in regularly having to resolve individual cases know that the most difficult cases, at least from a legal perspective, are those which involve fine judgments, questions of weight and issues of balance. More than one right may be involved and the ultimate question may come down to deciding how to reconcile competing rights. States may have legitimate interests to pursue but the question may come down to whether the manner in which those interests are being pursued is permissible having regard to any diminishment of rights which the State may consider is justified for legitimate ends.

It is here that there may frequently be room for legitimate difference of opinion. While recognising the rights engaged, it may be open to legitimate debate as to how they are to be balanced. Many cases involving State measures come down to an assessment of whether legitimate ends are pursued in a way which is proportionate in the context of the diminution of any rights affected. All such cases are likely to resolve around a judgment involving balance.

Skilled advocates will, therefore, almost invariably seek to present their case, to the extent permissible within the national legal order, by reference to those human rights instruments and, in so far as relevant, decisions of international courts or other bodies charged with the enforcement or interpretation of those instruments, which give the greatest chance of the balance tipping in their favour.

Some human rights cases, of course, turn almost exclusively on their facts. If what is alleged actually occurred, it would undoubtedly represent an infringement of guaranteed rights. In such circumstances access to independent courts protected by the rule of law provides the greatest guarantee of respect for the rights involved. That is why maintaining the independence of the judiciary forms a vital ingredient of the protection of rights generally.

But there are also cases where the facts may not be in particular dispute or may have been resolved by the court having fairly analysed the evidence and where the issues may be ones involving the sort of balancing exercise which I have sought to analyse. In such cases the question is as to how best to ensure overall coherence when faced with a multiplicity of potentially relevant international instruments.

Can I first suggest that there is no magic bullet. National courts must interpret their national human rights instruments in accordance with their own norms. This Court must interpret and apply the Convention. Where relevant, the Court of Justice must interpret and apply the Charter. It is also important to recognise that the text of these, and other, human rights instruments is important. Wherever one stands on the very interesting question raised at our earlier seminar by the Vice-President of the *Conseil d'État* of France, which concerned the extent to which it was legitimate to depend on interpretation of text for much of human rights law, I think text must matter at least to some extent even though I fully appreciate the point which you made, Mr President, about the terms of human rights instruments usually being expressed in very general terms.

States spend a lot of time negotiating the terms of international treaties or considering whether they should accede to them. They do

so on the basis of the text of the instrument concerned. The States who subscribe to the Council of Europe have adopted the Convention in the terms in which it stands and can amend it as they consider appropriate. Likewise, the way in which rights are guaranteed in national constitutions or equivalent human rights instruments involves language which the national system itself has chosen. The fact that different language might be used in separate instruments potentially influencing an individual case does not necessarily create problems, but it can.

Can I suggest that developing the dialogue which already exists at a number of levels between courts and other relevant institutions provides the best means of ensuring coherence and enhancing a harmonious approach to international human rights. That dialogue can, of course, exist on a range of levels and can be conducted in many different ways.

Firstly, there is the high-level dialogue between courts which are charged with the cross-border enforcement of rights, such as the dialogue between this Court and the Court of Justice. Secondly, there is the regular vertical interaction between national courts and supranational courts. This, in itself, can operate on a range of levels.

President Sicilianos, as you know I have had the honour and pleasure of leading a delegation of senior Irish judges to a bilateral meeting with judges of this Court under the presidency of your distinguished predecessor, President Raimondi. I have also, in the last few years, had the equal pleasure of arranging a meeting between all of the members of the Supreme Court of Ireland with the Court of Justice in Luxembourg. Both the formal and, if I might say, equally the informal aspects of these bilateral meetings are an invaluable contribution towards greater understanding of matters of mutual interest.

But there is also that form of dialogue which comes from courts considering each other's judgments. Admissible proceedings only come to be considered in detail by this Court where remedies within the national legal system have been exhausted. It follows that this Court has to consider the way in which national courts charged with protecting human rights have dealt with the case in question. Furthermore, the jurisprudence of this Court will clearly form part of the consideration given by national courts in such cases, even if the precise way in which the Convention may apply within the national legal order may vary.

That latter form of dialogue is an inevitable but useful consequence of the way in which we are all required to go about our task of handling those cases which come before our courts.

It might, therefore, be said that the vertical dialogue between national courts and supranational courts has developed to a reasonable extent. Perhaps the task for the future is both to ensure the continuance and the enhancement of that dialogue. There is a challenge for us all in making the time to engage meaningfully in such dialogue when we are all faced with significant caseloads and where it is natural that our first attention is directed towards what is, after all, our primary role, which is to consider and fairly decide those cases which come before us.

Those challenges are potentially even more acute when considering what I suggest is the third, and by far the least developed, pillar of judicial dialogue in the human rights area. That dialogue involves a discussion, whether on a bilateral or multilateral basis, between national courts charged with enforcing human rights and, in particular, courts at the apex of national systems.

There have, of course, often been close contacts between the judiciaries of neighbouring countries and, in particular, those which share similar legal systems and traditions. It is also the case that national legal orders differ on the extent to which it is considered permissible or appropriate to have regard to the jurisprudence of the courts of other States in developing their own case-law. But an understanding of how the apex courts of other States have dealt with similar problems can often be useful.

In that context the development both by this Court through the Superior Courts Network and by the Court of Justice through the Judicial Network of the European Union, of shared databases of relevant decisions taken by the higher courts in the national legal orders is, in my view, a most welcome development. So too are significant events such as the organisation by the Court of Justice and the Constitutional Court of Latvia of a meeting between its own members and senior members of national judiciaries which is due to be held in Riga in March. The topic of the conference is to consider, on a multilateral basis, the common constitutional traditions within the European Union.

I think it would be fair to say that a broad-based horizontal dialogue between higher national courts (beyond the courts of those States which have already close historical links) is only in its infancy. It is a development, however, which, in my judgment, should be greatly encouraged. It can, like the horizontal dialogue with supranational courts, involve both actual meetings, whether bilateral or multilateral, or, to the extent permissible within each national legal order, a consideration on a comparative-law basis of our respective jurisprudence.

But there are challenges. The first challenge obviously stems from courts having the time and resources to devote to such dialogue. We

cannot spend most of our time attending meetings and conferences, no matter how interesting, valuable and pleasurable that might be. This is a particular challenge for a small country such as Ireland and one which will only increase in the light of Brexit. It is also a particular challenge for courts, such as the Irish Supreme Court, which have competence in both constitutional and ordinary legal matters and which therefore have to engage across a wide range of areas and with a significant number of international bodies. However, it is, in my view, a challenge which must be faced.

Exactly how we come to be familiar with the case-law of colleagues from other States may vary depending on national legal practice. Some courts have significant research departments which may, where appropriate, allow them to inform themselves about relevant case-law from other States. In the common-law tradition from which I come there is an obligation on any advocate representing a party to research and place before the court any relevant legal materials which might legitimately influence the court's view of the law. This applies even where the material in question may be unfavourable to that advocate's case. This duty also includes an obligation to place relevant comparative material before the court but, of course, the sheer volume of potential material now available online must place a practical limit on that obligation.

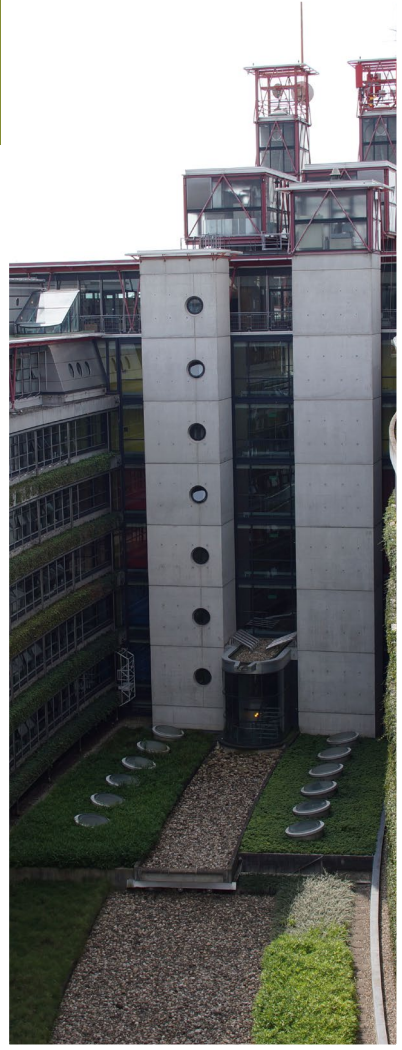
Perhaps one of the greater challenges stems from context. When we read the judgments of our own courts and of those supranational courts which have a direct impact on us, we do tend to know the legal context in which those judgments were written. But unless we are familiar with the legal context within which proceedings in another State were conducted there can be a danger of being misled on the true question decided by the court concerned. While the style in which judgments are written can vary significantly from legal system to legal system, we all, I think, usually refrain from stating the obvious.

But what may be obvious to those operating within their own national legal order may not be at all so obvious to someone reading a judgment who comes from a materially different legal system. Superficially, issues may appear to be the same but they may be significantly influenced by specific measures within the national legal order or, indeed, by differences between the way in which international instruments impact on that national legal order. I have to say that I have often had to emphasise to advocates appearing in our court that it is important, when referring to judgments of other respected courts from different States, to lay the ground properly by establishing that the court concerned was really answering the same question that our court was being asked to consider.

There are, therefore, real challenges involved in seeking to enhance the extent to which we can attempt to establish a coherent and harmonious human rights order by giving proper consideration to the views expressed in the judgments of colleague apex courts in other States. This does not, however, mean that we should minimise the benefits. The challenges can be overcome, or at least minimised, and the rewards are potentially well worth the effort.

If we consider it desirable that we develop a coherent and harmonious international human rights order which nonetheless respects appropriate national differences, then a deeper understanding among the senior national judiciaries of each of our States of the way in which common issues are addressed in colleague courts must surely be to everyone's significant benefit. Save to the extent that we may be obliged to take a certain course of action because of binding international obligations, such as, importantly, the minimum standards imposed on us all by the Convention, then we are, of course, free to differ. But that freedom to differ is, in my view, best exercised with understanding both of how common issues are approached in different States and the reasons why our colleague courts have come to the judgments which they have.

Can I suggest that one of the difficulties involved in building a coherent and harmonious approach to the vindication of human rights must require us to face the undoubted challenges of properly understanding and, where appropriate, applying the reasoning of respected colleagues across our many disparate States. We do not need to be the same but we have sufficient common legal traditions to make it important that we strive to ensure that we also share a coherent and harmonious human rights order.



Chapter 2

Case-law overview

This overview contains a selection by the Jurisconsult of the most interesting cases from 2020.

In 2020¹, the Grand Chamber delivered ten judgments and two decisions and its second advisory opinion under Protocol No. 16 to the Convention.

In its decision in *Slovenia v. Croatia*, the Grand Chamber ruled on the Court's jurisdiction (Article 32 of the Convention) to hear an inter-State case (Article 33), concerning an alleged violation of the Convention rights of a legal entity, which could not be classified as "non-governmental" within the meaning of Article 34.

Under Article 1, the Grand Chamber looked at the case of foreign nationals who apply for a visa at an embassy or consulate abroad (*M.N. and Others v. Belgium*).

As to Article 34, the Grand Chamber reiterated the general principle and listed the exceptions on the question whether a company's shareholders have "victim status" (*Albert and Others*). It also clarified its case-law concerning the notion of "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (*Selahattin Demirtaş (no. 2)*).

In *S.M. v. Croatia* the Grand Chamber analysed for the first time the applicability of Article 4 specifically to the trafficking and exploitation of women for prostitution, and it ruled on the scope of the State's obligations in such matters.

In cases concerning Article 6 § 1, the Grand Chamber clarified in particular the scope and meaning of the "tribunal established by law" concept (*Guðmundur Andri Ástráðsson*) and of a "criminal charge" in accordance with the Engel criteria (*Gestur Jónsson and Ragnar Halldór Hall*); it also recognised the connection between the scope of "criminal"

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

in Article 6 and that of the same adjective in Article 7 of the Convention (ibid.).

In its second advisory opinion under Protocol No. 16, this time in response to a request from the Armenian Constitutional Court, the Court clarified the significance of such opinions and addressed aspects of its Article 7 case-law (*Advisory opinion*, request no. P16-2019-001).

In its *Magyar Kétfarkú Kutya Párt* judgment, the Grand Chamber examined under Article 10 the question of the foreseeability of a law on freedom of expression for political parties in the context of an election or referendum.

Under Article 3 of Protocol No. 1, it defined the scope of the “adequate and sufficient safeguards” required for the effective examination of electoral disputes (*Mugemangango*). It also clarified in that context the notion of national “authority” within the meaning of Article 13 of the Convention.

In *Selahattin Demirtaş* (no. 2) it ruled on the lifting of the immunity of an opposition member of parliament and his prolonged pre-trial detention related to his political speeches, under Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1.

N.D. and N.T. v. Spain concerned the immediate and forcible return of aliens from a land border, following an attempt by a large number of them to cross it in an unauthorised manner by taking advantage of their large numbers; the Grand Chamber found that their removal had been compatible with Article 4 of Protocol No. 4 taken separately and in conjunction with Article 13 of the Convention.

Under Article 1 of Protocol No. 7 it ruled on the expulsion of lawfully resident aliens on national-security grounds, based on classified information that had not been disclosed to them (*Muhammad and Muhammad*).

Lastly, concerning Article 41 of the Convention, the Grand Chamber looked at an award of just satisfaction in respect of property, including when it is outside the territory of the respondent State (*Molla Sali*).

This year the Court has seen the further development of its case-law in other judgments, including on its jurisdiction to hear (and the admissibility of) complaints in the contexts of the transfer of a convicted prisoner from one member State to another to serve the rest of his sentence (*Makuchyan and Minasyan*) and of an arbitral award (*Platini*); it has also examined the concepts of direct and indirect victims under Article 34 of the Convention (*Akbay and Others*) and the exhaustion of domestic remedies (Article 35 § 1) in the case of a non-governmental organisation acting at domestic level to represent the interests of applicants (*Beizaras and Levickas*).

Concerning the various Convention rights and freedoms, the Court has developed a number of new and important principles under

Article 2 concerning the transfer of prisoners from one State to another (*Makuchyan and Minasyan*) and the implementation of a witness protection scheme by national authorities (*A and B v. Romania*).

Under Article 3, the Court has addressed the conditions of access to drinking water in Roma camps (*Hudorovič and Others*), and the poor living conditions of adult asylum-seekers who were deprived of decent accommodation (*N.H. and Others v. France*). On the issue of domestic violence, the case-law has been extended to cyberbullying (*Buturuğā*) and has established the State's obligations to protect children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*). In *M.K. and Others v. Poland*, the Court examined the situation of applicants who, having arrived at a border crossing, were not allowed to apply for asylum and were returned to the third State from which they had come, with a risk of chain *refoulement* to their country of origin; the Court also emphasised the obligations of the respondent State following the indication of an interim measure under Rule 39. For the first time the Court found that that an expulsion would carry a risk of a violation of Article 3 on account of ill-treatment on grounds of sexual orientation to which a homosexual applicant would be exposed in his country of origin (*B and C v. Switzerland*).

Under Article 5 § 1 (f), the Court ruled on the specific situation of an applicant who had been granted refugee status in one EU State, and had then been detained in a different State pending the examination of an extradition request from his country of origin (*Shiksaitov*).

Other cases of jurisprudential interest have been examined under Article 6 concerning the limitation period for a compensation claim in respect of physical harm (*Sanofi Pasteur*) and the use of police entrapment in securing a criminal conviction (*Akbay and Others*). For the first time the Court examined the admission in evidence, in criminal proceedings, of statements that had been forcibly obtained from individuals by means of ill-treatment, without the participation or approval of State agents (*Ćwik*). Lastly, in the *Farzaliyev* judgment, it clarified its case-law on the applicability of Article 6 § 2.

It also shed light on its case-law concerning the foreseeability of a criminal conviction under Article 7 of the Convention (*Baldassi and Others*) and on the right of appeal in criminal matters as guaranteed by Article 2 of Protocol No. 7 (*Saqueti Iglesias*).

Regarding Article 8 of the Convention, it addressed the limits to the concept of "private and family life" (*Evers*), data protection (*Breyer*), and, for the first time, the issue of cyberbullying as an aspect of violence against women (*Buturuğā*), access to drinking water in a Roma camp (*Hudorovič and Others*) and, lastly, a professional sanction in the world of sport (*Platini*).

The Court ruled on the compatibility with Article 10 of an organised boycott (*Baldassi and Others*), on the right to freedom of expression of a defendant in criminal proceedings (*Miljević*), and on the right to an effective remedy under Article 13 of the Convention (*M.K. and Others v. Poland*, *Beizaras and Levickas*, and *Association Innocence en Danger and Association Enfance et Partage*).

It also examined the failure by a State to enforce a prison sentence handed down in another State for a racially motivated hate crime (*Makuchyan and Minasyan*). It emphasised the need for a criminal-law response to verbal aggression and direct physical threats driven by homophobia (*Beizaras and Levickas*).

In *M.K. and Others v. Poland*, the Court ruled on Article 4 of Protocol No. 4 in relation to asylum-seekers. Lastly, it examined for the first time an alleged discrimination in the workplace on grounds of pregnancy, under Article 1 of Protocol No. 12 (*Napotnik*).

In addition, the case-law took account of the interactions between the Convention and EU law in cases concerning, in particular, asylum-seekers (*N.H. and Others v. France*), the expulsion of a homosexual (*B and C v. Switzerland*), data protection (*Breyer*) and the right of a pregnant woman not to be subjected to discrimination (*Napotnik*).

The Court has also, in a number of cases, taken account of the interactions between the Convention and international law or international and European organisations (for example, *Slovenia v. Croatia*, *M.N. and Others v. Belgium*, *Mugemangango*, and *Napotnik*) and in the contexts of human trafficking (*S.M. v. Croatia*), migrants and asylum-seekers (*N.D. and N.T. v. Spain*, *N.H. and Others v. France*), domestic violence (*Association Innocence en Danger and Association Enfance et Partage*), and the transfer of convicted prisoners to another State (*Makuchyan and Minasyan*).

The Court has referred in particular to the work of the UNHCR (*B and C v. Switzerland*, *Shiksaitov*), the ILO (*S.M. v. Croatia*), the Venice Commission (*Mugemangango*, *Selahattin Demirtaş (no. 2)*), and ECRI (*Beizaras and Levickas*).

The Grand Chamber has reiterated the principle of the harmonious interpretation of the Convention and other international law instruments (*S.M. v. Croatia*).

It is also noteworthy that this year the Court has developed its case-law on the positive obligations of member States under the Convention, especially in the area of violence against women (*Buturugä*), and incitement to hatred and violence (*Beizaras et Levickas*), the protection of children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*) and protection from ill-treatment at the hands of individuals (*Ćwik*), forced prostitution (*S.M. v.*

Croatia), access to drinking water (*Hudorovič and Others*) and sanctions in the area of professional sport (*Platini*).

Lastly, the Court once again ruled on the extent of the margin of appreciation to be afforded to States Parties to the Convention (*Mugemangango, Sanofi Pasteur, Saquetti Iglesias, Breyer, Platini, Hudorovič and Others, Miljević, Association Innocence en Danger and Association Enfance et Partage, and Napotnik*).

JURISDICTION AND ADMISSIBILITY

Jurisdiction of States (Article 1)²

The *M.N. and Others v. Belgium*³ decision concerned whether a State's ruling on a visa application and an applicant's challenge against that refusal in the State's courts can create a jurisdictional link.

The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgian embassy in Beirut to allow them to travel to Belgium to apply for asylum because of the conflict in Aleppo. Their requests were processed and refused by the Aliens Office in Belgium and, after being notified by the Belgian embassy of those decisions, the applicants lodged unsuccessful appeals before the Belgian courts.

The applicants complained under Articles 3 and 13 of the Convention that the refusal to grant them visas had exposed them to a risk of ill-treatment for which they did not have an effective remedy, and under Articles 6 § 1 and 13 about the unjustified failure to enforce certain court decisions delivered initially in their favour. Following relinquishment, the Grand Chamber declared the application inadmissible as regards their complaints under Articles 3 and 13 of the Convention, finding that the applicants had not been within the jurisdiction of Belgium. It then recharacterised the second complaint under Article 6 § 1 and found that, regardless of the issue of jurisdiction, Article 6 § 1 was inapplicable because the enforcement proceedings in question did not concern a "civil" right within the meaning of the Court's settled case-law.

This Grand Chamber decision is interesting because it examined whether a State exercises control and authority, and thus jurisdiction, over individuals lodging visa applications in embassies and consulates abroad. It found that the respondent State was not exercising jurisdiction extraterritorially by processing the visa applications and that the applicants' appeals had not created a jurisdictional link.

2. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) below.

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

(i) The first question to be examined was whether, in processing the visa applications, the State effectively exercised authority or control over the applicants, particularly through the acts or omissions of its diplomatic or consular agents posted abroad. The Court's analysis was informed by a number of factors: the applicants had never been within the national territory of Belgium; they had no pre-existing family or private-life ties with that State; and it had not been alleged before the Court that a jurisdictional link arose from any control exercised by the Belgian authorities in Syrian or Lebanese territories. In addition, the Court found it irrelevant who (whether the Belgian authorities in the national territory or diplomatic agents abroad) was responsible for taking the visa decisions and it thus attached no significance to the fact that the diplomatic agents in this case fulfilled merely a "letter box" role. It was, however, crucial that, when comparing the present case and the case-law of the European Commission on Human Rights on the acts and omissions of diplomatic agents (*X v. Germany*⁴; *X v. the United Kingdom*⁵; *S. v. Germany*⁶; and *M. v. Denmark*⁷), the Court found that none of the connecting links which characterised those cases was present in the present one. In particular, the applicants were not Belgian nationals seeking to benefit from the protection of their embassy. In addition, at no time had diplomatic agents exercised *de facto* control over the applicants, who had freely chosen to present themselves at the Belgian embassy in Beirut, rather than approaching any other embassy, to submit their visa applications. They had then been free to leave the premises of the Belgian embassy without any hindrance.

Furthermore, having regard to the Court's case-law concerning situations in which the officials of a State operating outside its territory, through control over buildings, aircraft or ships in which individuals were held, exercised power and physical control over those persons (*Issa and Others v. Turkey*⁸; *Al-Saadoon and Mufdhi v. the United Kingdom*⁹; *Medvedyev and Others v. France*¹⁰; *Hirsi Jamaa and Others v. Italy*¹¹; and

4. *X v. Germany*, no. 1611/62, Commission decision of 25 September 1969, unreported.

5. *X v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, Decisions and Reports 12, p. 73.

6. *S. v. Germany*, no. 10686/83, Commission decision of 5 October 1984, Decisions and Reports 40, p. 291.

7. *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, Decisions and Reports 73, p. 193.

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

9. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.

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

11. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

*Hassan v. the United Kingdom*¹²), the administrative control exercised by the Belgian State over the premises of its embassies was not sufficient to bring every person who entered those premises within its jurisdiction. Finally, the present context was considered to be fundamentally different from the numerous expulsion cases in which the applicants were, in theory, on the territory of the State concerned – or at its border – and thus clearly fell within its jurisdiction. No exercise of extraterritorial jurisdiction could therefore be established on this ground in the present case.

(ii) Secondly, the Court found that the applicants could not create, unilaterally, an extraterritorial jurisdictional link between them and Belgium merely by challenging the visa decisions before the Belgian courts.

The Grand Chamber considered the applicants' submission to have no basis in the case-law of the Court. It referred, firstly, to the judgment in *Markovic and Others v. Italy*¹³, which concerned civil proceedings for damages brought by nationals of the former Serbia and Montenegro before the Italian courts in respect of the deaths of relatives during NATO air strikes: in that case, the Court declared inadmissible for lack of jurisdiction all the applicants' substantive complaints, other than the one raised under Article 6. The Court then referred to the judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*¹⁴ in which the proceedings in question – which created a jurisdictional link with Turkey in respect of deaths which had occurred in the Cypriot Government-controlled area of the island – were criminal proceedings which had been opened on the initiative of Turkey (who had control over the "Turkish Republic of Northern Cyprus") in the context of its procedural obligations under Article 2. This was considered by the Court to be very different from the present case, which concerned administrative proceedings brought by private individuals who had no connection with the State except for proceedings which they had freely initiated and without the choice of the State, in this case Belgium, being imposed on them by any treaty obligation.

In contrast, the position of the Government was supported by the Court's decision in *Abdul Wahab Khan v. the United Kingdom*¹⁵, on which the Grand Chamber relied:

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

13. *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV.

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

15. *Abdul Wahab Khan v. the United Kingdom* (dec.), no. 11987/11, 28 January 2014.

The Court made clear in that decision that the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him ... The Court considers that to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction ...

The Grand Chamber added that precisely such an obligation would be created were the State's ruling on an immigration application to be sufficient to bring the individual making the application under its jurisdiction: the individual could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the scope of the Convention would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, have the right to control the entry, residence and expulsion of aliens (*Ilias and Ahmed v. Hungary*¹⁶).

(iii) Finally, the Grand Chamber nevertheless clarified that the above conclusion did not prejudice the endeavours made by the States to facilitate access to asylum procedures through their embassies and/or consular representations (see, for example, *N.D. and N.T. v. Spain*¹⁷, where the Court examined under Article 4 of Protocol No. 4 whether the possibility for the applicants in that case to claim international protection in Spanish embassies and consulates was genuinely and effectively accessible to them).

Admissibility (Articles 34 and 35)

Victim status (Article 34)

The judgment in *Albert and Others v. Hungary*¹⁸ concerned the victim status of shareholders who had lost control over their banks, which had been placed under supervision.

The applicants are 237 individual shareholders in two savings banks. They held a total of 98% of the shares in one bank and approximately 88% of the shares in the other. They complained under Article 1 of

16. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019.

17. *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 222, 3 October 2017.

18. *Albert and Others v. Hungary* [GC], no. 5294/14, 7 July 2020.

Protocol No. 1 that, as a result of the 2013 Integration Act, they had suffered a permanent and drastic loss in the level of control over the banks in favour of two central bodies which were indirectly owned by the State. In particular, their rights to establish and amend memorandums of association, adopt annual reports, appoint board members and take decisions on share capital and the payment of dividends had, in their view, been excessively restricted. They did not complain about any specific exercise of power by the two central bodies or about any resulting economic detriment to the business of the banks. In January 2019 a Chamber of the Court held that the applicants had not pointed to any circumstance justifying lifting the corporate veil and that they could therefore not claim to be victims of the alleged violation, and concluded there had been no violation of Article 1 of Protocol No. 1. The Grand Chamber endorsed the Chamber's finding regarding the applicants' victim status and rejected the complaint as incompatible *ratione personae* with the provisions of the Convention.

The Grand Chamber judgment is noteworthy because, firstly, it clarifies the distinction between acts considered to affect the rights of shareholders and those affecting the company and it confirms the crucial importance of this distinction for the purposes of determining the victim status of shareholders. Secondly, while reiterating the general principle that shareholders cannot claim to be victims of acts and measures affecting their companies, the Court clarified two situations which constitute an exception to this principle. The present judgment contains therefore a comprehensive outline of the Court's case-law in this regard.

(i) The Court identified a number of cases where the victim status of applicant shareholders had been implicitly accepted as regards measures which had directly and adversely affected those shareholders' ownership or freedom to dispose of their shares, or obliged them to sell their shares, or where the measures had decreased their power to influence the company *vis-à-vis* other shareholders, to act as the company's manager or to vote. Those cases were consistent with and illustrated the general principle which distinguished between measures directed at *the applicant's* rights as a shareholder and infringements of *the company's* rights (see the leading cases of *Agrotexim and Others v. Greece*¹⁹ and *Olczak v. Poland*²⁰). On this basis, the Court clarified as follows:

19. *Agrotexim and Others v. Greece*, 24 October 1995, Series A no. 330-A.

20. *Olczak v. Poland* (dec.), no. 30417/96, ECHR 2002-X (extracts).

... acts affecting the rights of the shareholders are distinct from measures or proceedings affecting the company in that both the nature of such acts and their alleged effect impact the shareholders' legal rights both directly and personally and go beyond merely disturbing their interests in the company by upsetting their position in the company's governance structure.

(ii) The first exception to the general principle excluding the victim status of shareholders in respect of measures affecting their companies is the situation "where the company and its shareholders are so closely identified with each other that it is artificial to distinguish between the two". This can be seen in cases brought by the shareholders of small or family-owned or run companies or cooperatives, notably where the sole owner of a company complains about the measures taken in respect of his or her company, or where all the shareholders of a small cooperative have applied to the Court as applicants, or where one shareholder in a family-owned firm has lodged an application under the Convention and the remaining shareholders have at least not objected to the lodging. In this respect, the Court pointed out, with reference to *Ankarcrona v. Sweden*²¹, that the reason for having accepted victim status in such cases was that there had been no risk of a difference of opinion among shareholders or between shareholders and a board of directors as to the alleged infringement of Convention rights or as to the most appropriate way of reacting thereto.

(iii) The second type of situation in which the Court may disregard the company's distinct legal personality and allow its shareholders to bring complaints about the company's rights, concerns the existence of "exceptional circumstances, in particular where it is clearly established that it is impossible" for the affected company to bring the case to the Court in its own name (*Agrotexim and Others*, cited above). In cases falling within this category, the mere existence of measures of outside supervision or control, imposed on the company in issue due to its financial or other difficulties, was generally viewed as an important factor, but not the only one. In the instant case, the Court was therefore called upon to clarify the nature of the circumstances which may be considered as "exceptional" for the purposes of granting victim status to shareholders. When analysing the relevant case-law examples in this respect, the Court pointed out that the burden had been on the shareholders to demonstrate either that an official who had been tasked

21. *Ankarcrona v. Sweden* (dec.), no. 35178/97, ECHR 2000-VI.

with looking after the company's interests had been unable or unwilling to raise the grievances in issue either at the domestic or Strasbourg level, or that the Convention complaint had concerned a matter – such as the removal of a regular manager and the appointment of a trustee – in respect of which there had been a difference of opinion between the trustee and the shareholders, or relating to various actions of the trustee affecting the interests of the shareholders. In each case, the matter had been such that its potential impact could have had a serious effect on the shareholders' situation, directly or indirectly. In the present judgment, the Court nuanced its approach as follows:

... in order for applicants to satisfy the Court that their pursuit, as shareholders, of a matter affecting the company is justified by “exceptional circumstances”, they ought to give *weighty and convincing reasons demonstrating that it is practically or effectively impossible* for the company to apply to the Convention institutions through the organs set up under its articles of association and that they should therefore be allowed to proceed with the complaint on the company's behalf. [Emphasis added.]

(iv) The Court went on to apply this three-tier test to the applicants' situation, finding that they could not be considered victims of the impugned acts against the companies. In the first place, while the reform had considerably impacted the banks and their statutory bodies, its effect on the rights of the applicant shareholders had been incidental and indirect. There had been no artificial dilution of their voting power or the outright cancellation of shares. The size of the applicants' individual shareholdings did not allow them to control either of the banks and their influence as a group, not consolidated by any agreement, had been fragmented and weak. Secondly, the banks, which were public liability limited companies with numerous shareholders and a fully delegated management, were not found to be “closely identified with” the applicants. The fact that the latter could have owned “almost 100%” of the shares in the banks was not decisive. Thirdly, there had been no exceptional circumstances precluding the banks from applying to the Court in their own names: the banks had remained operational; the applicants, who had collectively held voting majorities, could have directed the banks to bring legal proceedings on their behalf; the reform and the supervising authorities' decisions had been open to judicial review; and there was no evidence of any undue pressure on the banks in this respect.

In the inter-State judgment in *Slovenia v. Croatia*²² the Court reiterated its case-law to the effect that a legal entity “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto” may submit an individual application to the Court, provided that it is a “non-governmental organisation” within the meaning of Article 34 of the Convention.

The *Akbay and Others v. Germany*²³ judgment concerned persons convicted as a result of incitement by the police to commit offences. In it the Court clarified its case-law on the transferability of an Article 6 complaint of entrapment.

More generally, the judgment contains a comprehensive overview of the case-law concerning the notions of direct and indirect victims under Article 34 of the Convention (§§ 67-77 of the judgment). The Court reiterated, in particular, that where the direct victim has died before the application was lodged with the Court, the Court’s approach to accepting victim status has been generally restrictive. As regards complaints under, *inter alia*, Article 6, it has acknowledged the victim status of close relatives where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family, or where they have shown a material interest on the basis of the direct effect on their pecuniary rights. The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*²⁴).

Exhaustion of domestic remedies (Article 35 § 1)

The judgment in *Beizaras and Levickas v. Lithuania*²⁵ is noteworthy in that it clarifies whether the applicants can be considered to have exhausted domestic remedies, since it was a non-governmental organisation (NGO) which made the criminal complaints in pursuit of the applicants’ interests.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious

22. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Article 33 (Inter-State cases) below.

23. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Fairness of the proceedings) below.

24. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 100, ECHR 2014.

25. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 13 (Right to an effective remedy) and Article 14 taken in conjunction with Article 8 below.

homophobic comments (for example, calls for the applicants to be “castrated”, “killed” and “burned”). On the applicants’ request, an NGO (of which they were members and which protected the interests of homosexual persons) requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute. The two men were the only applicants in the case before the Court.

The Court emphasised that the legal action brought by the NGO in pursuit of the applicants’ interests was not an *actio popularis*, since the NGO had acted in response to specific facts affecting the rights of the two applicants, who were members of the NGO. The NGO’s standing had never been questioned or challenged at the domestic level. The Court also took into account the applicants’ statement that they had preferred the NGO to initiate the criminal proceedings for fear that the Internet commenters would retaliate should they launch such proceedings themselves. Bearing in mind the serious nature of the allegations, it was therefore open to the NGO to act as a representative of the applicants’ interests in the domestic criminal proceedings. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level, given that in modern-day societies recourse to collective bodies is one of the accessible means, sometimes the only means, available to citizens to defend their particular interests effectively (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*²⁶, and *Gorraiz Lizarraga and Others v. Spain*²⁷). The Court also observed that the present application had been lodged by the applicants, acting for themselves, after the domestic courts had adopted decisions in the case that dealt with their particular situation. The Government’s plea of non-exhaustion was therefore dismissed.

Matter already submitted to another international body (Article 35 § 2 (b))

The judgment in *Selahattin Demirtaş v. Turkey (no. 2)*²⁸ is noteworthy because the Court further developed the criteria for determining whether

26. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014.

27. *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, ECHR 2004-III.

28. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 10 (Freedom of expression), Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

In particular, the Court rejected the Government's argument that a complaint lodged with a particular Committee on behalf of the applicant amounted to a procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention. In so doing, the Court developed the criteria that an international body must satisfy in order to be regarded as "another procedure of international investigation or settlement" within the meaning of that provision. The requirement of judicial or quasi-judicial proceedings similar to the Convention mechanism means that the examination must be clearly defined in scope and limited to certain rights based on a legal instrument whereby the relevant body is authorised to determine the State's responsibility and to afford legal redress capable of putting an end to the alleged violation. It must also afford institutional and procedural safeguards, such as independence, impartiality and an adversarial procedure.

"CORE" RIGHTS

Right to life (Article 2)

Obligation to protect life

*Makuchyan and Minasyan v. Azerbaijan and Hungary*²⁹ concerned the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons. It also concerned the discriminatory nature of the failure to enforce a prison sentence imposed abroad for an ethnically biased crime.

While taking part in a NATO-sponsored course in Budapest, an Azerbaijani officer (R.S.) murdered an Armenian officer (the second applicant's nephew) and threatened to kill another Armenian soldier, the first applicant. R.S. was sentenced to life imprisonment in Hungary. Having served eight years of his sentence there, he was transferred to Azerbaijan under the [Council of Europe Convention on the Transfer of Sentenced Persons](#)³⁰. On his return to Azerbaijan he was released, pardoned and promoted at a public ceremony. He was also paid salary arrears for the time he had spent in prison, and given the use of a flat. Comments, approving of R.S.'s conduct and his pardon, were made by various high-ranking Azerbaijani officials.

29. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 14 in conjunction with Article 2 (Prohibition of discrimination) below.

30. Convention on the Transfer of Sentenced Persons, ETS 112.

The applicants complained under Article 2 of the Convention, taken alone and in conjunction with Article 14. The Court found that the manifest “approval” and “endorsement” by Azerbaijan of the crimes committed by a member of its armed forces in a private capacity did not engage that State’s responsibility under the substantive limb of Article 2 of the Convention. However, Azerbaijan’s unjustified failure to enforce the prison sentence imposed in Hungary, coupled with the “hero’s welcome” and various benefits given to R.S. without any legal basis, was considered to be incompatible with its procedural obligation under Article 2 and, in addition, to constitute ethnically motivated discrimination within the meaning of Article 14 in conjunction with the procedural limb of Article 2. The Court found no violation of the procedural limb of Article 2 as regards Hungary, noting that it had followed the Transfer Convention procedure to the letter to ensure R.S. completed his sentence in Azerbaijan.

The Court has developed in this judgment certain novel and important principles concerning the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States’ duties in the context of the transfer of sentenced persons.

(i) The first question the Court considered was whether Azerbaijan could be held responsible for the crimes in question and thus of a substantive violation of Article 2 of the Convention. The Court attached crucial importance to the fact that R.S. was not acting in the exercise of his official duties or on the orders of his superiors. It also rejected the applicants’ argument based on Article 11 of the [UN Draft Articles on the Responsibility of States of Internationally Wrongful Acts](#)³¹. The Court noted that Article 11 set a very high threshold for State responsibility in this context, a threshold not limited to the mere “approval” and “endorsement” of the relevant act, but one which required that two cumulative conditions be fulfilled: clear and unequivocal “acknowledgement” and “adoption” of the act in issue as having been perpetrated by the State itself. Although the measures taken by the Azerbaijani government manifestly demonstrated its “approval” and “endorsement” of R.S.’s criminal acts, it had not been convincingly demonstrated (on the basis of the very stringent standards under international law) that the State of Azerbaijan had “clearly and unequivocally” “acknowledged” and “adopted” R.S.’s acts “as its own”, thus directly and categorically assuming, as such, responsibility for the actual killing of one victim and the attempted murder of another. Those

31. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

measures could rather be interpreted as having the purpose of publicly addressing and remedying R.S.'s adverse personal, professional and financial situation, which the authorities had perceived, unjustifiably in the Court's view, as being the consequence of the allegedly flawed criminal proceedings in Hungary.

(ii) The case also gave the Court the opportunity to apply its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) against a home State (Azerbaijan), where a convicted prisoner is transferred from a sentencing State to the home State with the aim of continuing his or her sentence in the home State. The Court emphasised that the enforcement of a sentence imposed in the context of the right to life had to be regarded as an integral part of a State's procedural obligation under Article 2. Regardless of where the crimes had been committed, and since Azerbaijan had agreed to and assumed the obligations under the Transfer Convention to continue the enforcement of R.S.'s prison sentence, it was bound to do so in compliance with its procedural obligations under Article 2. There were therefore "special features" that triggered the existence of Azerbaijan's jurisdictional link to the procedural obligation under Article 2 (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*³², and *Güzelyurtlu and Others v. Cyprus and Turkey*³³). The acts of Azerbaijan, which had in effect granted R.S. impunity for a very serious ethnically biased crime without any convincing reason, were not compatible with its obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

(iii) Moreover, the Court examined, for the first time, the scope of the obligation of the sentencing State (Hungary) to ensure the completion of a prisoner's sentence after his or her transfer to another State, particularly in the light of the protection of the rights of victims of a crime or their next of kin. It found that the Hungarian authorities had taken sufficient steps in this respect, by following the procedure set out in the Transfer Convention to the letter. They had requested the Azerbaijani authorities to specify which procedure would be followed in the event of R.S.'s return. Although the Azerbaijani's authorities' reply had admittedly been incomplete and worded in general terms, there was no tangible evidence to show that the Hungarian authorities had unequivocally been or should have been aware that R.S. would be released upon his return to Azerbaijan. Indeed, given the time already served by R.S. in a

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

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

Hungarian prison, the Court did not see how the competent Hungarian bodies could have done anything other than respect the procedure and the spirit of the Transfer Convention and proceed on the assumption that another Council of Europe member State would act in good faith.

(iv) Finally, the judgment is also noteworthy for the manner in which the Court examined the question of whether the State's failure to enforce a prison sentence imposed abroad for an ethnic hate crime amounted to a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2 and, in particular, for the manner in which the Court distributed the burden of proof in this respect (*Nachova and Others v. Bulgaria*³⁴). In view of the special features of the case (R.S.'s promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking officials, as well as the creation of a special page on the website of the President in appreciation of R.S.), the applicants were considered to have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures in issue had been racially motivated. Given the difficulty for the applicants to prove such bias beyond reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

The judgment in *A and B v. Romania*³⁵ concerned the application and implementation of a witness protection programme.

The applicants, who had been called as witnesses in a corruption case involving highly placed officials, were included in the witness protection programme. They were given the status of "threatened witnesses" following the statements they had made to the prosecution. Under the protection protocols signed by the applicants, they were required to refrain from activity which would compromise the protection measures, or disclose their status or the identity of the police officers involved. A number of difficulties were experienced in the application and implementation of the protection programme. On the one hand, there had been delays in putting in place certain aspects of the programme: the authorities had lacked a coherent strategy and, on the ground, the protection officers had been badly briefed and negligent in their

34. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.

35. *A and B v. Romania*, nos. 48442/16 and 48831/16, 2 June 2020.

duties on certain occasions. On the other hand, the applicants had been uncooperative and difficult with the protection officers and the measures put in place. Their demands, particularly concerning their protection, were considered unattainable. In addition, they had maintained a social media and television presence to complain about their protection, thus risking compromising their protected-witness status. Despite attempts by the authorities to remove the applicants from the witness protection programme, the competent court maintained the protection measures.

The applicants complained under Article 2 of the Convention about the implementation of the witness protection programme and the Court found no violation of that Article.

(i) The judgment is noteworthy in that, while the Court has already applied the principles set out in *Osman v. the United Kingdom*³⁶ to the question of whether individuals should have been put in a witness protection programme (in *R.R. and Others v. Hungary*³⁷), this is the first time the Court has had to apply those principles to examine the implementation of a witness protection programme.

(ii) Key to its assessment was finding a balance between, on the one hand, the State's duty to protect under Article 2 of the Convention and, on the other, the individuals' duty to protect themselves and not to contribute to the risk. In particular:

- The Court examined whether the authorities had done all that could reasonably be expected of them to avoid a real and immediate risk to the applicants' lives. As soon as a risk had been identified, a series of concrete measures had been taken to protect the applicants, but it took long periods of time (in total more than one year and four months) before the applicants were formally included in the programme. The Court stressed, however, that the applicants had not been left without protection during this time – even if that protection was, at least initially, mostly improvised and carried out in the absence of regulations – and that the inevitable deficiencies had been corrected by the authorities. As to the other failures identified as regards the police officers on duty (and notably the absence of clear instructions from their superiors concerning the scope and aim of their mission and several omissions while on duty entailing risks to the applicants' safety), the Court noted that they had been investigated and promptly corrected.

- The Court also emphasised the applicants' duty to cooperate with the authorities and to abstain from any action that might compromise

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

37. *R.R. and Others v. Hungary*, no. 19400/11, 4 December 2012.

the safety of the mission, which had been clearly set out in the protection protocols to which they had consented. The Court considered that the above-mentioned flaws did not justify the applicants' provocative behaviour, repeated disregard of their responsibilities for their own protection and their failure to comply with the obligations on them. They were not only uncooperative with the protection team but also risked compromising their protected-witness status through their presence on social media and on television. Finally, the applicants potentially exposed themselves to a serious risk as they unilaterally decided to change their residence and move abroad.

The Court emphasised the authorities' efforts to continue the applicants' protection, despite the applicants' behaviour and even when they were abroad, as well as their willingness to find alternative solutions instead of withdrawing the applicants from the witness programme, which was an option open to them in domestic law. Consequently, the Court concluded that the authorities had done what could reasonably be expected of them to protect the applicants' lives and that they had not failed in their obligation under Article 2 of the Convention to protect them.

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

Inhuman or degrading treatment

*Hudorovič and Others v. Slovenia*³⁸ concerned the conditions of access to safe drinking water. The applicants belonged to Roma communities residing in two illegal and unserved settlements. They complained that the authorities had not taken sufficient measures to provide them with access to safe drinking water and sanitation.

It is of interest that the Court stated that it did not exclude the applicability of Article 3 in such a context (*O'Rourke v. the United Kingdom*³⁹, and *Budina v. Russia*⁴⁰). However, the positive measures undertaken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, and the way in which they had access and whether they had actually accessed it was irrelevant. Accordingly, even assuming that the alleged suffering had reached the minimum threshold and that Article 3 was applicable, the Court found no violation of this provision.

38. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 8 (Positive obligations) below.

39. *O'Rourke v. the United Kingdom* (dec.), no. 39022/97, 26 June 2001.

40. *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

Degrading treatment

*N.H. and Others v. France*⁴¹ concerned the impossibility for adult asylum-seekers to benefit from reception conditions provided for by domestic and EU law.

The applicants, including four young adult men in good health, arrived in France independently of each other in 2013 and 2014 with the intention of seeking asylum. To this end, they submitted their requests at the prefecture. At the time, an asylum-seeker was entitled to obtain an *autorisation provisoire de séjour* (“APS”) within fifteen days, although the waiting times at the time were significantly longer. After an APS had been issued, the asylum application was registered and the individual received a receipt (*récépissé*) confirming this. The APS served as proof that the recipient was entitled to accommodation and offered protection against removal, and the *récépissé* provided access to financial assistance. In practice, either document certified asylum-seeker status under domestic law. All of the applicants in the present case obtained such documents and status but three of them had to wait several months. Prior to that, they lived in fear of expulsion and could not avail themselves of the reception conditions (accommodation and financial assistance) foreseen for asylum-seekers by domestic law (and by the [EU Reception Conditions Directive](#)⁴²). Once they had obtained the documents certifying their asylum-seeker status they were still not housed in reception centres (due to a lack of places available) and the financial benefits they had the right to claim were either considerably delayed or not received at all. Relying on Article 3, the applicants complained, *inter alia*, that they had been unable to benefit from the reception conditions foreseen by domestic law and that they had been forced to live on the street in inhuman and degrading conditions for several months.

The Court found a breach of Article 3 in respect of three of the applicants, considering that the situation of a fourth did not meet the threshold for the applicability of that provision. The Court rejected their request under Article 46 to outline to the State measures to be taken as regards the reception conditions of asylum-seekers: since the lodging of the applications, domestic law had evolved to considerably shorten the time-limit for the registration of asylum applications and to reform the framework for accommodation and financial assistance for asylum-seekers.

41. *N.H. and Others v. France*, nos. 28820/13 and 2 others, 2 July 2020.

42. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

The judgment is noteworthy as it is only the second time – after the judgment in *M.S.S. v. Belgium and Greece*⁴³, and later follow-up cases against Greece – that the Court has found a breach of Article 3 in respect of the living conditions of adult asylum-seekers with no specific vulnerabilities who were, because of the acts or omissions of the authorities, unable to access accommodation or decent living conditions or to provide for their essential needs. While noting that the events in the present case unfolded during a progressive increase in asylum applications in France, the Court observed that they had not taken place during a humanitarian emergency caused by a major migration crisis.

(i) The Court noted that those seeking asylum are considered to be a “particularly underprivileged and vulnerable population group in need of special protection”, there being a broad consensus in that regard at an international and European level (*ibid.*, § 251). The question was therefore whether, given the inherent vulnerability of asylum-seekers, the situation of the present applicants (young, single, in good health and without children) could be considered one of “extreme material poverty” raising an issue under Article 3 of the Convention.

(ii) In this respect, the Court noted that the applicants were not allowed to work during the asylum procedure and were fully dependent on the authorities for accommodation and material living conditions. They had been forced to live on the streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion (prior to obtaining a document certifying their status as asylum-seekers, as far as their fear of expulsion was concerned). The applicants, who had on rare occasions benefited from emergency accommodation, could not be reproached for not soliciting the emergency accommodation shelters more often: given the insufficient capacities of those shelters and the applicants’ profile they would have been refused, priority being given to asylum-seekers who had a particular vulnerability (such as age, health or family situation). Accordingly, the Court found that three of the applicants had been placed in a situation contrary to Article 3 given the living conditions they had experienced, combined with the absence of an adequate response by the authorities whom they had repeatedly alerted to their situation, and since the domestic courts had systematically denied them the means at the disposal of the competent authorities because they were single adult men in good health. No violation of Article 3 was found as regards a fourth applicant:

43. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 235-64, ECHR 2011.

even though he had also lived in a tent for months, he had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time.

(iii) The present judgment can be usefully compared to that in *N.T.P. and Others v. France*⁴⁴. The applicants (a woman and her three children) had been accommodated (in view of their vulnerability) in a privately run shelter funded by the authorities while they waited for their appointment to lodge their asylum application, they had been given food and medical care and the children had been schooled, which factors had led the Court to find that they had not been in a situation of “extreme material poverty” raising an issue under Article 3 of the Convention.

Positive obligations

*Buturugă v. Romania*⁴⁵ is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women. It held in this connection that the State had failed to comply with its positive obligations under Articles 3 and 8 of the Convention.

The *Association Innocence en Danger and Association Enfance et Partage v. France*⁴⁶ judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following her death it transpired that the parents’ domination over the child had been such as to prevent the reality of the abuse from being revealed. The authorities had nevertheless already been warned in June 2008, in a report from a head teacher, that teachers had noticed wounds on M.’s body and face. Following a police investigation, the public prosecutor’s office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

44. *N.T.P. and Others v. France*, no. 68862/13, 24 May 2018.

45. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 8 (Positive obligations) below.

46. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 13 (Right to an effective remedy) below.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

(i) The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

(ii) Secondly, the Court reiterated its case-law on the State's positive obligation under Article 3 to take specific measures in order to protect children or other vulnerable persons from criminal abuse perpetrated by third parties. It emphasised in this connection the need to secure rights that were practical and effective, and the need for the authorities' response to be adapted to the situation in order to fulfil that obligation, as explained in *Opuz v. Turkey*⁴⁷.

In the present case, while recognising the difficulties faced by the domestic authorities, the Court pointed out the following, in particular: while the public prosecutor's office had reacted immediately (on the very day of the report), the case had only been entrusted to a police investigator thirteen days later; no inquiries had been conducted with the specific aim of shedding light on M.'s family environment (especially in view of the family's frequent relocations) and the teachers who had reported their suspicions had not been interviewed; and, while not mandatory, the participation of a psychologist when M. was examined would have been appropriate. The Court further found that the combination of the total discontinuance of the case (in 2008) and the lack of any mechanism to centralise information had seriously reduced the chances of special monitoring of the child and prevented any useful exchange of information between the justice system and the social

47. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

services. Moreover, while those services had certainly taken some steps (home visits), they had not engaged in any really meaningful action to establish the child's actual condition.

(iii) Thirdly, as regards the specific issue of parental abuse of children, the Court seems to have consolidated its approach, which consists of characterising such acts as “domestic violence”, with reference to the scope of this concept as defined in the [Council of Europe Convention on preventing and combating violence against women and domestic violence](#)⁴⁸ (*M. and M. v. Croatia*⁴⁹, and *D.M.D. v. Romania*⁵⁰).

Expulsion

*M.K. and Others v. Poland*⁵¹ concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

The applicants complained under Article 3 of the Convention and Article 4 of Protocol No. 4 (each alone and in conjunction with Article 13), as well as Article 34 of the Convention.

48. Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210.

49. *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts).

50. *D.M.D. v. Romania*, no. 23022/13, 3 October 2017.

51. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) below.

The Court found, *inter alia*, a violation of Article 3 on account of the applicants having been denied access to the asylum procedure and removed to Belarus, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 in conjunction with the aforementioned Articles owing to the absence of a remedy with automatic suspensive effect. It also found that the respondent State had failed to discharge its obligations under Article 34: it had either not complied with the interim measures indicated by the Court at all, or had complied with a significant delay.

(i) While the judgment does not develop the Court's case-law, it is noteworthy as it comprehensively examines complaints under several Convention provisions typically arising when individuals, with an arguable claim under Articles 2 or 3 to be at risk if returned to their country of origin, present themselves at a border crossing point to apply for asylum, but are denied that opportunity and removed to the third country from which they arrived, with a risk of *refoulement* to their country of origin.

Importantly, in determining whether or not the applicants had expressed a wish to apply for asylum when they presented themselves at the border checkpoints, the Court considered the applicants' version of the events to be more persuasive (contrast *Asady and Others v. Slovakia*⁵²). It found their account was corroborated by a large number of accounts collected by the national human rights institutions, whose reports indicated the existence of a practice of misrepresenting statements of asylum-seekers in the official notes of the border guards at checkpoints between Poland and Belarus, and by documents submitted by them to the Court at all stages of their applications, including copies of the asylum applications they had with them when they presented themselves at the border checkpoints, as well as by their numerous attempts to cross the border and to seek legal representation. Moreover, the authorities had been aware of the applicants' fears of being returned, as their asylum applications had been shared electronically with the authorities by the applicants' representatives and by the Court (in particular when granting interim measures under Rule 39).

(ii) As to the finding under Article 3, the judgment can be usefully compared to that in *Ilias and Ahmed v. Hungary*⁵³. The applicants in that case were able to lodge asylum applications at the border, which were, however, not examined on the merits because the third country from which they had arrived (Serbia) was deemed to be a safe third

52. *Asady and Others v. Slovakia*, no. 24917/15, 24 March 2020.

53. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019.

country where their asylum applications could be examined. In the present case, on the other hand, the authorities refused to lodge the applicants' asylum applications. In both cases the Court concluded that the authorities of the respondent States had failed to discharge their obligations under Article 3, which, in cases of removal to a third country, required an assessment of whether there was a real risk of the asylum-seeker being denied access to an adequate asylum procedure protecting him or her against *refoulement* (namely, against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faced from the standpoint of Article 3). If the guarantees in this regard are insufficient, Article 3 obliges a State not to remove the asylum-seeker to the third country concerned. In order for the State's obligation under Article 3 to be effectively fulfilled, a State cannot deny access to its territory to a person presenting at a border checkpoint alleging that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State, unless adequate measures are taken to eliminate such a risk.

*B and C v. Switzerland*⁵⁴ concerned the impossibility of requiring a homosexual person to conceal his sexual orientation to avoid ill-treatment upon removal to his country of origin, and the distribution of the burden of proof.

The first applicant, a Gambian national, arrived in Switzerland in 2008 and unsuccessfully applied for asylum. In 2014 he and the second applicant, a Swiss national, registered their same-sex partnership. They lived together until the second applicant's death in 2019. On 12 August 2014 the second applicant lodged a request for family reunification, namely for a residence permit to be granted to the first applicant in view of their registered partnership. That request was denied by the competent authority and the first applicant was ordered to leave the country and to await from abroad the outcome of the appeal proceedings he had initiated. On 2 August 2016 the Court granted his request for interim measures under Rule 39 of the Rules of Court, indicating that the first applicant was not to be deported for the duration of the proceedings before it. The domestic courts then rejected the appeal, finding that the first applicant was not entitled to a residence permit in view of, *inter alia*, his criminal record and the fact that he had not integrated well. As to the alleged risk of ill-treatment contrary to Article 3 in the Gambia, they

54. *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020.

considered that the first applicant had not shown substantial grounds for believing that he faced such a real risk: the situation for homosexuals had improved following a change in government, there was no reason to assume that the Gambian authorities knew of his sexual orientation and no homosexual acts would come to the attention of persons or the authorities in the Gambia since the applicants could enjoy their relationship during visits in Switzerland.

The Court found that the domestic courts did not sufficiently assess either the risks of ill-treatment for the first applicant as a homosexual person in the Gambia or the availability of State protection against any ill-treatment by non-State actors. The first applicant's deportation to the Gambia, without a fresh assessment of those aspects, would give rise to a violation of Article 3 of the Convention.

(i) The judgment is noteworthy as it is the first time that the Court has found that a deportation would breach Article 3 of the Convention in view of the risk of ill-treatment in the country of origin on the basis of sexual orientation, even if the present violation is of a procedural nature. The Court:

(a) reiterated that a person's sexual orientation formed a fundamental part of his or her identity so that no one could be obliged to conceal his or her sexual orientation in order to avoid persecution (confirming the approach taken in *I.K. v. Switzerland*⁵⁵, and in line with the case-law of the Court of Justice of the European Union (CJEU) and the position of the UNHCR);

(b) considered, disagreeing with the domestic authorities' finding to the contrary, that the first applicant's sexual orientation – the veracity of which was not disputed – could be discovered subsequently in the Gambia if he were removed there;

(c) took the view, in line with the approach it took in *I.I.N. v. the Netherlands*⁵⁶ and with the case-law of the CJEU, that the mere existence of laws criminalising homosexual acts in the country of destination did not render an individual's removal to that country contrary to Article 3 of the Convention: what was decisive was whether there was a real risk that these laws would be applied in practice, which according to the information available was not the case in the Gambia at present; and

(d) observed that the first applicant claimed that he would also face a real risk of ill-treatment at the hands of non-State actors; that recent country information indicated widespread homophobia and discrimination against LGBTI persons; that the Gambian authorities were

55. *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017.

56. *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

generally unwilling to provide protection to LGBTI persons; and that the UNHCR was of the view that laws criminalising same-sex relations were normally a sign that State protection of LGBTI individuals was not available. It concluded that the domestic courts, having taken the view that it was not likely that his sexual orientation would come to the attention of the Gambian authorities or other persons, had not engaged in an assessment of the availability of State protection against harm emanating from non-State actors and had not sufficiently assessed the risks of ill-treatment for the first applicant as a homosexual person in the Gambia.

(ii) The judgment also applied the principles, set out in *J.K. and Others v. Sweden*⁵⁷, concerning the distribution of the burden of proof in Article 3 removal cases where the risk of ill-treatment emanates from non-State actors. In such cases, the burden of proof lies with the applicant in respect of his or her personal circumstances (in the present case, his sexual orientation), but it is for the authorities to establish *proprio motu* the general situation in the country of origin, including the availability of State protection against ill-treatment emanating from non-State actors.

Prohibition of slavery and forced labour (Article 4)

*S.M. v. Croatia*⁵⁸ concerned trafficking and exploitation for the purposes of prostitution.

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring to which he had recruited the applicant, it had not been established that he had forced her into prostitution. The criminal court found that, since he had only been indicted on charges of forcing others to prostitute themselves, that is, the aggravated offence of organising prostitution, he could not be convicted of the more minor version of the same offence.

The Grand Chamber found that the applicant had made an arguable claim supported by *prima facie* evidence that she had been subjected to treatment contrary to Article 4, that is, human trafficking and/or forced prostitution. The Government's preliminary objection concerning the applicability of Article 4 was therefore dismissed. Noting that the

57. *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 91-98, 23 August 2016.

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

applicant's complaint raised issues of impunity and was essentially of a procedural nature, the Grand Chamber focused on the domestic authorities' compliance with their procedural obligations and found a breach of Article 4 in this respect.

The issue of human trafficking has already been addressed in several judgments of the Court (for example, *Rantsev v. Cyprus and Russia*⁵⁹ and *Chowdury and Others v. Greece*⁶⁰). In the instant case, the Grand Chamber had the opportunity, for the first time, to consider the applicability of Article 4 specifically to the trafficking and exploitation of women for the purposes of prostitution. The judgment is noteworthy because the Court clarified how the concepts of "trafficking in human beings" and "exploitation of prostitution" were incorporated within the material scope of Article 4 and how these two concepts were related to each other. The Court also clarified whether the principles regarding the States' positive, and in particular procedural, obligations in the field of human trafficking were applicable to instances of forced prostitution.

(i) In *Rantsev* (cited above, § 282), the Court had considered it unnecessary to identify whether the impugned treatment amounted to "slavery", "servitude" or "forced or compulsory labour", concluding instead that the *trafficking* itself, within the meaning of the relevant international instruments, fell within the scope of Article 4 of the Convention. On this basis and in keeping with the principle of the harmonious interpretation of the Convention and other instruments of international law, the Grand Chamber clarified in the present judgment that conduct or a situation will only give rise to an issue of human trafficking under Article 4 of the Convention if all three constituent elements of the international definition of human trafficking, as defined in the *Anti-Trafficking Convention*⁶¹ and the *Palermo Protocol*⁶², are present: (1) an action (the recruitment, transportation, transfer, harbouring or receipt of persons); (2) the means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); (3) an exploitative purpose (including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

59. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

60. *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017.

61. Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197.

62. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

labour or services, slavery or practices similar to slavery, servitude or the removal of organs). As there is a difference between the Palermo Protocol and the Anti-Trafficking Convention as regards the scope of their application, the Grand Chamber followed the approach under the Anti-Trafficking Convention and further clarified that, from the perspective of Article 4, the concept of human trafficking related to all forms of trafficking in human beings, whether national or transnational, and irrespective of whether it was connected with organised crime or not. Lastly, while human trafficking fell within the scope of Article 4, this did not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking might raise an issue under another provision of the Convention.

(ii) Regarding the *“exploitation of prostitution”*, it follows from the Grand Chamber judgment that this concept is not subsumed under that of human trafficking. Having analysed the relevant case-law, the Grand Chamber concluded that the notion of *“forced or compulsory labour”* under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human-trafficking context. Any such conduct could have elements qualifying it as *“slavery”* or *“servitude”* under Article 4, or could raise an issue under another provision of the Convention. In that context, *“force”* could encompass the subtle forms of coercive conduct identified in the Court’s case-law on Article 4, as well as by the International Labour Organization (ILO) and in other international materials (for instance, the concept of *“a penalty”* which *“may go as far as physical violence or restraint, but [which] can also take subtler forms, of a psychological nature”*). The question whether a particular situation involved all the constituent elements of *“human trafficking”* and/or gave rise to a separate issue of forced prostitution was, in the Grand Chamber’s view, a factual question to be examined in the light of all the relevant circumstances of a case.

(iii) Considering the *scope of the States’ positive obligations* in this domain, the Grand Chamber clarified that, given the conceptual proximity of the two phenomena, the relevant principles relating to human trafficking were applicable in cases concerning forced prostitution. Turning to the scope of the procedural obligation in particular, the Grand Chamber found no reason to revisit the Court’s approach, well established ever since the judgment in *Siliadin v. France*⁶³, according to which the converging principles of the procedural

63. *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

obligation under Articles 2 and 3 of the Convention informed the specific content of the procedural obligation under Article 4 of the Convention. It further held that those principles were applicable also to instances of forced prostitution. When assessing the State's compliance with its procedural obligation in this context, the Grand Chamber confirmed that it was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

Examining the facts of the case against the three constituent elements of human trafficking, the Court pinpointed the applicant's "recruitment" via Facebook, the use of force against her and possible harbouring and debt bondage. Moreover, T.M., a former policeman, had been in a position to abuse her vulnerability. The Court thus found that the applicant had made an arguable claim supported by prima facie evidence that she had been subjected to human trafficking and/or forced prostitution. The Court considered that the domestic procedural response to that claim had suffered from significant flaws, such as the failure to follow obvious lines of inquiry capable of elucidating the true nature of the relationship between both parties and the heavy reliance on the applicant's testimony without taking account of the possible impact of psychological trauma on her ability to consistently and clearly relate the circumstances of her exploitation.

Right to liberty and security (Article 5)⁶⁴

Extradition/Expulsion (Article 5 § 1 (f))

*Shiksaitov v. Slovakia*⁶⁵ concerned the detention in an EU member State of the applicant, who had already been recognised as a refugee in another EU member State, in order to examine the admissibility of his extradition to his country of origin.

The applicant, a Russian national of Chechen origin, was granted asylum (and permanent leave to remain) in Sweden in 2011 on account of his political opinions. In January 2015 he was arrested in Slovakia on the basis of an international arrest warrant which had been issued against him in 2007 by a court in the Chechen Republic on charges of terrorism allegedly committed in Grozny. The Slovak courts examined the admissibility of the request for his extradition to the Russian Federation

64. See also, under Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people), *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

65. *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, 10 December 2020.

and he was detained to ensure his presence in those proceedings. On 2 November 2016 the Supreme Court found his extradition to be inadmissible and ordered his immediate release: the applicant had been granted refugee status in Sweden and therefore enjoyed protection as a refugee on Slovak territory; the provisions contained in the [1951 Refugee Convention](#)⁶⁶ and [Directive 2011/95/EU](#)⁶⁷ (providing for the exclusion from refugee status) were not applicable to him; and the action serving as the initial impetus for his criminal prosecution had to be regarded as “political” and the applicant’s political views could give rise to bias on the part of the requesting State’s authorities, within the meaning of Article 3 §§ 1 and 2 of the [European Convention on Extradition](#)⁶⁸.

In the Convention proceedings the applicant complained that his detention in Slovakia had been unlawful because his refugee status precluded his extradition to the Russian Federation. The Court found a violation of, *inter alia*, Article 5 § 1 because the grounds for the applicant’s detention had not remained valid for the entire period of detention and because the authorities had failed to conduct the proceedings with due diligence.

The judgment concerns a novel factual matrix – the applicant, who had been recognised as a refugee in one EU member State, was detained in another EU member State in order to examine the admissibility of his extradition to his country of origin, where he claimed to face persecution – and thus the issue of the extraterritorial effect of the granting of asylum. In particular:

(i) The case concerned the extraterritorial effects in Slovakia, from where his extradition was requested, of refugee status granted to the applicant in Sweden. Emphasising the importance of the relevant rules of international law, with which the Convention should in so far as possible be interpreted in harmony, the Court relied on [Conclusion No. 12 \(XXIX\) of the UNHCR’s Executive Committee](#)⁶⁹ and considered that the refugee status awarded to the applicant in Sweden could be called into question by Slovakia only in exceptional circumstances, notably if information came to light showing that he fell within the terms of an exclusion provision and was thus not entitled to refugee

66. 1951 Geneva Convention relating to the Status of Refugees.

67. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

68. European Convention on Extradition, ETS 024.

69. Conclusion No. 12 (XXIX) Extraterritorial Effect of the Determination of Refugee Status, Executive Committee 29th session, 17 October 1978, UN Doc. A/33/12/Add.1.

status. Observing that the Swedish authorities had neither checked Interpol's database during the asylum proceedings nor examined the nature of the criminal charge brought against the applicant in the Russian Federation, the applicability of an exclusion clause had not been examined in the asylum proceedings in Sweden. The Slovak authorities could not therefore be blamed for examining the extradition request, despite the applicant's refugee status in Sweden. Consequently, his detention had not therefore been, *ab initio*, contrary to domestic law or to Article 5 § 1 (f) of the Convention.

The present factual scenario can therefore be contrasted with that in *Eminbeyli v. Russia*⁷⁰, where the Court found that the applicant's detention for the purposes of extradition had been arbitrary *from the outset* owing to his refugee status in the country from which extradition had been requested, since domestic law prohibited the extradition of a refugee.

(ii) The applicant's detention had not, however, remained justified under Article 5 § 1 (f) throughout its entire duration (more than one year and nine months). In particular, information about the applicant's refugee status (which constituted the main reason for the Supreme Court's judgment of 2 November 2016), as well as documents relating to his criminal prosecution in Russia (which allowed for an assessment as to the political nature of the alleged crimes) had been available to the Slovak authorities since February 2015. It had not therefore been established that the Slovak authorities had proceeded in an active and diligent manner as required by Article 5 § 1 (f) of the Convention.

PROCEDURAL RIGHTS

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

Fairness of the proceedings⁷¹

The judgment in *Sanofi Pasteur v. France*⁷² concerned the starting-point of the prescription period for an action for damages in respect of bodily harm.

Following an injection with a vaccine manufactured by the applicant company, an individual contracted various illnesses, including multiple sclerosis. She brought civil liability proceedings against the applicant company and was awarded compensation. The applicant company argued that the legal prescription period (ten years) had begun to run

70. *Eminbeyli v. Russia*, no. 42443/02, 26 February 2009.

71. See also, under Article 8 (Applicability), *Evers v. Germany*, no. 17895/14, 28 May 2020.

72. *Sanofi Pasteur v. France*, no. 25137/16, 13 February 2020.

from the date of purchase of the vaccine. The court of appeal found, however, that the period in question had began to run from the date that the illness stabilised. In the present case, however, given that stabilisation of the illness was impossible in that the pathology in question was a progressive one, the proceedings had not become time-barred. In support of its appeal on points of law, the applicant company requested, in particular, that the case be referred to the Court of Justice of the European Union (CJEU). The Court of Cassation dismissed the appeal on points of law and indicated that it was not necessary to refer a question to the CJEU for a preliminary ruling.

In the Convention proceedings, the applicant company argued, in particular, that by fixing the starting-point of the prescription period for proceedings on the date at which the damage had stabilised – even though the underlying illness was not amenable to stabilisation – the action had in effect become not subject to limitation, in breach of the principle of legal certainty protected by the Convention. The Court did not share that view and found no violation of Article 6 § 1. It is interesting to note that it did hold that there had been a violation of Article 6 § 1 on account of the failure to give reasons for the refusal to refer the case for a preliminary ruling.

The judgment is interesting in so far as it concerns the starting-point to be fixed for the prescription period in respect of an action for damages in a case concerning bodily harm, which, in the applicant company's submissions, meant that this action was in reality not subject to limitation.

In this case the Court was not examining an application which had been lodged by a victim seeking compensation (*Howald Moor and Others v. Switzerland*⁷³; *Eşim v. Turkey*⁷⁴; and *Stubbings and Others v. the United Kingdom*⁷⁵), but instead one lodged by the respondent to the action (see, in another context, *Oleksandr Volkov v. Ukraine*⁷⁶). The situation was thus that a right derived by one person from the Convention was in conflict with a right, also derived from the Convention, enjoyed by another person: on the one hand, the victim's right of access to a court; on the other, the applicant company's right to legal certainty. This implied a balancing of the competing interests. The Court afforded a wide margin of appreciation to the State in this difficult balancing exercise. In the

73. *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014.

74. *Eşim v. Turkey*, no. 59601/09, 17 September 2013.

75. *Stubbings and Others v. the United Kingdom*, 22 October 1996, *Reports of Judgments and Decisions* 1996-IV.

76. *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 138-40, ECHR 2013.

present case, it noted that the French legislation was intended to enable the victim to obtain full compensation for the bodily harm sustained, the extent of which could only be ascertained after his or her condition had stabilised. The Court found that it could not call into question, as such, the choice made in the national legislation to attach greater weight to the right of access to a court of individuals who had sustained physical injury than it attached to the right to legal certainty of the persons who were liable for those injuries. In this connection, it reiterated the importance attached by the Convention to the protection of physical integrity, which was covered by Articles 3 and 8 of the Convention. The approach in issue also made it possible to take account of the needs of persons suffering from a progressive illness, such as multiple sclerosis.

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

Applicability⁷⁷

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*⁷⁸, the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were “by nature” a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in

77. See also, under Article 6 § 2 (Presumption of innocence) below, *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

78. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020. See also under Article 7 (No punishment without law) below.

issue did not involve the determination of a “criminal charge” within its autonomous meaning and thus rejected the applicants’ complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy in three respects. In the first place, it reviews the application of the *Engel and Others v. the Netherlands*⁷⁹ criteria to determine whether contempt-of-court proceedings or proceedings concerning misconduct of legal professionals could be considered “criminal”. Secondly, and as to the third Engel criterion (the nature and degree of severity of the penalty the applicants risked incurring), the judgment clarifies that the absence of an upper statutory limit on the amount of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb and that the Court will have regard to certain other factors (described below). Thirdly, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of “criminal” in Article 6 and Article 7 of the Convention.

(i) On the facts, the Court found that the first and second Engel criteria had not been met: it had not been demonstrated that the offence had been classified as “criminal” under domestic law; nor was it clear, despite the seriousness of the breach of professional duties in question, whether the applicants’ offence was to be considered criminal or disciplinary in nature.

(ii) The third Engel criterion was therefore of key importance for the determination of the applicability of Article 6 of the Convention. When examining the nature and degree of the severity of the penalty, the Court did not consider itself bound by the finding of the Icelandic Supreme Court in this respect, noting, however, that it was open to the Contracting States to adopt a broader interpretation entailing a stronger protection of the rights and freedoms in question. The Court proceeded to distinguish the instant case from the other relevant cases, before finding that Article 6 was not applicable under its criminal limb.

In the first place, in contrast to previous contempt-of-court cases in which Article 6 was found to apply, notably on account of the third criterion (*Kyprianou v. Cyprus*⁸⁰, and *Zaicevs v. Latvia*⁸¹), the kind of misconduct for which the applicants had been held liable was not punishable by imprisonment.

Secondly, the fines in issue could not be converted into a deprivation of liberty in the event of non-payment, unlike in other relevant cases.

79. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

80. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

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

For example, in *Ravnsborg v. Sweden*⁸² and *Putz v. Austria*⁸³, the existence of such a possibility, subject to certain fair-hearing guarantees, was an important consideration even if not sufficient in those circumstances to attract the application of Article 6 under its criminal head. In *T. v. Austria*⁸⁴, it was the punitive nature and the high amount of the penalty at stake (the fine imposed amounting to around EUR 2,000 and the maximum fine being around EUR 30,000), together with the possibility of converting it into a prison term without the guarantee of a hearing, that warranted considering the matter as “criminal”.

Thirdly, the fines had not been entered on the applicants’ criminal record, as in other cases where Article 6 under its criminal limb was not found to apply (*Ravnsborg* and *Putz*, both cited above, and *Žugić v. Croatia*⁸⁵).

Fourthly, the Court compared the amount of the penalty at stake in the instant case with those in issue in other relevant cases⁸⁶, before concluding that the size of the present fines (EUR 6,200) and the absence of an upper statutory limit on their amount did not suffice for the Court to deem the severity and nature of the sanction as “criminal” within the autonomous sense of Article 6 of the Convention.

(iii) Finally, having noted that the proceedings in question did not involve the determination of a “criminal charge” within the meaning of Article 6, the Grand Chamber went on, for “reasons of consistency in the interpretation of the Convention taken as a whole”, to find that the impugned fines could not be considered a “penalty” within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*⁸⁷; *Del Rio*

82. *Ravnsborg v. Sweden*, 23 March 1994, Series A no. 283-B.

83. *Putz v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-I.

84. *T. v. Austria*, no. 27783/95, ECHR 2000-XI.

85. *Žugić v. Croatia*, no. 3699/08, 31 May 2011.

86. For instance, in *Müller-Hartburg v. Austria* (no. 47195/06, 19 February 2013), the size of the potential fine (approximately EUR 36,000), though having a punitive effect, had not been so severe as to bring the matter within the “criminal” sphere. Similarly, in *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and 2 others, 6 November 2018), the maximum penalty (ninety day-fines) and the fine imposed on the applicant (twenty day-fines, which allegedly corresponded to EUR 43,750) did not render Article 6 applicable under its criminal limb. The Court further had regard to the scale of the fines at issue in the cases where the penalties applied had been considered criminal in nature: the fine imposed in *Mamidakis v. Greece* (no. 35533/04, 11 January 2007) was over EUR 3,000,000; in *Grande Stevens and Others v. Italy* (nos. 18640/10 and 4 others, 4 March 2014), the fines ranged from EUR 500,000 to EUR 3,000,000, with a maximum fine of up to EUR 5,000,000; in *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia* (no. 47072/15, 23 October 2018), the applicant company was fined EUR 105,000 and the maximum fine risked amounting to more than EUR 500,000.

87. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

*Prada v. Spain*⁸⁸; and *Ilmseher v. Germany*⁸⁹). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

Fairness of the proceedings

The *Akbay and Others v. Germany*⁹⁰ judgment concerned persons convicted as a result of incitement by the police to commit offences.

N.A. (the first applicant's husband) and the second and third applicants were convicted of drug offences in the context of a smuggling operation. The domestic courts found that N.A., and indirectly through him the second but not the third applicant, had been incited by State authorities to commit the offences. They therefore considerably reduced N.A.'s and the second applicant's sentences, and also took the State's influence into account as a general mitigating factor when imposing a sentence on the third applicant.

In the Convention proceedings the applicants claimed, in particular, that their right to a fair trial under Article 6 § 1 had been violated as N.A. and the second and third applicants had been convicted of offences following entrapment by the police. The Court found a violation of Article 6 § 1 with respect to the first and second applicants' complaints and no violation of that provision in respect of the third applicant.

The judgment is noteworthy because the Court (i) clarified its case-law on the transferability of an Article 6 complaint of entrapment; (ii) set out the Convention test to be applied with respect to indirect police incitement; and (iii) reaffirmed its methodology for examining entrapment cases.

(i) As to the transferability of the Article 6 entrapment complaint in the first applicant's case, the judgment contains a comprehensive overview of the case-law concerning the notions of direct and indirect victims under Article 34 of the Convention (§§ 67-77 of the judgment). The Court reiterated, in particular, that where the direct victim has died before the application was lodged with the Court, the Court's approach to accepting victim status has been generally restrictive. As regards complaints under, *inter alia*, Article 6, it has acknowledged victim status of close relatives where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family, or where they have shown a material

88. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

89. *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

90. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020. See also under Articles 34 and 35 (Applicability – Victim status) above.

interest on the basis of the direct effect on their pecuniary rights. The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*⁹¹).

In the present case, the Court found that a potential violation of Article 6 based on unlawful incitement to an offence that would otherwise not have been committed raised issues which went beyond purely procedural flaws resulting in a finding that the proceedings at issue were unfair. Given that according to the Court's established case-law a finding of incitement must result in the exclusion of all evidence obtained thereby or similar consequences (*Furcht v. Germany*⁹²), the Court's conclusion that there has been a breach of Article 6 on that ground will enable the person concerned to substantively challenge, at the national level, the validity of the conviction itself which was based on such evidence. In these circumstances, the Court accepted that the first applicant might have a legitimate interest to seek, by means of the present proceedings, to ultimately have N.A.'s conviction, pronounced on the basis of such evidence, set aside. It further noted that N.A. was a close relative of the first applicant who had been convicted of a serious drug offence and died soon afterwards, shortly before the present application had been lodged: as such, the first applicant might be considered to have a certain *moral* interest for the purposes of Article 34 (§§ 81-82 of the judgment). However, the first applicant did not have the requisite *material* interest under Article 34 to pursue the application: a potential just satisfaction award under Article 41 of the Convention could not constitute such a material interest (§§ 83-85 of the judgment). Lastly, the Court considered that the main issue raised by the case brought by the first applicant transcended the interests of the first applicant in that it concerned the legal system and practice of the respondent State (§§ 86-88 of the judgment). In sum, on the basis of an overall assessment, the Court found that the first applicant had the requisite standing under Article 34 of the Convention (§§ 89-90 of the judgment).

(ii) With respect to the issue of indirect entrapment – namely a situation where a person was not directly in contact with the police officers working undercover, but was involved in the offence by an accomplice (in the present case, N.A.) who had been directly incited to commit an offence by the police – on the basis of a detailed analysis of its

91. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 100, ECHR 2014.

92. *Furcht v. Germany*, no. 54648/09, § 64, 23 October 2014.

earlier case-law, the Court set out the following test for its assessment: (a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence; (b) whether that person's activities were also determined by the conduct of the police officers; and (c) whether the persons involved were considered as accomplices in the offence by the domestic courts (§ 117 of the judgment).

(iii) Finally the Court reaffirmed and applied its methodology for the examination of entrapment cases (*Bannikova v. Russia*⁹³ and *Matanović v. Croatia*⁹⁴). Accordingly, and when faced with a plea of entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement). Where, under the substantive test of incitement, on the basis of the available information, the Court can find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that would normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings in respect of the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention. If the Court's findings under the substantive test are inconclusive (owing to a lack of information in the file or to the lack of disclosure or contradictions in the parties' interpretations of events) or confirm that the applicant was subjected to incitement, then it will be necessary to proceed, as a second step, to the procedural test of incitement, that is to say, the Court will assess whether the domestic courts have drawn the relevant inferences in accordance with the Convention. This includes, as already found in the above-cited *Furcht* case, excluding all evidence obtained as a result of entrapment or applying a procedure with similar consequences (§§ 111-24 of the judgment).

Applying this methodology to the first and second applicants' complaints, the Court agreed with the domestic courts that N.A. (directly) and the second applicant (indirectly) had been subjected to police incitement to commit the offences of which they were later convicted. However, merely reducing sentences – without excluding all the evidence obtained as a result of entrapment or applying a procedure with similar consequences – did not satisfy the requirements of the entrapment test and the Court concluded that there had been a

93. *Bannikova v. Russia*, no. 18757/06, §§ 37-65, 4 November 2010.

94. *Matanović v. Croatia*, no. 2742/12, §§ 131-35, 4 April 2017.

violation of Article 6 § 1 of the Convention. By contrast, on the basis of the evidence available to it, the Court agreed with the domestic courts that the third applicant had not been subjected to entrapment, and there had therefore been no violation of Article 6 § 1 in respect of him.

The admission of statements obtained through ill-treatment by private individuals was the subject of the judgment in *Ćwik v. Poland*⁹⁵.

The applicant and K.G. were part of a criminal group involved in drug trafficking. K.G. was abducted and tortured by a rival gang to obtain information and his statements were recorded. The police freed K.G. and seized the recording. Some years later, the applicant was convicted of drug-trafficking offences. The trial court relied, *inter alia*, on the recording of the statements made by K.G. during his ill-treatment at the hands of the gang members. The applicant unsuccessfully challenged the admissibility of the recording. The Court of Appeal found that the recording had been obtained lawfully by the police and that the rule excluding evidence obtained by coercion concerned the authorities conducting the investigation and not private persons. The Supreme Court dismissed the applicant's cassation appeal as manifestly ill-founded without providing any reasons.

In the Convention proceedings the applicant complained, under Article 6 § 1, that his trial had been unfair. The Court found a violation of this provision.

The judgment is noteworthy because the Court examined, for the first time, the admission in evidence in criminal proceedings of statements obtained through ill-treatment inflicted by private individuals, without the involvement or acquiescence of State agents.

The Court's consistent case-law indicates that the use in criminal proceedings of statements obtained from the accused or a witness by any form of treatment in breach of Article 3 automatically renders the criminal proceedings unfair as a whole (see, among many other authorities, *Gäfgen v. Germany*⁹⁶). This is irrespective of whether that treatment is classified as torture or inhuman or degrading treatment, and irrespective of the probative value of the statements and of whether their use was decisive in securing the defendant's conviction (the admissibility of real evidence was not in issue in the present case; see, in that regard, *Gäfgen*, cited above, § 178).

95. *Ćwik v. Poland*, no. 31454/10, 5 November 2020.

96. *Gäfgen v. Germany* [GC], no. 22978/05, §§ 165-66, ECHR 2010.

These principles, developed in cases where State agents were involved in obtaining the statements in question, were found by the Court in the present case to be equally applicable to the admission of statements obtained as a result of ill-treatment inflicted by private individuals.

In applying those principles, the Court determined, on the basis of the available material, that the treatment inflicted on K.G. by private individuals had attained the threshold of severity necessary to fall within the scope of Article 3 and to trigger the State's positive obligation under this provision to protect persons from ill-treatment by private individuals. The Court did not find it necessary to determine whether that ill-treatment might be qualified as torture. Having ascertained that the domestic courts had indeed relied on statements made by K.G. during this ill-treatment, the Court found that the admission of the statements in evidence rendered the criminal proceedings as a whole unfair and violated Article 6 § 1 of the Convention.

Tribunal established by law

*Guðmundur Andri Ástráðsson v. Iceland*⁹⁷ concerned the participation of a judge whose appointment had been vitiated by undue executive discretion, and compliance with the "established by law" requirement.

The Court of Appeal rejected the applicant's appeal against his criminal conviction. He complained that one of the judges on the bench of that court had been appointed in breach of domestic procedures. The Supreme Court acknowledged that the judge's appointment had been irregular in two respects. In the first place, the Minister of Justice had replaced four of the candidates (from the fifteen considered by the Evaluation Committee to be the best qualified) with four others (including the impugned judge who had not made it into the top fifteen) without carrying out an independent evaluation or providing adequate reasons for her decision. Secondly, Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*. The Supreme Court held, nevertheless, that these irregularities could not be considered to have nullified the appointment and that the applicant had received a fair trial. The Grand Chamber found that there had been a violation of the right to a tribunal "established by law".

This Grand Chamber judgment is noteworthy in two respects. In the first place, it clarified the scope of, and the meaning to be given to, the

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

concept of a “tribunal established by law” and it analysed its relationship with other “institutional requirements” (notably, independence and impartiality). Secondly, while the Grand Chamber endorsed the logic of the “flagrant breach” test of the Chamber, it developed it further into a three-step threshold test.

(i) The Grand Chamber analysed how each of the three individual components of the concept of a “tribunal established by law” should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. As to a “tribunal”, in addition to the judicial function and the applicable requirements of independence, impartiality, and so on, it is inherent in its very notion that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed: the higher the tribunal in the judicial hierarchy, the more demanding the applicable selection criteria should be. As to “established”, the Grand Chamber noted its purpose which was to protect the judiciary against unlawful external influence, from the executive in particular. In this light, the process of appointing judges necessarily constituted an inherent element of the requirement that a tribunal be “established by law”, with the result that breaches of the law regulating this process may render the participation of the relevant judge in the examination of a case “irregular”. The Grand Chamber further clarified that the third component – “by law” – also meant “in accordance with the law”, so that provisions on judicial appointments should be couched in unequivocal terms, to the extent possible, to prevent arbitrary interferences, including by the executive. At the same time, the mere fact that the executive has decisive influence on appointments may not as such be considered problematic. Finally, in view of a very close interrelationship and common purpose shared by the requirements of independence/impartiality and “tribunal established by law”, an examination under the latter must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers, and to compromise the independence of the court in question.

(ii) On the basis of the above, the Grand Chamber developed the following three cumulative criteria to be applied to assess whether there has been a breach of the right to a “tribunal established by law”, in light of the object and purpose of this concept (namely, to ensure the ability of the judiciary to perform its duties free of undue interference). In the first place, there must, in principle, be a *manifest* breach of domestic

law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose. Secondly, only those breaches that relate to the *fundamental rules* of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the “established by law” requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold. Thirdly, *the review by domestic courts*, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

(iii) On the facts of the case, the Grand Chamber found that the very essence of the applicant’s right to a “tribunal established by law” had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. In particular in this regard, the Minister of Justice had failed to explain why she had picked one candidate over another. Given the alleged political connections between her and the husband of the impugned judge, her actions were of such a nature as to prompt objectively justified concerns that she had acted out of political motives. Moreover, the Minister was a member of one of the political parties composing the majority in the coalition government, by whose votes alone her proposal had been adopted in Parliament. As to the procedure before Parliament, not only had it failed to demand that the Minister provide objective reasons for her proposals, but Parliament had not complied with the special voting rules, which had undermined its supervisory role as a check against the exercise of undue executive discretion. The applicant’s belief that Parliament’s decision had been driven primarily by party political

considerations might not therefore be considered to be unwarranted. This was sufficient to taint the legitimacy and transparency of the whole appointment procedure. As to the third criterion, the Supreme Court had in turn failed to carry out a Convention-compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. However, the finding of a violation in the present case could not, as such, be taken to impose on the respondent State an obligation to reopen all similar cases that had since become *res judicata*.

Presumption of innocence (Article 6 § 2)

*Farzaliyev v. Azerbaijan*⁹⁸ concerned the existence of a "criminal charge" and the applicability of Article 6 § 2.

The applicant is the former Prime Minister of an autonomous region in Azerbaijan whose term of office ended in the early 1990s. In November 2005 a criminal investigation for embezzlement was opened relating to his time in office. Two months later, in January 2006, the investigation was discontinued as time-barred. The following month the prosecutor who had led the criminal investigation instituted civil proceedings against the applicant for embezzlement. The domestic courts ordered the applicant to pay compensation for – as was clearly indicated – his "crime" of embezzlement. The applicant had never been questioned or charged during the brief criminal investigation and, indeed, only discovered that there had been such an investigation later during the civil proceedings.

He complained to the Court under Article 6 § 1 about the unfairness of the civil proceedings and under Article 6 § 2 that the domestic courts in the civil proceedings had breached his right to be presumed innocent by declaring him guilty of the crime of embezzlement. The Court found a violation of both provisions.

The judgment is noteworthy for two reasons: first, because it confirmed that the moment from which a "criminal charge" exists is to be interpreted in the same way under both Article 6 § 1 and Article 6 § 2 and, further, because it confirmed and applied a narrow exception to

98. *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

this rule (recently recognised in *Batiashvili v. Georgia*⁹⁹) to find Article 6 § 2 applicable in the particular circumstances of the case. In particular:

(i) The Court confirmed that a “criminal charge” exists within the meaning of Article 6 § 2 from the moment an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been “substantially affected” by actions taken by the authorities as a result of a suspicion against him (as regards Article 6 § 1, see, in the context of the fairness of the proceedings, *Simeonovi v. Bulgaria*¹⁰⁰, with further references, and, in the context of the length of proceedings, *Mamič v. Slovenia (no. 2)*¹⁰¹, and *Liblik and Others v. Estonia*¹⁰²).

(ii) According to *Allen v. the United Kingdom*¹⁰³, Article 6 § 2 would be violated if, without having been convicted in earlier criminal proceedings, a later judicial statement reflects the view that the applicant was guilty. According to the above-described definition of a “criminal charge”, for Article 6 § 2 to apply to such a complaint to protect the applicant from statements made in later linked proceedings (the civil action in the present case), the applicant would need to have been previously actually charged or “substantially affected”, the latter generally meaning he or she had been aware of an investigation when it was taking place (through, for example, being questioned by the police).

However, neither event occurred in the present case: the applicant was never actually charged and was not made aware of the criminal investigation until it was over. Finding – as it had done recently in *Batiashvili*, cited above, in the rather unique circumstances of that case – an exception to the above-described principles concerning the applicability of Article 6 §§ 1 and 2 given the very particular circumstances of the present case, the Court nonetheless concluded that the applicant could be considered to have been “substantially affected” by the conduct of the investigating authorities (and thus “charged with a criminal offence”). In particular, the Chamber found that:

48. ... The question before it is whether the applicant was a person “charged with a criminal offence” within the autonomous meaning of Article 6 § 2 of the Convention. In order to answer that question, the Court is compelled to look behind the appearances and investigate the realities of the situation before it (see *Batiashvili v. Georgia*, no. 8284/07, § 79, 10 October 2019). It notes once again

99. *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019.

100. *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017.

101. *Mamič v. Slovenia (no. 2)*, no. 75778/01, § 24, ECHR 2006-X (extracts).

102. *Liblik and Others v. Estonia*, nos. 173/15 and 5 others, § 94, 28 May 2019.

103. *Allen v. the United Kingdom* [GC], no. 25424/09, ECHR 2013.

that it is true that the applicant was never formally charged with a criminal offence in the discontinued criminal proceedings and that he became aware of the allegations made against him in those proceedings only ... after the civil claim ... had been lodged against him on 16 February 2006, less than a month after their discontinuation on 21 January 2006. However, having regard to the case-specific sequence of closely interconnected events ... considered as a whole, as well as to the relatively close temporal proximity between the relevant events in question, the Court considers that, in the particular circumstances of the present case, the combined effect of the authorities' actions taken as a result of a suspicion against the applicant was that his situation was "substantially affected" by the conduct of the authorities (compare, *mutatis mutandis*, *Batiashvili*, cited above, § 94) and that therefore, for the purposes of the present complaint, he must be considered as a person "charged with a criminal offence" within the autonomous meaning of Article 6 § 2.

Other rights in criminal proceedings

No punishment without law (Article 7)

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion¹⁰⁴ on 29 May 2020, which further defines the scope of advisory opinions. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions.

In 2018 a former President of Armenia, Mr R. Kocharyan, was charged with overthrowing the constitutional order, essentially on account of having declared a state of emergency and used the armed forces to quell post-election protests in February and March 2008. By the time he was charged in 2018 the provisions of the Criminal Code had been amended (in 2009) so that the definition of the offence in issue had become broader in one respect and narrower in another, when compared to the provision which had been in force at the time of the commission of the alleged offences in 2008. Both the first-instance court and Mr Kocharyan lodged applications with the Constitutional Court, which then requested this Court to give an advisory opinion on the following questions:

104. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

1. Does the concept of “law” under Article 7 of the Convention and referred to in other Articles of the Convention, for instance in Articles 8 to 11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
2. If not, what are the standards of delineation?
3. Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?
4. In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

(i) In this its second advisory opinion under Protocol No. 16, the Court, prompted by two specific features of the present request, has further defined the scope of its opinions.

In the first place, since the Court considered the questions to be at least in part broad and general, it reiterated that its opinions must be confined to issues directly connected to the pending domestic proceedings, inferring therefrom the power to reformulate and combine the submitted questions having regard to the specific factual and legal circumstances in issue in the domestic proceedings. It also clarified that the panel’s decision to accept the request as a whole could neither deprive the Court of the possibility of employing the full range of the powers conferred upon it, including in relation to the Court’s jurisdiction, nor preclude the Court itself from assessing (on the basis of the request, the observations received and all the other material before it) whether each of the submitted questions fulfilled the requirements of Article 1 of Protocol No. 16. On this basis, the Court decided not to answer the first and second questions, which were found to have no direct link with the domestic proceedings and could not be reformulated so as to enable the Court to discharge its advisory function effectively and in accordance with its purpose.

Secondly, a particular feature of the present request was the preliminary nature of the proceedings before the Constitutional Court, so that the relevant facts had not yet been the subject of domestic judicial determination. In accordance with the principle of subsidiarity, the Grand Chamber proceeded on the basis of the facts provided by the Constitutional Court and indicated that its opinion should inform the Constitutional Court’s interpretation of domestic law in the light of

the Convention; this interpretation should then be applied by the first-instance court to the concrete facts of the case.

(ii) The Court went on to respond to the remaining questions (the third and fourth) in the request and, in so doing, further developed certain aspects of its case-law under Article 7 of the Convention.

(a) The third question referred to the fact that Mr Kocharyan had been accused of an offence which was defined by reference to certain provisions of the Constitution. In responding to this question in the light of the requirements of clarity and foreseeability arising out of Article 7, the Court, for the first time, explicitly ruled on the technique of “blanket reference” or “legislation by reference”, that is, where substantive provisions of the criminal law (“referencing provisions”) referred, when defining the constituent elements of criminal offences, to legal provisions outside the criminal law (“referenced provisions”):

Using the “blanket reference” or “legislation by reference” technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.

The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

In reaching this conclusion, the Court drew on case-law in which this technique had been implicitly accepted (*Kuolelis and Others v. Lithuania*¹⁰⁵, and *Haarde v. Iceland*¹⁰⁶) and on the comparative material available to it. It also specified that constitutional provisions were often developed further through acts of lower hierarchical levels, through non-codified constitutional customs and through jurisprudence. The Court thus confirmed its previous finding that Article 7 did not exclude that evidence of existing constitutional practice might form part of the national court’s overall analysis of foreseeability of an offence based on a

105. *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, 19 February 2008.

106. *Haarde v. Iceland*, no. 66847/12, 23 November 2017.

constitutional provision. Furthermore, both of the above-cited cases, in which no breach of Article 7 had been found, indicated that the status of the accused was a relevant consideration so that particular caution may be required from professional politicians/holders of high office in assessing whether conduct could entail criminal liability.

(b) Finally, the fourth question in the request concerned the amendment of the definition of the offence in issue, which became broader in one respect and narrower in another, compared to the provision which had been in force at the time of the commission of the alleged offence. While its case-law did not offer a comprehensive set of criteria for comparing successive criminal laws, the Court drew upon its approach in cases relating to the reclassification of charges (*G. v. France*¹⁰⁷; *Ould Dah v. France*¹⁰⁸; *Berardi and Mularoni v. San Marino*¹⁰⁹; and *Rohlena v. the Czech Republic*¹¹⁰), emphasising in particular that the Court has regard to the specific circumstances of the case, the formal classification of the offences in issue being of no concern. The Court thereby extended the application of the “principle of concretisation” – developed in the context of the amendment of penalties (*Maktouf and Damjanović v. Bosnia and Herzegovina*¹¹¹) – to cases, such as the present one, involving an amendment of the definition of the offence itself. Based on that principle, if the subsequent law is considered more severe than the law in force at the time of the alleged commission of the offence, it may not be applied.

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*¹¹², the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the

107. *G. v. France*, 27 September 1995, Series A no. 325-B.

108. *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009.

109. *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, 10 January 2019.

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

111. *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).

112. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Applicability) above.

proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were “by nature” a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in issue did not involve the determination of a “criminal charge” within its autonomous meaning and thus rejected the applicants’ complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy because, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of “criminal” in Article 6 and Article 7 of the Convention.

Having noted that the proceedings in question did not involve the determination of a “criminal charge” within the meaning of Article 6, the Grand Chamber went on, for “reasons of consistency in the interpretation of the Convention taken as a whole”, to find that the impugned fines could not be considered a “penalty” within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*¹¹³; *Del Río Prada v. Spain*¹¹⁴; and *Ilseher v. Germany*¹¹⁵). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

*Baldassi and Others v. France*¹¹⁶ concerned the existence of a case-law precedent rendering the likelihood of a criminal conviction foreseeable.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign “Boycott, Divestment and Sanctions” launched by Palestinian non-

113. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

114. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

115. *Ilseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

116. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 10 (Freedom of expression) below.

governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words “incitement to discrimination” in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The most interesting feature of this judgment is the Court’s finding concerning the conformity with Article 7 of the application of the Law on freedom of the press to the present case. While expressing reservations about the foreseeability of the references among different legislative texts underpinning the applicants’ conviction, that is to say, on the one hand, between various subsections of the 1881 Law and, on the other, between the latter and the Criminal Code, the Court concluded that as the case-law had stood at the material time, the applicants should have known that they were likely to be convicted on that basis for calling for a boycott of products imported from Israel.

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

In *Saqueti Iglesias v. Spain*¹¹⁷ the Court set out the criteria for characterising an offence as “minor”.

The case concerned an applicant’s inability to secure a higher-court assessment of an administrative decision penalising him for failing to declare a sum of money on passing through customs at an airport. Despite the fact that the Spanish Law on the prevention of money-laundering and the funding of terrorism provides for escalating scales of punishment depending on the circumstances, the authorities confiscated virtually the whole amount, that is 153,800 euros (EUR), without considering the specific circumstances of the case. The domestic authorities subsequently imposed on the applicant a fine corresponding to the amount confiscated.

117. *Saqueti Iglesias v. Spain*, no. 50514/13, 30 June 2020.

The applicant complained before the Court of a violation of Article 2 of Protocol No. 7 to the Convention on the grounds that he had been unable to obtain an assessment by the Supreme Court of the judgment delivered by the Madrid Higher Court of Justice, as the threshold for an appeal on points of law had been raised to EUR 600,000. The applicant's last-instance *amparo* appeal had been dismissed by the Constitutional Court.

(i) The most interesting feature of this judgment is that it develops the case-law on the applicability of Article 2 of Protocol No. 7, in the light of the “Engel criteria” and the judgment in *A and B v. Norway*¹¹⁸.

As regards the first criterion, that is to say the domestic classification, Spanish law deemed it a “serious administrative offence” which was not subject to a custodial sentence.

As regards the second criterion, namely the nature of the offence, the Court emphasised that the Law on the prevention of money-laundering and the funding of terrorism was general in scope, that it had already had occasion to hold that the criminal limb of Article 6 of the Convention could be applicable to customs offences, and that the imposition of the fine had necessarily pursued the aim of deterrence and prevention in response to the applicant's failure to comply with the obligation to make a customs declaration. That consideration alone was sufficient to confer a criminal nature on the offence in issue. The Court also drew a distinction between the present case and those of *Butler v. the United Kingdom*¹¹⁹, which concerned smuggling, and *Inocêncio v. Portugal*¹²⁰, in which the penalty imposed had been far less severe than that in the instant case and which had not concerned the customs sphere.

Finally, in connection with the third criterion, to wit the severity of the penalty incurred for the “serious” offence with which the applicant had been charged, it was such as to confer a criminal nature on the proceedings. Having regard to the various aspects of the case, the Court concluded that Article 2 of Protocol No. 7 was applicable to the case in hand.

(ii) Secondly, the Court considered the relevance of the exceptions set forth in Article 2 § 2 of Protocol No. 7. It sought to ascertain whether the offence of which the applicant had been convicted had not in fact amounted to a “minor offence” and whether, consequently, an appeal

118. *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 105 and 107, 15 November 2016.

119. *Butler v. the United Kingdom* (dec.) no. 41661/98, ECHR 2002-VI.

120. *Inocêncio v. Portugal* (dec.), no. 43862/98, ECHR 2001-I.

should have been available in the instant case. In that regard, the Court reiterated that an important criterion was whether or not the offence was subject to a custodial sentence.

The Court, emphasising that it realised that the legislations of the Contracting States diverged widely on the matter of failure to declare sums of money, held that the relevance and weighting afforded to each element should be determined on the basis of the specific circumstances of the individual case, leaving a margin of appreciation to States to assess proportionality and any particularly serious consequences in accordance with an applicant's personal situation. Therefore, the existence of a custodial sentence became an important factor which the Court had to consider in determining whether or not an offence was minor, although it could not be a decisive factor in itself.

Having regard to the circumstances of the case (virtually the whole amount discovered, which was equivalent to the applicant's entire personal savings, had been confiscated; the money did not originate in practices linked to money-laundering, the amounts having been declared on the applicant's return to Spain; and the fact that the applicant had no police record) and reiterating that the penalty should match the seriousness of the infringement found, that is to say the failure to honour the declaration obligation, the Court concluded that the offence could not be considered "minor" within the meaning of Article 2 of Protocol No. 7 and that the exception was not applicable. The Court also noted that the domestic authorities had not conducted a proportionality assessment, even though such an assessment was required under Spanish law.

(iii) Finally, having regard to the limited powers of the Constitutional Court in the framework of the *amparo* appeal, the Court found, for the first time, that it could not be regarded as a "higher tribunal" for the purposes of Article 2 of Protocol No. 7. The Court also noted that according to the explanatory report to Protocol No. 7 to the Convention, courts of appeal and courts of cassation could be considered as fulfilling the requirements of a second level of jurisdiction, and that no mention was made of constitutional courts. The applicant had therefore not had access to a system of appeal.

In the light of all the specific circumstances of the case, including the severity of the penalty imposed on the applicant, the failure by the domestic authorities to examine his personal circumstances and the lack of access to a higher-level court, the Court found that there had been a violation of Article 2 of Protocol No. 7 to the Convention.

OTHER RIGHTS AND FREEDOMS

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

Applicability¹²¹

In *Evers v. Germany*¹²² the Court concluded that Article 8 was not applicable to the applicant's challenge against a contact ban concerning a disabled woman whom he had sexually abused.

The applicant had sexually abused, and had a child with, the mentally disabled daughter of the woman with whom he was living. Criminal proceedings, initiated against him for sexual abuse of a person incapable of resistance, were discontinued. The disabled woman was placed in specialised residential care. The District Court appointed a guardian and issued a contact ban against the applicant, who wished to continue his sexual relationship with the disabled woman. The applicant's appeal against the contact ban was dismissed by the Regional Court.

The applicant complained under Article 8 about the contact ban. He also alleged certain shortcomings in the domestic proceedings, including that he had not been heard in person, in particular, before the Regional Court. The Court found the complaint under Article 8 to be inadmissible and that there had been a violation of Article 6 § 1 owing to the Regional Court's refusal to hear the applicant in person.

The judgment is noteworthy for its finding that the applicant's complaint did not fall within the scope of Article 8 and, in particular, of "private life", which is generally considered to be a broad term not susceptible to exhaustive definition. In particular:

In the first place, the Court considered that the mere fact that the applicant had been living in a common household with the disabled woman and had been the biological father of her child did not constitute, in the circumstances of the case, a family link which would fall under the protection of "family life".

Secondly, and as regards the "private life" aspect of Article 8, the Court reiterated that, while this provision protected the right to establish and develop relationships with other human beings and the outside world (*Denisov v. Ukraine*¹²³), a broad construction of Article 8 did not mean that it protected every activity in which a person might

121. See also, under Article 8 (Positive obligations), *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020.

122. *Evers v. Germany*, no. 17895/14, 28 May 2020.

123. *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018.

seek to engage with other human beings in order to establish and develop such relationships (*Friend and Others v. the United Kingdom*¹²⁴, and *Gough v. the United Kingdom*¹²⁵). The Court explained that it had generally assumed contact with a specific other person to constitute a fundamental element of Article 8 mainly under the family-life limb (see, for example, *Elsholz v. Germany*¹²⁶ (concerning parents and children); *Kruškić v. Croatia*¹²⁷ (concerning grandparents and their grandchildren); and *Messina v. Italy (no. 2)*¹²⁸ (regarding prisoners and close members of their family)). However, the Court emphasised that private life did not as a rule come into play in situations where a complainant did not enjoy family life within the meaning of Article 8 in relation to a person with whom he or she wanted to establish contact and where that person did not share the wish for contact. This was all the more so if that person had been the victim of behaviour which had been deemed detrimental by the domestic courts.

Since, moreover, Article 8 could not be relied upon to complain about, *inter alia*, personal or psychological loss which was the foreseeable consequence of one's own actions, such as a criminal offence or other misconduct entailing a measure of legal responsibility with foreseeable negative effects on private life (*Denisov*, cited above, § 98), the Court concluded that the applicant's challenge against the contact ban did not fall within the scope of the "private life" aspect of Article 8 and was thus incompatible *ratione materiae* with that provision of the Convention.

Private life¹²⁹

The domestic legal obligation on service providers to store the personal data of users of their prepaid mobile phone SIM cards was examined in *Breyer v. Germany*¹³⁰.

In June 2004 amendments to the Telecommunications Act introduced a legal obligation for telecommunication providers to acquire and store personal details of all their customers, including customers whose details were not needed for billing purposes or other contractual reasons, such as those who purchased prepaid mobile phone SIM cards. These

124. *Friend and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, § 41, 24 November 2009.

125. *Gough v. the United Kingdom*, no. 49327/11, § 183, 28 October 2014.

126. *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII.

127. *Kruškić v. Croatia* (dec.), no. 10140/13, § 111, 25 November 2014.

128. *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X.

129. See also, under Article 8 (Positive obligations), *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020.

130. *Breyer v. Germany*, no. 50001/12, 30 January 2020.

amendments were considered necessary by the domestic authorities to comply with obligations arising from EU law. The applicants purchased prepaid mobile phone SIM cards and were required to register certain personal details (including the phone number and their name, address and date of birth) with their respective service providers when activating those SIM cards. The applicants challenged this obligation before the Federal Constitutional Court, which found that such an obligation was not incompatible with the Basic Law. The Court found that the legal obligation under section 111 of the Telecommunications Act was not contrary to Article 8 of the Convention.

The judgment is noteworthy as it concerns a novel data-protection issue. It also contains a comprehensive overview of the case-law under Article 8 relating to the protection of private life when compiling personal data, in particular as regards the principle of informational self-determination (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*¹³¹).

(i) As regards the nature of the interference with Article 8 rights, the Court reiterated that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (*Leander v. Sweden*¹³²). In this connection, the Court also took note of the finding of the Federal Constitutional Court to the effect that the extent of protection of the right to informational self-determination under domestic law was not restricted to information which by its very nature was sensitive and that, in view of the processing possibilities, there was no item of personal data which was of itself (namely, regardless of the context of its use) insignificant.

(ii) As regards the lawfulness of the interference, the Court found that the storage of data itself had a basis in the law (section 111 of the Telecommunications Act), which was sufficiently clear and foreseeable. Moreover, the duration of the storage was clearly regulated and the technical side of the storage was clearly outlined. In so far as safeguards, access of third parties and further use of the stored data were concerned, section 111 had to be read in conjunction with other provisions of that Act, which the Court found more appropriate to examine in its proportionality assessment.

(iii) In its proportionality assessment, a number of issues were of importance to the Court.

131. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 137, 27 June 2017.

132. *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116.

It acknowledged that the pre-registration of mobile-phone subscribers substantially simplified and accelerated investigation by law-enforcement agencies and was capable of contributing to effective law enforcement and prevention of disorder or crime. In this connection it also reiterated that in a national-security context national authorities enjoyed a certain margin of appreciation when choosing the means for achieving a legitimate aim and that there was no consensus between the Council of Europe member States as regards the retention of subscriber information of prepaid SIM card customers. Thus, the Court accepted that the obligation to store subscriber information under section 111 of the Telecommunications Act was, in general, a suitable response to changes in communication behaviour and in the means of telecommunications.

It was significant that the storage of data in issue concerned only a limited data set: this data did not include any highly personal information or allow the creation of personality profiles or the tracking of the movements of mobile-phone subscribers. Moreover, no data concerning individual communication events were stored. The Court thus distinguished this level of interference from previous cases concerning the collection of more sensitive data or cases in which the registration in a particular database led to frequent checks or further collection of private information. In this connection, the Court also referred to the findings of the Court of Justice of the European Union in the case of *Ministerio Fiscal*¹³³. In sum, the Court concluded that the interference was, while not trivial, of a rather limited nature.

Certain safeguards were highlighted by the Court in this context.

In the first place, the Court observed that there were no technical insecurities as regards the storage of data, that the duration of the storage was limited to the expiry of the calendar year following the year in which the contractual relationship ended, and that the stored data appeared limited to the information necessary to clearly identify the relevant subscriber.

Secondly, the Court examined the possibilities for future access to and use of the data stored and, notably, information requests which could be made under sections 112 and 113 of the Telecommunications Act. It found it important that the named authorities who could request access to the stored data under section 112 of the Act were concerned with law enforcement or the protection of national security. While under section 113 of the Act the authorities who could request access to the

133. *Ministerio Fiscal*, C-207/16, 2 October 2018, EU:C:2018:788.

data were identified only by reference to the tasks they performed and were not therefore explicitly enumerated, those authorities had to make a written request and the wording of the provision was detailed enough to clearly foresee which authorities were empowered to request information. In each case, the stored data were further protected against excessive or abusive information requests by the fact that the requesting authority required an additional legal basis to retrieve the data. Moreover, these information requests under sections 112 and 113 were also subjected to review and supervision. The Court explained that the level of review and supervision was an important, but not a decisive, element in the proportionality assessment of the collection and storage of a limited data set, such as that in the present case. As regards the applicable regime, in particular, the Court noted that the Federal Network Agency was competent to examine the admissibility of the transmission of data when needed; that each retrieval and the relevant information regarding the retrieval were recorded for the purpose of data-protection supervision by the relevant independent data-protection authorities; that these authorities could also be seized in an individual appeal relating to the collection, processing or use of personal data by public bodies; and that legal redress against information retrieval could be sought under general rules of domestic law, and was available against the final decisions of the authorities.

The decision in *Platini v. Switzerland*¹³⁴ concerned the protection of private life in connection with an arbitral decision in professional sport that resulted in a suspension of activity for the applicant.

The applicant was a former professional football player who had been captain and coach of the France national team. He had served as President of UEFA (Union of European Football Associations) and Vice-President of FIFA (*Fédération Internationale de Football Association*). Disciplinary proceedings were brought against him in respect of a salary “supplement” of 2 million Swiss francs which had been granted to him by FIFA’s former President, against whom proceedings had also been brought, both criminal and disciplinary. The FIFA sanction consisted of his suspension from any football-related professional activity for six years plus a fine. The applicant appealed against the decision to the Court of Arbitration for Sport (CAS), which reduced the suspension period from

134. *Platini v. Switzerland* (dec.), no. 526/18, 11 February 2020.

six years to four and decreased the amount of the fine. The Swiss Federal Court upheld that decision.

In the Convention proceedings, the applicant complained in particular that the sanction was incompatible with his freedom to exercise a professional activity, in breach of Article 8. The Court rejected the complaint as manifestly ill-founded.

The decision is of interest as the Court provided clarification under Article 8, firstly, on its jurisdiction *ratione personae* in such matters and, secondly, for the first time, on the applicability of Article 8 (private life) to this type of professional dispute and on the State's positive obligations and margin of appreciation.

(i) As regards the Court's jurisdiction: in the case of *Mutu and Pechstein v. Switzerland*¹³⁵, the respondent State's responsibility under the Convention was acknowledged when it came to the Article 6 compliance of the CAS proceedings as validated by the Federal Court. However, the issue in the present case was the State's responsibility under Article 8 for the substance of the decisions by those organs. The Court took the view that the relevant decisions engaged the State's responsibility for two reasons: firstly, Swiss law provides for the legal effects of CAS awards and for the jurisdiction of the Federal Court to examine their validity; secondly, that apex court had dismissed the applicant's appeal, thereby giving the arbitral decision the force of *res judicata* in the Swiss legal order. The Court thus found it had jurisdiction to entertain the application against Switzerland.

(ii) As to the applicability of Article 8 to the professional dispute in question, the Court applied the Denisov approach, based on the consequences of the professional sanction for the applicant's private life (*Denisov v. Ukraine*¹³⁶). Having regard to the concrete and convincing arguments submitted by the applicant, it found that the threshold of severity required to engage Article 8 had been attained (*ibid.*, § 116). It acknowledged that the applicant, who had spent his whole career in football, could indeed feel significantly affected by the four-year ban on any football-related activity.

(iii) Concerning the positive obligations imposed on the respondent State and the extent of its margin of appreciation, the Court first pointed out that, unlike the applicants in *Mutu and Pechstein* (cited above, §§ 114 and 122), the present applicant had not claimed before the Court that he had been forced to sign compulsory arbitration clauses excluding the possibility of submitting disputes to an ordinary domestic court.

135. *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, §§ 65-67, 2 October 2018.

136. *Denisov v. Ukraine* [GC], no. 76639/11, §§ 115-17, 25 September 2018.

Moreover, he had expressly accepted the jurisdiction of the CAS. The Court, having examined the procedure and the decisions, found that the applicant had, in his dispute with FIFA, been afforded adequate institutional and procedural safeguards in the context of both private (CAS) and State (Federal Court) adjudicatory organs, as required by Article 8. Lastly, it took account of the State's significant margin of appreciation in the present case.

Positive obligations

*Buturugă v. Romania*¹³⁷ is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women under Articles 3 and 8 of the Convention.

The applicant complained to the authorities about the violent behaviour of her ex-husband. He received an administrative fine. The criminal proceedings against him were discontinued, essentially on the ground that his conduct had not been sufficiently serious to be designated as a criminal offence. Moreover, the authorities did not address the acts in issue from the perspective of domestic violence. As part of the proceedings, the applicant requested an electronic search of the family computer, alleging that her ex-husband had wrongfully consulted her electronic accounts, including her Facebook account, and had copied her private conversations, documents and photos. This request was refused on the ground that the evidence likely to be gathered by such a search was unrelated to the offences allegedly committed by her ex-husband. A further complaint by the applicant, alleging a breach by her ex-husband of the secrecy of correspondence, was dismissed without an examination on the merits. The Court held in this connection that there had been a failure to comply with the positive obligations arising under Articles 3 and 8 of the Convention.

The judgment is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women.

The Court reiterated in this context that the phenomenon of domestic violence was not perceived as being limited to incidents of physical violence alone, but that it included, among other forms, psychological violence or harassment (compare *Opuz v. Turkey*¹³⁸; *T.M. and C.M. v. the*

137. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 3 (Positive obligations) above.

138. *Opuz v. Turkey*, no. 33401/02, §§ 132 and 138, ECHR 2009.

*Republic of Moldova*¹³⁹; and *Talpis v. Italy*¹⁴⁰). In addition, cyberbullying was currently recognised as one aspect of violence against women and girls and could take on a variety of forms, including cyber-breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data. In the context of domestic violence, cyber-surveillance was often carried out by the person's intimate partner. The Court therefore accepted that acts such as illicitly monitoring, accessing or saving one's partner's correspondence could be taken into account by the domestic authorities when investigating cases of domestic violence.

The Court also emphasised the need to address comprehensively the phenomenon of domestic violence in all its forms (see *Talpis*, cited above, § 129), which was of particular relevance in the present case. In examining the applicant's allegations of cyberbullying and her request to have the family computer searched, the national authorities had been overly formalistic in dismissing any connection with the domestic violence which she had already reported to them. The applicant had thus later been obliged to submit a new complaint alleging a breach of the confidentiality of her correspondence. In dealing with it separately, the authorities had failed to take into consideration the various forms that domestic violence could take.

In contrast, the Court adopted a comprehensive approach, by examining, under Articles 3 and 8 of the Convention, the allegations of physical violence and cyberbullying taken as a whole.

*Hudorovič and Others v. Slovenia*¹⁴¹ sets out the criteria for determining the existence of a State's positive obligation under Article 8 to provide access to safe drinking water

The applicants belonged to Roma communities residing in illegal and unserviced settlements. They complained that they had not been provided with access to basic public utilities, in particular, to safe drinking water and sanitation. The municipal authorities had taken some steps to provide the applicants with the opportunity to access safe drinking water. In one settlement, at least one water tank co-financed by the municipality had been installed and filled with drinking water. In another settlement, the municipality had installed and financed a

139. *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 47, 28 January 2014.

140. *Talpis v. Italy*, no. 41237/14, §§ 129-30, 2 March 2017.

141. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 3 (Inhuman or degrading treatment) above.

public water point to which individual connections could be installed. The applicants considered these measures insufficient. The Court found that, even assuming they were applicable, there had been no violation of Articles 8 and 3 of the Convention, taken alone and in conjunction with Article 14.

The judgment is noteworthy in that the Court, for the first time, clarified the conditions which could trigger the applicability of Article 8 with regard to the provision by the State of basic public utilities, in particular, safe drinking water. The Court also developed criteria for determining the existence of a State's positive obligation under this provision and its eventual content.

(i) Relying on the consequence-based approach outlined in *Denisov v. Ukraine*¹⁴², the Court defined as follows the threshold of severity which could bring Article 8 into play in this context: a "persistent and long-standing lack of access to safe drinking water" with "adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home".

(ii) The existence of any positive obligation in this respect and its eventual content are to be determined by the specific circumstances of the persons affected, by the legal framework and by the economic and social situation of the State in question. In the Court's view, States must be accorded a wide discretion in such matters, including as regards the concrete steps to ensure everyone has adequate access to water.

– As to the economic and social position in Slovenia, the Court noted that a non-negligible proportion of the Slovenian population living in remote areas did not have access to the public water supply and sewerage systems;

– As to the comprehensive regulatory framework in place, the Court considered it reasonable that the State or its local authorities assumed responsibility for the provision of that service while it was left to the owners to install individual house connections at their own expense. Likewise, it appeared reasonable that alternative solutions such as the installation of individual water tanks or systems for harvesting rainwater were proposed in those areas not yet covered by a public water supply system.

– As regards the applicants' specific circumstances, the key consideration for the Court was the fact that they belonged to a socially disadvantaged group which faced greater obstacles than the majority in accessing basic utilities.

142. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

In the first place, the Court took note of all the affirmative action measures already taken by the domestic authorities with a view to improving the living conditions of the Roma community, including concrete actions to provide the applicants with the opportunity to access safe drinking water. While not an ideal or permanent solution, these positive steps demonstrated that the authorities had acknowledged the disadvantages suffered by the applicants as members of a vulnerable community and had shown a degree of active engagement with their specific needs.

Secondly, the applicants, who remained in their respective settlements by choice, were not living in a state of extreme poverty. They received social benefits which could have been used towards improving their living conditions by, for instance, installing private water and septic tanks, systems for collecting rainwater or other alternative solutions. In sum, the Court took the view that, while it fell upon the State to address the inequalities in the provision of access to safe drinking water which disadvantaged Roma settlements, this could not be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes.

Thirdly, the applicants had not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water had resulted in adverse consequences for their health and human dignity, effectively eroding their core rights under Article 8. Even assuming that Article 8 was applicable, and having regard to the State's wide margin of appreciation in such matters, the Court found that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants had taken account of their vulnerable position and satisfied the requirements of Article 8 of the Convention.

Freedom of expression (Article 10)

Freedom of expression

*Magyar Kétfarkú Kutya Párt v. Hungary*¹⁴³ concerned the foreseeability of restrictions on the freedom of expression of political parties in the context of an election or a referendum.

In 2016 a referendum concerning the European Union was held in Hungary. Immediately prior thereto the applicant political party had made available to voters a mobile-phone application which they could use to anonymously upload and share photographs of their ballot

143. *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, 20 January 2020.

papers. Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing principles concerning the fairness and secrecy of elections as well as the principle of the “exercise of rights in accordance with their purpose”. The *Kúria* upheld the finding of the NEC as regards the latter principle but dismissed its conclusions regarding voting secrecy and the fairness of the referendum. The applicant party’s constitutional complaint was declared inadmissible.

The Grand Chamber examined the case from the standpoint of the lawfulness of the measure under Article 10. It found that the legislation setting out the principle concerning the “exercise of rights in accordance with their purpose” was not formulated with sufficient precision to rule out any arbitrariness and enable the applicant party to regulate its conduct accordingly and found a breach of Article 10.

The judgment is noteworthy in that it clarified the extent of the Court’s scrutiny of restrictions on the freedom of expression of political parties in an electoral context and, in particular, the level of foreseeability required of the legal basis for such a restriction.

(i) Restrictions on the freedom of expression of political parties in an electoral context must be subjected to rigorous supervision. The same applies, *mutatis mutandis*, in the context of a referendum aimed at identifying the will of the electorate on matters of public concern.

(ii) Such rigorous supervision naturally extends to the assessment of whether the legal basis, relied upon by the authorities to restrict the freedom of expression of a political party, was sufficiently foreseeable to rule out any arbitrariness in its application. As well as protecting democratic political parties from arbitrary interferences by the authorities, rigorous supervision serves to protect democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process, its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law.

In the present case, the Court noted that the applicant party had been seeking not only to provide a forum for voters to express an opinion, but also to convey a political message on the referendum (the name of the application was “Cast an invalid ballot”). There had therefore been an interference with its freedom of expression in relation to both of these aspects: providing a forum for third-party content and imparting information and ideas.

The salient issue was whether the applicant party – in the absence of a binding provision of domestic legislation explicitly regulating the taking of photographs of ballot papers and the uploading of those photographs in an anonymous manner to a mobile-phone application for dissemination while voting was ongoing – knew or ought to have known, if need be after taking appropriate legal advice, that its conduct would breach the existing electoral procedure law.

The Court observed that the vagueness of the principle of the “exercise of rights in accordance with their purpose” relied on by the authorities had been noted by the Constitutional Court. The relevant legislation did not define what constituted a breach of that principle, it did not establish any criteria for determining which situation constituted a breach and it did not provide any examples. The relevant domestic regulatory framework allowed the restriction of voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and on the domestic courts called upon to interpret and apply it. While the Constitutional Court had restricted the reach of the said principle to voting-related conduct that entailed “negative consequences”, it had not been established how the restriction in issue “related to, and addressed, a concrete ‘negative consequence’, whether potential or actual”, particularly since the applicant party had not been found to have infringed the fairness of the referendum or the secrecy of the ballot.

Having regard to the particular importance of the foreseeability of law when it came to restricting the freedom of expression of a political party in the context of an election or a referendum, the Court concluded that the considerable uncertainty about the potential effects of the legal provisions in issue had exceeded what was acceptable under Article 10 § 2 of the Convention.

In *Selahattin Demirtaş v. Turkey (no. 2)*¹⁴⁴, the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The applicant was an elected MP and one of the co-chairs of the Peoples’ Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted

144. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) above and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the “Kurdish question”. The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforementioned violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

The Grand Chamber found a violation of Article 10.

This judgment is noteworthy in that it considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10 and articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

In particular:

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts’ task is to determine whether this speech is covered by the principle of “non-liability” of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court fully subscribed to the finding of the Venice Commission that the impugned unprecedented and one-off constitutional amendment had been aimed expressly at specific statements of MPs, particularly those of the opposition, and that it was thus a “misuse of the constitutional amendment procedure”. MPs could not reasonably have expected that such a procedure would be introduced during their term of office. The interference with the freedom of expression had not therefore been foreseeable, in violation of Article 10 of the Convention.

(iii) The Court stressed that the importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1.

*Baldassi and Others v. France*¹⁴⁵ concerned the right to call for a boycott as a specific form of expression.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign “Boycott, Divestment and Sanctions” launched by Palestinian non-governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words “incitement to discrimination” in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The Court has seldom had occasion to consider the issue of the compatibility of a call for a boycott with Article 10 of the Convention, one previous case being *Willem v. France*¹⁴⁶. The judgment in the present case is the first time the Court has designated boycotts as a means of expressing protest opinions, while reiterating the limits which should not be overstepped in the framework of Article 10 of the Convention:

63. A boycott is first and foremost a means of expressing a public protest. A call for a boycott, which is intended to communicate protest opinions while calling for specific related actions, is therefore, in principle, protected by Article 10 of the Convention.

64. However, a call for a boycott is a special mode of exercise of freedom of expression in that it combines the expression of a protest opinion with incitement to differential treatment such that, depending on the particular circumstances, it is liable to amount to a call to discriminate against others. Incitement to discrimination is a form of incitement to intolerance, which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in the framework of the exercise of freedom of expression (see, for example, *Perinçek*, cited above, § 240). However,

145. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 7 (No punishment without law) above.

146. *Willem v. France*, no. 10883/05, 16 July 2009.

incitement to different treatment is not necessarily the same as incitement to discrimination.”

In its analysis of the necessity of the interference (the conviction of the applicants), the Court adopted a three-stage approach:

(i) First of all, it decided that the judgment in *Willem* (cited above), in which it had found no violation of Article 10 of the Convention, could not serve as a precedent here, having noted that Mr Willem had not been convicted on the basis of his political opinions but of incitement to a discriminatory act.

In that case the applicant had been a mayor who, in 2002, at a municipal council meeting with journalists in attendance and subsequently on the municipal website, had announced that he had asked the municipal catering services to boycott Israeli foodstuffs in protest against the Israeli Prime Minister’s policy *vis-à-vis* the Palestinians. In announcing his decision, the applicant had been acting in his capacity as mayor and using his mayoral powers, in disregard of the concomitant duties of neutrality and discretion. He had made the announcement without a prior debate or vote in the municipal council, and therefore could not claim to have encouraged free discussion of a subject of public interest.

The Court drew the following distinctions between the circumstances of the present case and those in *Willem*: the applicants here were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence on consumers was not comparable to that of a mayor on the services in his municipality; and it had manifestly been in order to trigger or stimulate debate among supermarket customers that the applicants had issued the calls for a boycott which had led to the criminal proceedings of which they complained before the Court.

(ii) Reiterating the limits which should never be overstepped in the framework of exercising freedom of expression (see above), the Court emphasised that the applicants had not been convicted of making racist or antisemitic remarks or of inciting to hatred or violence; nor had they been convicted of engaging in violence or causing damage.

(iii) Without calling into question the interpretation of the law on which the applicants’ conviction was based, that is to say incitement to economic discrimination, the Court assessed, in particular, the reasoning of the domestic court in convicting the applicants. It noted that French law, as interpreted and applied in the present case, prohibited any call for a boycott of products on account of their geographical origin whatever the tenor, grounds and circumstances of such a call.

The Court noted that by adjudicating on that legal basis, the domestic court had failed to give detailed reasons, which would have been all the more vital in this case as it concerned a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. Indeed, on the one hand, the actions and remarks imputed to the applicants had concerned a subject of public interest, that is to say, compliance by the State of Israel with public international law and the human rights situation in the occupied Palestinian territories, and had been part of a contemporary debate, in France and throughout the international community. On the other hand, the actions and words had fallen within the ambit of political or militant expression.

The Court deduced that the applicants' conviction had not been based on relevant and sufficient grounds, applying rules in conformity with the principles set out in Article 10 and relying on an appropriate assessment of the facts. It found that there had been a violation of Article 10 of the Convention.

In *Miljević v. Croatia*¹⁴⁷ the Court examined a conviction for defamation on account of statements made while defending criminal proceedings, about someone not participating in those proceedings.

During his trial for war crimes, the applicant made statements in his defence, accusing I.P. (who was not participating in the proceedings) of instigating his prosecution, witness tampering and leading a criminal enterprise aiming to have him convicted. The applicant was acquitted of war crimes, but later convicted in criminal defamation proceedings brought against him by I.P. on account of the impugned statements. The Court found a violation of Article 10 of the Convention.

(i) The judgment is noteworthy because it gave the Court the opportunity, for the first time, to balance the right to freedom of expression of an accused in criminal proceedings (Article 10) against the right to respect for reputation (Article 8), in a novel context where the offending statements were made against a third party not having any formal role in the relevant proceedings (compare with previous cases concerning either a lay accused making disparaging statements against judges or prosecutors (for example, *Lešník v. Slovakia*¹⁴⁸, and *Skalka v. Poland*¹⁴⁹) or a defence lawyer making such statements against judges,

147. *Miljević v. Croatia*, no. 68317/13, 25 June 2020.

148. *Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV.

149. *Skalka v. Poland*, no. 43425/98, 27 May 2003.

prosecutors, witnesses or police officers (for example, *Nikula v. Finland*¹⁵⁰, and *Kyprianou v. Cyprus*¹⁵¹)).

(ii) The Court observed that Articles 8 and 10 normally enjoy equal protection, so that the outcome of the application should not, in principle, vary according to whether it has been lodged under Article 8 by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question. However, in cases where the right to freedom of expression is to be read in the light of an accused's right to a fair trial under Article 6, the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower. Importantly, the Court set out the following principles for balancing the relevant competing rights at stake in this context:

In particular, in the Court's view, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the accused to speak freely without the fear of being sued in defamation whenever his or her speech concerns the statements and arguments made in connection with his or her defence. On the other hand, the more an accused's statements are extraneous to the case and his or her defence, and include irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it becomes legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8 of the Convention.

The Court emphasises that an accused's statements and arguments are protected in so far as they do not amount to malicious accusations against a participant in the proceedings or any third party. As it follows from the Court's case-law, the defendant's freedom of expression exists to the extent that he or she does not make statements that intentionally give rise to false suspicions of punishable behaviour concerning a participant to the proceedings or any third party ... In practice, when making this assessment, the Court finds it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements ... The more severe the consequences are, the more solid the factual basis for the statements made must be ...

(iii) Applying these principles to the present case, the Court found that the domestic authorities had failed to strike a fair balance between the competing rights at stake for the following reasons.

150. *Nikula v. Finland*, no. 31611/96, 21 March 2002.

151. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

Considering, in the first place, the *nature and context* of the impugned statements, the Court found that they had had a sufficiently relevant bearing on the applicant's defence during the criminal trial and had therefore deserved a heightened level of protection under the Convention. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case. As a matter of principle, the defendant had to have the opportunity to speak freely about his impression concerning possible witness tampering and the improper motivation of the prosecution without the fear of subsequently being sued for defamation. Furthermore, I.P., who was a well-known public figure and activist as regards the prosecution of crimes committed during the war, had entered the public arena on the subject and had therefore in principle been required to display a higher level of tolerance of acceptable criticism than another private individual.

Secondly, the Court was unable to find that the applicant's allegations against I.P. lacked any *factual basis*. I.P. had attended the public hearings in the applicant's case and admitted to having met some of the witnesses, including the witness who had lodged a criminal complaint against the applicant on charges of war crimes. Moreover, I.P. had advised the editors of a television show in their preparation of several reports on the war in Croatia without, however, being involved in the broadcast concerning the applicant. The domestic courts had failed to take these factual elements into account.

Thirdly, the Court examined the *consequences* of the impugned statements for I.P. and found them to be limited. Although the applicant had accused I.P. of witness tampering, which was punishable under domestic law, the competent authorities had never investigated I.P. for that offence. Though excessive, the statements in issue were not malicious accusations. Moreover, there was no conclusive evidence that I.P. had suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

Fourthly, regarding the *severity of the sanction* imposed, the Court observed that, although the applicant had been ordered to pay the minimum fine possible under domestic law, that sanction had nevertheless amounted to a criminal conviction which, in such a context, could only in exceptional circumstances be accepted as necessary in a democratic society.

Right to an effective remedy (Article 13)¹⁵²

In *Beizaras and Levickas v. Lithuania*¹⁵³ the Court decided to examine separately the applicants' complaint under Article 13 after finding a violation of Article 14 of the Convention taken in conjunction with Article 8.

The issue to be considered was whether a complaint under Article 13, based on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law, gave rise to a separate issue to that already examined under Article 14 of the Convention and which had already given rise to a violation under that Article. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had not usually considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*¹⁵⁴). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted.

The Court found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning a breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The *Association Innocence en Danger and Association Enfance et Partage v. France*¹⁵⁵ judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following a police

152. See also, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens), *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020, and, under Article 3 of Protocol No. 1 (Right to free elections – Stand for election), *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

153. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 14 taken in conjunction with Article 8 below.

154. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.

155. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 3 (Positive obligations) above.

investigation, the public prosecutor's office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

Secondly, the judgment is of interest with regard to the assessment of the margin of appreciation to be afforded to States in fulfilling their obligation under Article 13 (*De Souza Ribeiro v. France*¹⁵⁶, citing *Jabari v. Turkey*¹⁵⁷), in the light of Article 3. The Court found that the interpretation by the national courts of the minimum threshold of "gross negligence", within the meaning of Article L. 141-1 of the Code of Judicial Organisation, since it could be constituted by a series of more minor acts of negligence resulting in deficiencies in the justice system, thus fell within their margin of appreciation. The Court found that the fact that the applicant associations had not met the conditions laid down by Article L. 141-1 of that Code did not suffice for it to be concluded that the remedy, taken as a whole, was ineffective. The requirement to establish "gross negligence" had not negated the effectiveness of this remedy, which had been available to the applicant associations.

156. *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 77-78, ECHR 2012.

157. *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 2

The judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*¹⁵⁸ is interesting for the way in which the Court examined the question whether the failure of the State to enforce a prison sentence imposed abroad for an ethnically biased crime could be considered a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2.

Article 14 taken in conjunction with Article 8

In *Beizaras and Levickas v. Lithuania*¹⁵⁹ the Court emphasised the necessity of a criminal-law response to direct verbal assaults and physical threats based on homophobic attitudes.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious homophobic comments (for example, calls for the applicants to be “castrated”, “killed” and “burned”). On the applicants’ request, a non-governmental organisation (NGO), of which they were members and which protected the interests of homosexual persons, requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute, finding that the applicants’ behaviour had been “eccentric” and did not correspond to “traditional family values” in Lithuania and that the comments in issue had not reached a threshold which could be considered criminal. The Court found it established that the applicants had suffered discrimination on the ground of their sexual orientation, in breach of Article 14 taken in conjunction with Article 8. The Court also found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning the breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The judgment is noteworthy in that it clarified the following two issues:

158. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) above.

159. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) and Article 13 (Right to an effective remedy) above.

(i) Whether criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*¹⁶⁰; *Király and Dömötör v. Hungary*¹⁶¹; and *Alković v. Montenegro*¹⁶²);

(ii) Whether a complaint based, under Article 13, on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law gives rise to a separate issue to that raised under Article 14 of the Convention.

(i) Regarding the necessity of criminal-law measures in this context, the Court stressed that criminal sanctions, including against individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure. This applied equally to hate speech concerning a person's sexual orientation and sexual life. However, the instant case concerned undisguised calls for an attack on the applicants' physical and mental integrity, which required protection by the criminal law. While the Lithuanian Criminal Code did indeed provide for such protection, it had not been granted to the applicants, owing to the authorities' discriminatory attitude which was at the core of their failure to discharge their positive obligation to investigate in an effective manner whether the comments in issue constituted incitement to hatred and violence. The Court rejected the Government's claim that the applicants could have had recourse to other (civil law) remedies when the domestic courts refused to qualify the comments as criminal, considering that, in the circumstances, it would have been manifestly unreasonable to require the applicants to exhaust any other remedies and would have downplayed the seriousness of the comments.

(ii) The Court also examined whether Article 13 could be infringed in situations where generally effective remedies are considered not to have operated effectively in a particular case owing to discriminatory attitudes negatively affecting the application of national law. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had usually not considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*¹⁶³). However, considering the

160. *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016.

161. *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017.

162. *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017.

163. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.

nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted. Having regard to the general developments in the case-law of the national courts, conclusions by international monitoring bodies and statistical information provided, the Court concluded that there had been a violation of Article 13 mainly on the following grounds:

- it did not appear that the Supreme Court had had an opportunity to provide greater clarity on the standards to be applied in cases of hate speech of comparable gravity: the manner in which its case-law had been applied did not provide for an effective domestic remedy for complaints about homophobic discrimination;
- the growing level of intolerance against sexual minorities had remained largely unchecked;
- the failure by law-enforcement institutions to acknowledge bias as a motive for such crimes and to adopt an approach adequate to the seriousness of the situation; and
- the authorities' lack of a comprehensive strategy to tackle the issue of homophobic hate speech.

General prohibition of discrimination (Article 1 of Protocol No. 12)

*Napotnik v. Romania*¹⁶⁴ concerned the termination of a diplomat's posting due to pregnancy

While working as a consular officer at the Romanian embassy in Slovenia, the applicant became pregnant and gave birth to a child. Her posting was terminated when she announced that she was pregnant again shortly after giving birth to her first child. It was considered that her absences for medical appointments and maternity leave would have jeopardised the functional capacity of the consular section: during her first pregnancy, when she was absent from the office, consular services had been suspended and requests for assistance had been redirected to neighbouring States.

Relying on Article 1 of Protocol No. 12, in the Convention proceedings the applicant complained that she had been discriminated against at work. The Court found no violation of this provision.

The judgment is noteworthy because in it the Court examined, for the first time, allegations of discrimination at work on account of pregnancy and, in particular, the Court had to balance, on the one hand,

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

the right of a pregnant woman not to be discriminated against and, on the other, the legitimate aim of maintaining the functional capacity of a public service.

Referring to a similar approach taken by the Court of Justice of the European Union, the Court observed that only women can be treated differently on grounds of pregnancy and, for this reason, any such difference in treatment would amount to direct discrimination on grounds of sex if it was not justified. Having established that the applicant had been treated differently on grounds of sex, and notwithstanding the narrow margin of appreciation afforded to States in such cases, the Court went on to find that the domestic authorities had provided relevant and sufficient reasons to justify the measure.

In the first place, bearing in mind the nature of the applicant's work and the urgency of the requests with which she had been called upon to deal, her absence from the office had seriously affected consular services. The early termination of her posting abroad had therefore been necessary to ensure and maintain the functional capacity of the diplomatic mission and ultimately the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia.

Secondly, while the impugned decision had been motivated by the applicant's pregnancy, it had not been intended to put her in an unfavourable position and it had therefore been proportionate to the above legitimate aim. In particular, the resulting change in her conditions of work could not be equated with a loss of employment or a disciplinary measure. The consequences for the applicant had not been of the same nature as those expressly prohibited by domestic equal-opportunity laws and the State's international commitments in the field of the protection of pregnancy and maternity. Significantly, it did not appear that the applicant had suffered any long-term setbacks in her diplomatic career, since she had been promoted both during her first pregnancy and a year after the second one, despite her extended absence.

Right to free elections (Article 3 of Protocol No. 1)

Free expression of the opinion of the people

In *Selahattin Demirtaş v. Turkey (no. 2)*¹⁶⁵, the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

165. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) and

The applicant was an elected MP and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the "Kurdish question". The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforementioned violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

In November 2018 the Chamber held, *inter alia*, that there had been a violation of Article 5 § 3, Article 18 (in conjunction with Article 5 § 3) and of Article 3 of Protocol No. 1. It found no violation of Article 5 §§ 1 and 4 and did not consider it necessary to examine the case under Article 10 of the Convention. The Grand Chamber followed the Chamber's finding of no violation of Article 5 § 4 and of a breach of Article 3 of Protocol No. 1. However, it examined separately the complaint under Article 10, finding a violation of this provision, and it held that there had been violations of Article 5 §§ 1 and 3 on account of the lack of a reasonable suspicion that the applicant had committed an offence. It also considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political debate, in breach of Article 18 of the Convention in conjunction with Article 5. Finally, the Court indicated under Article 46 that Turkey must take all necessary measures to secure the applicant's immediate release.

This Grand Chamber judgment is noteworthy in four respects: (i) by emphasising the link between parliamentary immunity (and the need for elevated protection of parliamentary speech, especially of the opposition) and the guarantee to sit as an MP once elected, the Court identified a procedural obligation on domestic courts examining charges against MPs; (ii) the Court considered the compatibility of the impugned constitutional amendment with the foreseeability

Article 10 (Freedom of expression) above and Article 18 (Restrictions not prescribed by the Convention) below.

requirement of Article 10; (iii) the Court has, for the first time, ruled on a complaint under Article 3 of Protocol No. 1 about the effects of the pre-trial detention of elected MPs on their performance of parliamentary duties. The Court defined the scope of a procedural obligation on domestic courts when ordering an MP's initial and/or continued pre-trial detention and, where such detention is linked to an MP's political speech, the Court articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1; and (iv) finally, the Court further developed the criteria for determining whether a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court stressed that the imposition of a measure depriving an MP/candidate in parliamentary elections of liberty does not automatically constitute a violation of Article 3 of Protocol No. 1. However, the procedural obligation under this provision requires the domestic courts to show that, in ordering an MP's initial and/or continued pre-trial detention, they have weighed up all the relevant interests, in particular those safeguarded by this provision. As part of this balancing exercise, they must protect the expression of political opinions by the MP concerned. The importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1. Another important element is whether the charges are directly linked to an MP's political activity. Moreover, a remedy must be offered by which an MP can effectively challenge his or her detention and have his or her complaints examined on the merits. Furthermore, the duration of an MP's pre-trial detention must be as short as possible and the domestic courts should genuinely consider alternative measures to detention and provide reasons if less severe measures are considered insufficient. In this context, whether there was a reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1, is equally relevant for the purposes

of Article 3 of Protocol No. 1. The domestic courts failed to duly consider all of these elements and to effectively take into account the fact that the applicant was not only an MP but also a leader of the opposition, the performance of whose parliamentary duties called for a high level of protection. Although the applicant retained his seat throughout his term of office, it was effectively impossible for him to take part in the activities of the National Assembly. His unjustified pre-trial detention was therefore incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

Stand for election

The scope of the procedural safeguards for the effective examination of electoral disputes and the impartiality of the decision-making body were examined in *Mugemangango v. Belgium*¹⁶⁶.

Under Belgian electoral law, the legislative assemblies alone are competent to verify any irregularities that may have taken place during elections to the exclusion of the jurisdiction of any external court or body. The applicant stood for election to the parliament of the Walloon Region in 2014 and lost the seat by fourteen votes. He did not ask for the election to be declared void or for fresh elections, but for a re-examination of the ballot papers that had been declared blank, spoilt or disputed (of which there were over 20,000) and for a recount of the votes validly cast in his constituency. Although the Committee on the Examination of Credentials (of the Walloon Parliament) found his complaint well founded and proposed a recount of the votes, Parliament (which had not yet been constituted at the material time) decided, by a simple majority, not to follow that conclusion and approved all the elected representatives' credentials. The members elected in the applicant's constituency, whose election could have been called into question as a result of the examination of his complaint, also voted on the applicant's complaint. The applicant complained under Article 3 of Protocol No. 1, both alone and in conjunction with Article 13, about the procedure for the examination of his complaint.

The Grand Chamber found violations of both provisions. It was satisfied that the applicant had put forward sufficiently serious and arguable allegations that could have led to a change in the distribution of seats. It found that his grievances had not been dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination in accordance with the

166. *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

requirements of Article 3 of Protocol No. 1. For the same reasons, the remedy before the Walloon Parliament could not be deemed “effective” within the meaning of Article 13.

The judgment is noteworthy because it clarifies the scope of the procedural safeguards for the effective examination of electoral disputes, particularly as regards the impartiality of a body charged with this task and the necessity of access to a judicial remedy. Moreover, the specific context of the present case, that of a regional parliament having exclusive jurisdiction to rule on the validity of electoral processes, gave the Court an opportunity to clarify the relationship between the above safeguards and the principle of parliamentary autonomy (*Karácsony and Others v. Hungary*¹⁶⁷).

(i) The Court emphasised that parliamentary autonomy can only be validly exercised in accordance with the rule of law. Procedural safeguards for the effective examination of electoral disputes serve to ensure the observance of the rule of law in this field, and hence the integrity of the election, so that the electorate’s confidence and the legitimacy of parliament are guaranteed. In that respect, these safeguards ensure the proper functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy. As to the weight to be attached to parliamentary autonomy in the context of the present case, involving a challenge to the result of the elections, the Court took into account the fact that the Walloon Parliament had examined and rejected the applicant’s complaint before its members had been sworn in and their credentials approved. The newly elected parliament had yet to be constituted and, in that regard, the present case differed from disputes that may arise in respect of a full member of parliament after the composition of the legislature has been approved.

(ii) The Court defined the scope of the adequate and sufficient procedural safeguards to prevent arbitrariness required by Article 3 of Protocol No. 1 in order to ensure the effective examination of electoral disputes (*Podkolzina v. Latvia*¹⁶⁸; *Kovach v. Ukraine*¹⁶⁹; *Kerimova v. Azerbaijan*¹⁷⁰; *Davydov and Others v. Russia*¹⁷¹; and *Riza and Others v. Bulgaria*¹⁷²). In the first place, the Court clarified the scope of the

167. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016.

168. *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II.

169. *Kovach v. Ukraine*, no. 39424/02, ECHR 2008.

170. *Kerimova v. Azerbaijan*, nos. 17170/04 and 5 others, 3 May 2011.

171. *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017.

172. *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015.

requirement to provide sufficient guarantees of impartiality of a decision-making body and the importance of appearances in this respect. Such guarantees are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about the result of an election must not become a forum for political struggle between different parties. Given that members of parliament cannot, by definition, be “politically neutral”, in a system where parliament is the sole judge of the election of its members, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results. Secondly, the discretion enjoyed by the body concerned must not be excessive: it must be circumscribed with sufficient precision by the provisions of domestic law. Thirdly, the electoral-disputes procedure must guarantee a fair, objective and sufficiently reasoned decision. Complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public statement of reasons by the relevant decision-making body that the complainants’ arguments have been given a proper assessment and an appropriate response.

On the facts of the present case, and having regard to the standards and recommendations of European and international bodies, the Court found that the Walloon Parliament had not provided sufficient guarantees of impartiality. Domestic law did not provide for the withdrawal of members of parliament who had been elected in the constituency concerned by an electoral complaint and, indeed, in the applicant’s case, his direct opponents had taken part in the voting on his complaint, together with all the newly elected members, whose credentials had not yet been approved. Moreover, the rule on voting by simple majority, which had been applied without any adjustment, had failed to avert the risk of a political decision and to protect the applicant – a candidate from a party not represented in the parliament prior to the elections in issue – from a partisan decision. Furthermore, the discretion enjoyed by that body had not been sufficiently circumscribed, given its exclusive jurisdiction in such matters and the lack of domestic provisions on the procedure and criteria for the examination of electoral complaints and the effects of decisions to be taken thereupon. Finally, the applicant had been afforded certain procedural safeguards on an *ad hoc* discretionary basis: however, in the absence of a procedure laid

down in domestic law, they were neither accessible nor foreseeable. Moreover, while Parliament had given reasons for its decision, it had not explained why it had not followed the view of its Committee on the Examination of Credentials, which had found the applicant's complaint to be well founded. The Court thus found a breach of Article 3 of Protocol No. 1.

(iii) Under Article 13 of the Convention, the Court indicated that the "authority" referred to in that Article did not necessarily have to be a judicial one in the strict sense: that question fell within the wide margin of appreciation afforded to Contracting States. The Court clarified, however, that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, would, in principle, satisfy the above-noted procedural requirements of Article 3 of Protocol No. 1.

Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4)

The immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner and by taking advantage of the fact that there was a large number of them, was examined in *N.D. and N.T. v. Spain*¹⁷³.

In August 2014 a group of several hundred sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla, a Spanish enclave on the North African coast. Having climbed the fences, they were arrested by members of the Civil Guard (*Guardia Civil*), who handcuffed them and returned them to the other side of the border without conducting an identification procedure or providing them with the opportunity to explain their personal situation. The Grand Chamber found no violation of Article 4 of Protocol No. 4 or Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

The judgment is noteworthy in two respects. In the first place, it addressed, for the first time, the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border. Secondly, it established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force.

(i) In the context of the applicability of Article 4 of Protocol No. 4, the Grand Chamber was, for the first time, called upon to ascertain

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

whether the concept of “expulsion” as used in that Article also covered the non-admission of aliens at a State border or – in respect of States belonging to the Schengen area – at an external border of that area. Interpreting the relevant terms autonomously, it took the view that the protection of the Convention, particularly Article 3, which embraces the prohibition of *refoulement* as defined in the 1951 Refugee Convention¹⁷⁴, cannot be denied or rendered ineffective on the basis of purely formal considerations, for instance on the ground that the relevant persons could not make a valid claim for such protection as they had not crossed the State’s border lawfully. The Grand Chamber therefore confirmed the interpretation of the term “expulsion” in the generic meaning in current use (“to drive away from a place”; see *Khlaifia and Others v. Italy*¹⁷⁵, and *Hirsi Jamaa and Others v. Italy*¹⁷⁶). It further specified that this term refers to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or asylum-seeker or his or her conduct when crossing the border. It is also of interest that the Grand Chamber confirmed the relevance of the recent judgments in *Hirsi Jamaa and Others* (cited above), *Sharifi and Others v. Italy and Greece*¹⁷⁷ and *Khlaifia and Others* (cited above), concerning applicants who had attempted to enter a State’s territory by sea, to the circumstances of the instant case, refusing to adopt a different interpretation of the term “expulsion” in the context of an attempt to cross a national border by land as in the present case. It follows from this case-law that Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions. The Grand Chamber concluded that the applicants, who were within Spain’s jurisdiction when forcibly removed from its territory by members of the Civil Guard, had been subjected to an “expulsion” within the meaning of Article 4 of Protocol No. 4, which provision was therefore applicable.

(ii) The Grand Chamber then turned to the extent of the protection to be afforded under Article 4 of Protocol No. 4 to applicants, such as those in the present case, whose conduct created “a clearly disruptive

174. 1951 Geneva Convention relating to the Status of Refugees.

175. *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 243, 15 December 2016.

176. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012.

177. *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014.

situation which is difficult to control and endangers public safety". It decided to apply the principle drawn from the Court's well-established case-law according to which there is no violation of this provision if the lack of an individual expulsion decision can be attributed to the applicant's own conduct (see *Khlaifia and Others*, cited above, § 240; *Hirsi Jamaa and Others*, cited above, § 184; *M.A. v. Cyprus*¹⁷⁸; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*¹⁷⁹; and *Dritsas and Others v. Italy*¹⁸⁰). It also developed a two-tier test for the assessment of complaints in this particular context. In the first place, the Court considered it important to take account of whether the respondent State in a particular case has provided genuine and effective access to a means of legal entry, in particular border procedures. Such means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention. Secondly, where the respondent State has provided such access but an applicant has not made use of it, the Court will consider, in the context of the case and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible. Only the absence of such cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

Significantly, the Grand Chamber emphasised that where appropriate arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as specified above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in the present case, by taking advantage of the fact that there was a large number of them and using force in the context of an operation that had been planned in advance.

178. *M.A. v. Cyprus*, no. 41872/10, § 247, ECHR 2013.

179. *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII.

180. *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011.

In the instant case, the Grand Chamber was satisfied that Spanish law afforded the applicants several possible means of seeking admission to the national territory, in particular at the Beni Enzar border crossing point. On the facts, it was not persuaded that the applicants had demonstrated the required cogent reasons for not using it, which was sufficient of itself to conclude that there had been no breach of Article 4 of Protocol No. 4. The Grand Chamber also took note of the applicants' unexplained failure to apply to Spanish embassies or consulates in their countries of origin or transit, or in Morocco. In any event, their complaints under Article 3 had been declared inadmissible by the Chamber and they had been unable to indicate the slightest concrete factual or legal ground which would have precluded their removal had they been registered individually. Consequently, the lack of individual removal decisions had been a consequence of the applicants' own conduct, namely, their failure to use the official entry procedures. The Grand Chamber emphasised, however, that the finding of no violation of Article 4 of Protocol No. 4 in this case does not call into question the obligation and necessity for Contracting States to protect their borders in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*.

*M.K. and Others v. Poland*¹⁸¹ concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the

181. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 3 (Prohibition of torture and inhuman or degrading treatment and punishment – Expulsion) above.

Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

In respect of Article 4 of Protocol No. 4, the judgment may usefully be compared to that in *N.D. and N.T. v. Spain*¹⁸². The applicants in that case, who did not have an arguable claim under Article 3 of the Convention, had not presented themselves at a border crossing point but had crossed the border in an unauthorised manner by climbing the fences. In the present case, by contrast, the applicants, who had an arguable claim under Article 3, presented themselves at the border checkpoints and tried to enter the respondent State in a legal manner by making use of the procedure to submit an asylum application that should have been available to them under domestic law. Even though they were interviewed individually by the border guards and received individual decisions refusing them entry into Poland, the Court considered that their statements concerning their wish to apply for asylum had been disregarded and that the decisions they were issued did not properly reflect the reasons given by the applicants to justify their fear of persecution. Moreover, the applicants were not allowed to consult lawyers and were even denied access to lawyers who were present at the border checkpoint. The Court concluded that the decisions refusing the present applicants entry to Poland had not been taken with proper regard to their individual situations and were part of a wider policy of refusing to lodge asylum applications from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus.

Procedural safeguards relating to expulsion of aliens (Article 1 of Protocol No. 7)

The judgment in *Muhammad and Muhammad v. Romania*¹⁸³ concerned an expulsion on national-security grounds which was based on classified information that was not disclosed to the applicants.

The applicants, who were Pakistani nationals living in Romania on student visas, were deported on national-security grounds. They did

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

183. *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

not have access to the classified documents on which that decision was based and neither were they provided with any specific information as to the underlying facts and grounds for deportation.

The Grand Chamber found a breach of Article 1 of Protocol No. 7, concluding that the applicants had suffered a significant limitation of their right to be informed of the factual elements submitted in support of their expulsion and of the content of the relevant documents, a limitation which had not been counterbalanced in the domestic proceedings.

The judgment is noteworthy in three respects. In the first place, it clarifies whether and to what extent the right to be informed of the reasons for expulsion and the right to have access to documents in the case file are protected by Article 1 of Protocol No. 7. Secondly, it clarifies the extent to which limitations of these rights are permissible. Thirdly, the judgment outlines the methodology to be followed in assessing such limitations.

(i) As to the right to be informed of the reasons for expulsion, while the Court had not addressed the necessity of the disclosure of such reasons in previous cases, it had always found fault with a failure to provide any information in this respect to the alien concerned (*Lupsa v. Romania*¹⁸⁴; *Kaushal and Others v. Bulgaria*¹⁸⁵; *Baltaji v. Bulgaria*¹⁸⁶; and *Ljatifi v. the former Yugoslav Republic of Macedonia*¹⁸⁷). In the present case, the Court clarified that the provision of such information is limited to that which is essential to ensure the effective exercise by the alien of the right, enshrined in Article 1 § 1 (a) of Protocol No. 7, to submit reasons against his or her expulsion, that is, to the *relevant factual elements* which have led the domestic authorities to believe that the alien represents a threat to national security. As to a right of access to documents in the case file (not enshrined as such in the case-law to date), the Court delimited the scope of any such right by requiring that the alien concerned be informed, preferably in writing and in any event in a manner allowing an effective defence, of the *content of the documents and the information in the case file* relied upon by the competent authority when deciding on his or her expulsion, without prejudice to the possibility of imposing duly justified limitations on such information if necessary.

(ii) The above procedural rights of the alien not being absolute, the Court set a threshold not to be exceeded by any limitations: such

184. *Lupsa v. Romania*, no. 10337/04, ECHR 2006-VII.

185. *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010.

186. *Baltaji v. Bulgaria*, no. 12919/04, 12 July 2011.

187. *Ljatifi v. the former Yugoslav Republic of Macedonia*, no. 19017/16, 17 May 2018.

restrictions must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in it, such as the right of the alien to submit reasons against his or her expulsion and the protection against any arbitrariness.

(iii) While the scope of the alien's procedural rights is of a more limited nature compared to that of the corresponding safeguards under Articles 5 and 6 (*Regner v. the Czech Republic*¹⁸⁸; *Jasper v. the United Kingdom*¹⁸⁹; *Schatschaschwili v. Germany*¹⁹⁰; and *Ibrahim and Others v. the United Kingdom*¹⁹¹), the Court drew inspiration from that case-law to develop its methodology for assessing whether limitations of the procedural rights are compatible with Article 1 § 1 of Protocol No. 7. The Court will therefore apply a two-prong test to establish, in the first place, whether the impugned limitations have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case; and, secondly, whether the resulting difficulties for the alien have been sufficiently compensated for by counterbalancing factors, including by procedural safeguards. Accordingly, the lack of an examination, or an insufficient examination, of the need for the impugned limitations will not automatically entail a violation of Article 1 of Protocol No. 7, but will call for a stricter scrutiny of the counterbalancing factors by the Court: the more cursory the domestic examination, the stricter the Court's scrutiny. Two further guiding principles are relevant: the more the information available to the alien is limited, the more the safeguards will be important; and when the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly.

(a) As to the first part of the above two-prong test, the Court set out the requirements the domestic assessment of whether the limitation was imposed for "*duly justified reasons*" must satisfy (compare, for example, with the "*compelling reasons*" required in *Ibrahim and Others*, cited above, and *Beuze v. Belgium*¹⁹², and the "*good reasons*" required in *Schatschaschwili*, cited above). In the first place, such an assessment should weigh up the relevant competing interests and be surrounded by safeguards against arbitrariness, including the need for the relevant decision to be duly reasoned and for a procedure allowing such reasons to be properly scrutinised, particularly if not disclosed to the alien

188. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

189. *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000.

190. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

191. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

192. *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

concerned. Secondly, it should be entrusted to an authority, judicial or not, which is independent from the executive body seeking to impose the limitation. In this regard, weight is to be attached to the scope of the remit of that authority as well as to the powers vested in it: in this latter respect, it should be ascertained whether that authority would be entitled to declassify the relevant documents itself or to ask the competent body to do so.

(b) As to the second part of the above two-prong test, the Court provided a non-exhaustive list of counterbalancing factors: (i) *relevance of the information disclosed to the alien* – in particular, whether an independent authority, judicial or otherwise, determined what factual information could be disclosed; whether it was provided at a stage of the proceedings when it was still possible to challenge it; and whether it concerned the substance of the accusations (a mere enumeration of the numbers of legal provisions cannot suffice in this respect, not even *a minima*); (ii) *information as to the conduct of the proceedings and the domestic counterbalancing mechanisms* – whether the required information was provided at least at key stages in the proceedings, especially if aliens are not represented and domestic rules impose a certain expedition; (iii) *access to representation in the course of the proceedings*, and whether the representative had access to classified documents and was able to communicate with the alien after consulting them; (iv) *involvement of an independent authority in the proceedings to adopt or review the expulsion measure* – in particular, whether it had access to the classified documents; whether it had the power, and duly exercised it, to verify the authenticity, credibility and veracity of those documents and, if need be, to annul or amend the expulsion decision; whether the nature and the degree of the scrutiny applied are apparent, at least summarily, in the reasoning of its decision; whether the applicant was able to effectively challenge before it the allegations against him or her, it being understood that judicial scrutiny, especially by superior courts, will in principle have a greater counterbalancing effect than an administrative one. Article 1 of Protocol No. 7 does not necessarily require that all of these questions be answered cumulatively in the affirmative.

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL No. 16¹⁹³)

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its

193. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

advisory opinion¹⁹⁴ on 29 May 2020. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions. The Court further developed some aspects of its case-law relating to Article 7 of the Convention.

JUST SATISFACTION (ARTICLE 41)

In *Molla Sali v. Greece*¹⁹⁵ the Court examined the claims submitted by the applicant under Article 41 concerning property not covered by its finding in the principal judgment in the case and located in a State that was not the respondent party.

On the death of her husband, who was a Greek Muslim, the applicant inherited his entire estate under the terms of a will he had drawn up before a notary. The sisters of the deceased successfully challenged the will. The Court of Cassation found that matters of inheritance in the Muslim minority community were to be settled under Sharia law, according to which notarised wills drawn up by Greek nationals of Muslim faith were devoid of legal effect. As a result, the applicant lost three-quarters of the property her husband had bequeathed to her. In its principal judgment of 19 December 2018, the Court found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. It held, in particular, that the difference of treatment suffered by the applicant, the beneficiary of a will drawn up in accordance with the Civil Code by a Greek testator of Muslim faith, compared with a beneficiary of a will drawn up in accordance with the Civil Code by a Greek non-Muslim testator, had no objective and reasonable justification. At the time, the question of the application of Article 41 of the Convention was reserved and it is this that was examined in the present judgment of the Grand Chamber.

In her claims in respect of pecuniary damage in the context of the just satisfaction judgment, the applicant sought compensation for the loss of the property which was located both in Greece and Turkey. The Court noted, as regards the property located in Greece, that the land register had not yet been rectified (the deceased sisters' action to be

194. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 7 (No punishment without law) above.

195. *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, 18 June 2020.

recognised as co-owners of the property was still pending) and it found that Greece should take measures to ensure that the applicant retained ownership of that property or, in the event of an amendment of the land register, that her property rights be restored. In default of taking such measures within a year of the delivery of the just satisfaction judgment, Greece was to pay compensation to the applicant, namely, the value of the proportion (three-quarters) of the inherited property of which she had been deprived under Sharia law. However, if the outcome of the pending domestic proceedings was consistent with the Court's principal judgment and if compensation had been paid in the meantime, the applicant should repay that sum to the respondent State. The Court also found that the legal effects of the deceased's will, in so far as they related to the property located in Turkey, were the subject of pending proceedings in the Turkish courts and that it did not have jurisdiction to rule on the applicant's claims concerning that property. The Court also made awards in respect of non-pecuniary damage and costs and expenses.

The judgment is noteworthy for the Court's analysis of the effect of its principal judgment on a State (Turkey) that had not been a party to those proceedings, when dealing with the applicant's claims under Article 41 concerning property located in Turkey. The Court's reasoning in this regard was informed by the following three elements.

In the first place, the Turkish first-instance court had ruled that the judgment of the Greek Court of Cassation, declaring the applicant's late husband's will null and void, was binding on the Turkish courts under private international law, rendering it unnecessary for them to re-examine the case. The appeals against this judgment lodged by both the applicant and the testator's sisters are currently pending before the Istanbul Court of Appeal. There were no particular circumstances that could be said to amount to the exercise by Greece of its jurisdiction in respect of the proceedings taking place in Turkey.

Secondly, while the will in issue did not distinguish between properties located in Turkey and in Greece, the applicant's notarised deed accepting the will referred to and described the deceased's property in Greece alone. Importantly, the Court, when finding Article 1 of Protocol No. 1 applicable in its principal judgment, explicitly referred only to the Greek properties. It was on that basis alone that the Court had gone on to examine whether there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. Accordingly, the Court had taken no substantive position in the principal judgment on the applicant's alleged rights in relation to the property located in

Turkey. Consequently, this property could not form the basis of any just satisfaction claims against the respondent State in the present judgment concerning the reserved Article 41 proceedings.

Thirdly, while the Court reiterated that under Article 46 of the Convention any judgment of the Court was binding only on the States that were parties to the proceedings giving rise to it (Greece in the present case), it is noteworthy that the Court nevertheless went on to emphasise that

... there is nothing to prevent the Turkish courts from taking the principal judgment into account when giving their decision. ... The Court would further point out that the applicant will, if appropriate, have the opportunity to bring an application against Turkey in respect of the final decision delivered by the Turkish courts on the effects of her husband's will on the property in Turkey, should that decision not have regard to the Court's principal judgment holding Greece liable of violating Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, and should it not draw from it the necessary consequences flowing from Turkey's status as Contracting Party to the Convention.

OTHER CONVENTION PROVISIONS

Restrictions not prescribed by the Convention (Article 18)

*Selahattin Demirtaş v. Turkey (no. 2)*¹⁹⁶ concerned the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The Grand Chamber considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political debate, in breach of Article 18 in conjunction with Article 5 of the Convention.

Inter-State cases (Article 33)

*Slovenia v. Croatia*¹⁹⁷ concerned the Court's jurisdiction to examine an inter-State application alleging a violation of Convention rights of a legal

196. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body), Article 10 (Freedom of expression) and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) above.

197. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Articles 33 and 34 (Applicability – Victim status) above.

entity which did not qualify as “non-governmental” for the purposes of Article 34 of the Convention.

The Slovenian Government lodged an inter-State application (Article 33 of the Convention) against the Croatian Government, alleging a series of violations of the Convention rights of Ljubljana Bank, a legal entity nationalised by the Slovenian State after its declaration of independence from the former Yugoslavia and currently controlled by the Succession Fund, a Slovenian government agency. In the decision in *Ljubljanska Banka D.D. v. Croatia*¹⁹⁸, a Chamber of the Court had already declared inadmissible *ratione personae* an individual application submitted by the Ljubljana Bank itself: although a separate entity, it was found that it did not enjoy sufficient institutional and operational independence from the State to be regarded as non-governmental for the purposes of Article 34 of the Convention.

In the present inter-State case, the Grand Chamber equally decided that Article 33 does not empower the Court to examine inter-State applications aimed at protecting the rights of entities which cannot be regarded as “non-governmental”. The Court lacked therefore jurisdiction to take cognisance of the application.

This Grand Chamber decision is noteworthy in two respects. In the first place, it clarified the distinction between “jurisdiction” and “admissibility” within the meaning of Articles 32 and 35 of the Convention, respectively. Secondly, the Grand Chamber clarified that a Contracting Party may not use the inter-State procedure to protect the interests of a legal entity which itself would not be entitled to lodge an individual application pursuant to Article 34 of the Convention.

(i) Before deciding on whether the present application was compatible with Article 33 of the Convention, the Grand Chamber had to ascertain whether it could examine this question at the admissibility stage of the proceedings. An inter-State application can be rejected as inadmissible pursuant to Article 35 only for a failure to exhaust domestic remedies or to comply with the six-month time-limit: the other admissibility criteria are reserved for the post-admissibility stage to be examined on the merits of the case. Nevertheless, referring to general principles governing the exercise of jurisdiction by international tribunals, the Grand Chamber found that nothing prevented it from establishing, already at the admissibility stage, whether it has any competence at all to deal with the matter laid before it. In other words, the Court could reject an inter-State application without declaring it admissible if it was clear,

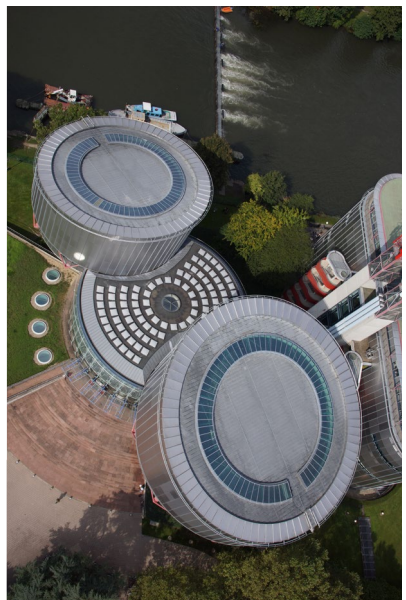
198. *Ljubljanska Banka D.D. v. Croatia* (dec.), no. 29003/07, 12 May 2015.

from the outset, that it was wholly unsubstantiated or otherwise lacked the requirements of a genuine allegation in the sense of Article 33 of the Convention. The Grand Chamber considered that the key question before it – whether the Convention as a human rights treaty could create subjective rights for “governmental” entities – was not an “admissibility” one since it did not correspond to any of the admissibility criteria set out in Article 35 of the Convention but it was rather a question which went beyond the boundaries of the Convention mechanism and touched upon a general issue of international law. It was therefore a matter pertaining to the Court’s “jurisdiction” within the meaning of Article 32 and, as such, could be adjudicated upon at any stage of the proceedings.

(ii) As to that precise key question, the Grand Chamber found that Article 33 did not allow the Court to examine an inter-State application aimed at protecting the rights of an entity which would not be able to lodge an individual application under Article 34 because it could not be regarded as “non-governmental”. It did so for essentially three reasons. In the first place, the Grand Chamber applied the general principle according to which the Convention must be read as a whole and construed in such a way as to promote internal consistency between its provisions – including the jurisdictional and procedural provisions such as Articles 33 and 34 of the Convention. This implied that the meaning and scope of “non-governmental organisation” had to be the same for the purposes of both of these provisions. Secondly, the Grand Chamber took into account the specific nature of the Convention as a human rights treaty, universally recognised in international law. It observed that even in an inter-State case, it is always the individual who is directly or indirectly harmed and primarily “injured” by a violation of the Convention. In other words, only individuals, groups of individuals and legal entities which qualified as “non-governmental organisations” could be bearers of rights under the Convention, but not a Contracting State or any legal entity belonging to it. Thirdly, the Grand Chamber drew a logical conclusion from the principle defined in the just satisfaction judgment in *Cyprus v. Turkey*¹⁹⁹ according to which any just satisfaction afforded in an inter-State case must always be for the benefit of individual victims and not for the benefit of the State. If therefore the Court found a violation in an inter-State case brought on behalf of a “governmental” organisation, then the eventual beneficiary of any sum awarded under Article 41 would be the applicant State only. In the present case, the Grand Chamber saw no reason to depart from the findings of the Chamber in

199. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

the above-cited decision in *Ljubljanska Banka D.D.*, according to which the Bank did not constitute a “non-governmental organisation” for the purposes of Article 34 of the Convention. Consequently, the applicant Government were not entitled to lodge an inter-State application with a view to protecting its interests.



Chapter 3

Superior Courts Network

A network that evolves and adapts

The importance of the dialogue between the Court and national courts continues to be highlighted, including through the Superior Courts Network (SCN), aimed at ensuring an exchange of information on Convention case-law as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention¹.

The SCN continues to grow, in terms of both the expansion of its membership and the increasingly fruitful exchanges through its activities. It ends 2020 with ninety-three member courts in forty States, the latest addition being the German Federal Constitutional Court.

The SCN and the challenge of the pandemic

The pandemic that marked 2020 worldwide also prevented the SCN from holding its traditional annual Forum. Some rapid adjustments led to the creation of a new meeting format, in the form of the SCN theme-based webinars. Two webinars were held in 2020: the first, which took place in July, dealt with the topic “Adapting judicial systems to the COVID-19 pandemic and its potential impact on the right to a fair trial”, while the second, in October, focused on “Detention and health”.

As early as April the member courts of the SCN had begun sharing information on Convention-related legal issues arising out of the COVID-19 pandemic. A compilation mainly comprising decisions adapting judicial procedures to the pandemic, and any substantive case-law on Convention issues in the same context, was published on the SCN’s secure site and has been updated regularly with contributions from members.

1. Decision of the Committee of Ministers of the Council of Europe on the occasion of the 70th anniversary of the Convention, at its annual session on 4 November 2020.

This practice, together with the series of webinars organised with the help of funding from the Council of Europe's Directorate General of Human Rights and the Rule of Law (DG1), allowed the SCN to adapt and to continue its activities effectively.

The first two webinars revealed a keen interest on the part of the member courts in this form of online discussion of legal issues that concern them all. Representatives from the member courts participated very effectively in the discussions, whether by taking the floor or contributing questions and comments. The aim of these webinars is to bring the member courts together for shared reflection on a particular Convention-related topic. The Court's role is to provide the framework for the discussions and facilitate them, while experts from the Court and its Registry provide input from the perspective of the Court's case-law. Experts from other backgrounds are also invited to the webinars in order to offer a greater variety of perspectives from different disciplines and to enrich the debate.

An ongoing response to member courts' needs

While adjusting to the changed conditions, the SCN has maintained its existing forms of exchange, and in particular the Knowledge Sharing platform, assistance to member courts in response to specific questions about Convention law ("formal requests"), assistance with searches of the HUDOC database, and members' contributions to the Court's comparative-law activities.

These contributions, which are immensely useful for the Court's comparative work, also constitute a valuable source for the SCN as a whole. The member courts attach particular importance to informal exchanges, through the intermediary of the SCN, on the application of the Convention in each jurisdiction. At the request of the member courts, contributions are therefore compiled and shared within the SCN once the judgment (or decision) which was the subject of the comparative-law research has been delivered.

A survey was carried out which demonstrated the member courts' attachment to all these tools, which have proved their worth and now form part of their day-to-day work. In particular, members stressed the usefulness of the Knowledge Sharing platform, the content of which is constantly evolving, reflecting the development of the Court's case-law. In 2020 almost all the normative clauses of the Convention and its Protocols were covered, and further pages were added on overarching topics concerning several clauses of the Convention.

Previous experience has shown that the member courts have varied needs in terms of access to the Court's case-law. These needs may cover both guidance in navigating the vast corpus of case-law and more fine-tuned technical assistance, to foster a better understanding of the Court's reasoning and methodology.

As to the experience of the past year, it further highlighted the degree of similarity in the issues facing the member courts, and the Strasbourg Court, in implementing Convention values and principles.

In his opening speech for the first webinar, on 10 July 2020, the President of the Court, Robert Spano, focused on the dialogue between the Strasbourg Court and national judicial systems as the bedrock of the Convention system. President Spano stressed that the Court and the national judges formed a "community of judges" with a vital role in ensuring the implementation of Convention values and principles. He addressed the national judges in the following terms:

The international challenges which we all face today are just one more reason to forge closer ties and strengthen cooperation in the European judicial community. We all know that the pandemic has simply come to us over and above already existing tensions within the European legal landscape. We have to now be ever mindful of the crucial importance for independent and impartial judges to secure and uphold the safeguarding and protection of human rights.

The Superior Courts Network, which is a unique body in many ways, will continue its pan-European vocation, developing various forms of cooperation and coordination with the relevant entities of the Council of Europe, but also with other judicial networks with a European vocation.



Chapter 4

Bringing the Convention home

2020 saw the launch of the Ukrainian user interface of the HUDOC case-law database, a continued increase in the number of partners translating Court materials and further development of the Knowledge Sharing platform with a view to launching a fully external version.

In line with the conclusions of the Interlaken, Izmir, Brighton, Brussels and Copenhagen Conferences, the Court's knowledge-sharing and case-law translation programmes are designed to improve the accessibility to and understanding of key Convention principles and standards at national level, in order to give full expression to the principle of subsidiarity, which will be inserted in the Preamble to the Convention when Protocol No. 15 comes into force.

The 130th session of the Committee of Ministers of the Council of Europe, held on the occasion of the 70th anniversary of the Convention on 4 November, underlined the importance of the dialogue between the Court and national courts. It further called upon all States Parties to give full effect to the principle of subsidiarity by complying with their obligations to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, to abide by the judgments of the Court rendered against them, to ensure the promotion and effective implementation of the Convention, and to translate and disseminate the Court's case law at national level.¹

1. [Securing the long-term effectiveness of the system of the European Convention on Human Rights](#), 130th Session of the Committee of Ministers (Videoconference, Athens, 4 November 2020).

The Court works with the member courts of the Superior Courts Network (SCN, over ninety courts from forty States), as well as with multiple additional partners who all share the objective of disseminating Convention standards, with a view to improving their implementation at national level. This year a series of webinars took place within the SCN in order to intensify dialogue between the Court and the domestic judiciaries (see Chapter 3).

The year also saw the further development of the Knowledge Sharing platform with a view to making it available in a fully external version as soon as feasible. In the meantime, the Court's website continues to offer a wealth of materials such as regularly updated case-law guides which cover an ever-expanding range of Convention Articles and transversal topics; a biannual overview of the most significant developments in the Court's case-law; thematic handbooks and factsheets; video-talks explaining its case-law in matters such as terrorism and asylum; as well as a methodological guide on how to make optimal use of the available materials.

With the help of its various partners the Court continued to ensure the translation of judgments, decisions and case-law publications into languages other than its official ones (English and French). 2020 saw a continued increase in the number of such partnerships: the new Ukrainian user interface for the HUDOC database will facilitate case-law searches for legal professionals working in that language.

DISSEMINATION OF THE COURT'S CASE-LAW

Selection of key cases

The Bureau of the Court identifies those judgments and decisions it considers to be of particular importance for each quarter, for example because they make a significant contribution to the development of the Court's case-law, deal with a new problem of general interest or entail a new interpretation or clarification of principles. Cases in this category will always be made available in both official languages. The selected cases can be found either by referring to the quarterly and annual lists available on the Court's website² or by selecting "Key cases" under the "Importance" filter in HUDOC.

The HUDOC case-law database

2020 saw the welcome launch of the Ukrainian user interface of the Court's HUDOC site (hudoc.echr.coe.int³), a project developed in

2. Under *Case-law/Judgments and decisions/Selection of key cases/Key cases*.

3. FAQs, manuals and video tutorials on HUDOC are available on the Court's website under *Case-law/Judgments and decisions/HUDOC database*.

cooperation with the Ukrainian Ministry of Justice. HUDOC-ECHR now exists in a total of seven languages (English, French, Georgian, Russian, Spanish, Turkish and Ukrainian). The development of a Bulgarian interface is well under way and further language versions are under consideration. The number of HUDOC-ECHR visits increased by 22.6% in 2020 (5,538,216 visits compared with 4,516,395 visits in 2019).

22%

HUDOC visits



The Registry also joined forces with the EU Fundamental Rights Agency (FRA) by making HUDOC documents and metadata available through FRA's human rights gateway, EFRIS (EU Fundamental Rights Information System), which provides one-stop access to databases tracking EU member States' acceptance of human rights treaties, as well as compliance assessments by various monitoring mechanisms.

The launch of HUDOC-GREVI (Group of Experts on Action against Violence against Women and Domestic Violence) brought the total number of HUDOC sites to nine.

Case-law translations programme

The Registry continued its efforts to improve the understanding of Convention principles and standards in those member States where neither of the Court's official languages is sufficiently understood.

The Registry maintains a standing invitation to courts, ministries, judicial training centres, associations of legal professionals, non-governmental organisations and other partners to offer, for inclusion in HUDOC, any case-law translations to which they have the rights.

The Registry also references, on the Court's website, third-party websites or databases hosting translations of the Court's case-law, and welcomes suggestions for the inclusion of further sites of this kind⁴.

The Court's various partners continue to support its work and the implementation of the Convention at national level by offering to translate select judgments, decisions and advisory opinions as well as publications, factsheets, legal summaries, country profiles and the like. These are then shared with the Court so as to be made available either on its website or in HUDOC. By way of example, some sixty translations of case-law guides, handbooks and research reports were published in 2020⁵.

4. More information can be found on the Court's website under [Case-law/Judgments and decisions/Case-law translations/Existing translations/External online collections of translations](#); scroll down to see the list of third-party sites.

5. Some seventy translations remained pending at the end of 2020 (for a complete list see the online table at www.echr.coe.int/Documents/Translations_pending_ENG.pdf).

In addition, some 32,000 in thirty-one languages other than English and French have now been made available in HUDOC – nearly 20% of its total content – making it the first port of call for legal professionals across Europe and beyond⁶. The language-specific filter allows for rapid searching of these translations, including in free text.

32,000
translations

31 languages

By proposing or outsourcing materials for translation, the Registry also lends its support to the implementation of Council of Europe Action Plans for specific member States, as well as to the implementation of joint Council of Europe-EU programmes and projects building capacity at national or regional level.

Finally, the Court continued to work with other sectors of the Council of Europe to accompany reforms, in particular in Morocco and Tunisia, as part of the Council of Europe’s Neighbourhood Partnerships (2018-21), [South Programme III \(2018-2020\)](#) as well as in cooperation with the Council of Europe’s programme, Human Rights Education for Legal Professionals (HELP).

OTHER PUBLICATIONS AND INFORMATION TOOLS

Jurisconsult’s Overview of the case-law

The Jurisconsult’s *Overview of the case-law* provides valuable insight into the most important judgments and decisions delivered by the Court each year, setting out the salient aspects of the Court’s findings and their relevance to the evolution of its case-law. The annual version of the *Overview* can be consulted in this Annual Report. Both the annual and interim versions (the latter is published halfway through the year) can also be downloaded separately from the Court’s website.

Case-law guides and research reports

The Directorate of the Jurisconsult published five new Article guides covering Article 10 (Freedom of expression); Article 12 (Right to marry);

Publishers or anyone wishing to translate and/or reproduce Court materials (or any translation thereof) should contact publishing@echr.coe.int for further instructions regarding applicable intellectual rights and in order to avoid duplicating an already pending translation.

6. The translations are published with a disclaimer since the only authentic language version of a judgment, decision or advisory opinion is in one or both of the Court’s official languages.

Article 14 and Article 1 of Protocol No. 12 (Prohibition of discrimination); Article 46 (Binding force and execution of judgments); and Article 1 of Protocol No. 7 (Procedural safeguards relating to expulsion of aliens). In addition, two further thematic guides were launched, on mass protests and prisoners' rights, and existing guides were regularly updated.

The Directorate also published five research reports on the Court's case-law covering the following subjects: a State's "jurisdiction" for the acts of its diplomatic and consular agents (Article 1); the "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law (Article 7); application of Islamic law in the domestic legal order (Article 9); expression and advertising of political positions through the media/Internet in the context of elections/referendums (Article 10); and victim status of company shareholders in relation to measures affecting their companies or their shares (Article 1 of Protocol No. 1).

All these materials are available on the Court's website under [Case-law/Case-law analysis](#).

Methodological guide

The Directorate also updated its methodological guide on how to make the best use of the HUDOC database, Court publications, newsfeeds and other tools ([Finding and understanding the case-law](#)). It is available in multiple languages on the Court's website (under [Case-law/Case-law analysis](#)).

Handbooks on European law

In December 2020 a new edition of the *Handbook on European law relating to asylum, borders and immigration* was published in English, French, German, and Italian in cooperation with FRA. Additional translations of other existing ones were made available throughout the year. All Handbooks and language editions are available online under [Case-law/Other publications](#).

Case-law Information Note

The Case-law Information Note (CLIN) has played a key role in the dissemination of the Court's case-law since the first monthly edition was published in 1998. It has evolved considerably over the years but mainly reports on the most interesting cases recently examined by the Court.

The complete set of Information Notes and annual indexes are available on the Court's website ([Case-law/Case-law analysis/Case-law Information Note](#)), while individual legal summaries of the different

cases can be found in the HUDOC database. These summaries are published on the day of delivery of the judgment, decision or opinion and translated into the other official language. Translations into non-official languages are also available in some cases.

Compilation on human rights challenges in the digital age

In partnership with Council of Europe Publishing and with the support of the Finnish Ministry for Foreign Affairs, the Court published a compilation of articles on the topic *Human Rights Challenges in the Digital Age: Judicial Perspectives*⁷. The book followed a seminar held in June 2019 honouring the then retiring Jurisconsult Lawrence Early and bringing together various experts on media law and data protection.

Joint Law Report of regional human rights courts

In July 2018, on the occasion of the 40th anniversary of the entry into force of the American Convention on Human Rights, the three regional human rights courts adopted the San José Declaration and established a Permanent Forum of Institutional Dialogue which is to meet every two years.

In October 2019, the African Court of Human and Peoples' Rights hosted the first Forum in Kampala. This was followed by the first *Joint Law Report*, published in 2020 and covering the three courts' leading case-law of the preceding year⁸.

Factsheets and country profiles

In 2020 the Press Unit prepared one new Factsheet on the Court's case-law concerning, in particular, the independence of justice. More than sixty Factsheets are now available in English and French, many of which have been translated into German, Greek, Italian, Polish, Romanian, Russian, Spanish and Turkish with the support of, among others, the States concerned and national human rights institutions. These Factsheets provide the reader with a rapid overview of the most relevant cases concerning a particular topic and are regularly updated to reflect the development of the case-law.

The Press Unit has also prepared Country Profiles covering each of the forty-seven Council of Europe member States. These profiles, which

7. <https://book.coe.int/en/human-rights-and-democracy/8055-pdf-human-rights-challenges-in-the-digital-age-judicial-perspectives.html>.

8. https://www.echr.coe.int/Documents/Joint_Report_2019_AfCHPR_ECHR_IACHR_ENG.pdf.

are updated regularly, provide general and statistical information on each State as well as summaries of the most noteworthy cases.

The Factsheets and Country Profiles can be viewed on, and downloaded from, the Court's website under [Press/Press Service/Factsheets](#) and [Press/Press Service/Country Profiles](#).

TRAINING OF LEGAL PROFESSIONALS

At the beginning of 2020 judges and Registry members continued to offer their expertise at case-law training events, both at the Court and in the member States. In organising training sessions, the Court maintained its long-standing cooperation with the French *Conseil d'Etat*. Cooperation also continued with the Swedish National Courts Administration.

Group visits were cancelled from March onwards on account of the COVID-19 pandemic. The events then took place mainly in a virtual format.

HUDOC training sessions were organised for judges and prosecutors being trained by the European Judicial Training Network, the Office of the Armenian Government Agent before the Court, as well as for trainers on the HELP programme of the Council of Europe.

The Registry also contributed expertise to a know-how webinar for the benefit of the African Court of Human and Peoples' Rights.

In partnership with the European Judicial Training Network, the Court organised an in-person training session at the beginning of the year for judges and prosecutors from EU member States. An online session was organised in November in order to deliver training while complying with the restrictions imposed by the confinement period.

In 2019 the Visitors' Unit organised nine training sessions lasting between one and three days for legal professionals from six of the forty-seven member States.

With the cooperation and support of the Council of Europe's HELP programme, the Court's website hosts three video-presentations in the COURTtalks-disCOURs series: on the admissibility criteria, asylum and terrorism. These videos serve as a training tool for the HELP programme, judicial training institutes and Bar associations, complementing other materials produced by the Court and by HELP. The videos with their transcripts have been published online in multiple languages ([Case-law/Case-law analysis/COURtalks-disCOURs](#)).

GENERAL OUTREACH

Public relations

The Court's communication activities in 2020 were inevitably affected by the public-health crisis.

The Court made it a priority to communicate to applicants and their representatives the measures it had put in place on account of the COVID-19 crisis. The information was published in the official languages of the Council of Europe on the [Applicants](#) page of the Court's website. During the year the information was updated to reflect the various measures taken as the public-health situation evolved.

As it was no longer possible to hold hearings in the presence of the parties and the public, the Court adjusted its procedures and opted to conduct hearings by video-conference. The hearings were recorded and retransmitted on [the Court's website](#), like all hearings since 2007, thanks to a contribution from Ireland.

Several conferences, in particular those organised to mark the 70th anniversary of the Convention, also had to be conducted by video-conference, as did the swearing-in ceremonies for the new judges of the Court. In addition, numerous video messages from the President and the judges were recorded owing to the impossibility of travelling to the Council of Europe member States to attend seminars and conferences and raise awareness of the Convention system.

To mark the 70th anniversary of the Convention, the Court published a [commemorative book](#) which was launched to coincide with the inauguration of the judicial year.



This work contains many hitherto unpublished photos and recounts the history of the Court, especially in images. A copy of the original

Convention text has been reproduced for the first time, and this is also the first publication to contain pictures of all the Court's judges since its creation. In addition, case-law of major importance for Europe is presented through forty-seven cases, one for each member State, tracing their background and especially their impact in the various States Parties to the Convention. Lastly, the book takes a look inside the Human Rights Building, an architectural icon which was inaugurated exactly twenty-five years ago and which also features on a commemorative stamp issued by the French postal service.

The Court also published a new brochure for the public entitled [The European Convention on Human Rights – A living instrument](#). This publication presents the Convention, its development and its Articles and Protocols in an easy-to-read style, in order to raise awareness among the wider public concerning this key instrument of the Organisation. It is already available in [fourteen language versions](#).

A special [webpage dedicated to the 70th anniversary of the Convention](#) was created in 2020. It contains useful information and details of the various initiatives taken to celebrate, in so far as possible given the global situation, one of the main European and international instruments.

Furthermore, an exhibition on seventy years of the Convention was staged by the Court in the Palais de l'Europe, the headquarters of the Council of Europe.

As it does every year, the Court published its [Facts and figures](#) for 2019, as well as an [Overview 1959-2019](#) covering the sixty years of the Court's activity. Further additions were made to the series of documents [Facts and figures by State](#), with the publication of facts and figures for the countries that held the Chairmanship of the Committee of Ministers in 2020, namely [Greece](#) and [Germany](#), as well as five further publications concerning [Albania](#), [Andorra](#), [Armenia](#), [Croatia](#) and [Denmark](#).

In 2020, more than ever, the Court's website was its main channel of communication. The website (www.echr.coe.int) was visited more than 2,621,000 times in 2020, an increase of 9% over the previous year. It is updated daily, and in 2020 the menu was partially overhauled and new pages were created to make it easier to navigate and search (pages on [Registrars](#), [Dialogue between courts](#), [Regional Human Rights Courts](#), [70 years of the Convention](#), [Advisory opinions](#), [Press](#), [Official visits](#), and so on).

2,621,000
number of visits to the website

an increase of **9%**

The online catalogue of the Court’s library, containing references to the secondary literature on the Convention case-law and Articles, was consulted around 295,200 times in 2020.

The website also underwent something of a makeover, with the styles being redesigned.

The Court made changes to its Twitter account, which can now be found at twitter.com/ECHR_CEDH, replacing the two separate accounts it had previously, one for press and the other for publications. The new single Twitter account enables legal professionals, the media and the general public to keep up with the Court’s news.

The Court also continued to add event videos to its [YouTube](#) channel.

Visits

2020 was marked by the COVID-19 pandemic. The public-health measures adopted in these exceptional circumstances inevitably had an impact on visits to the Court, which were suspended in March 2020.

In 2020 the Visitors’ Unit organised seventy-three information visits for 1,800 members of the legal community. In total, 2,603 visitors were welcomed to the Court.

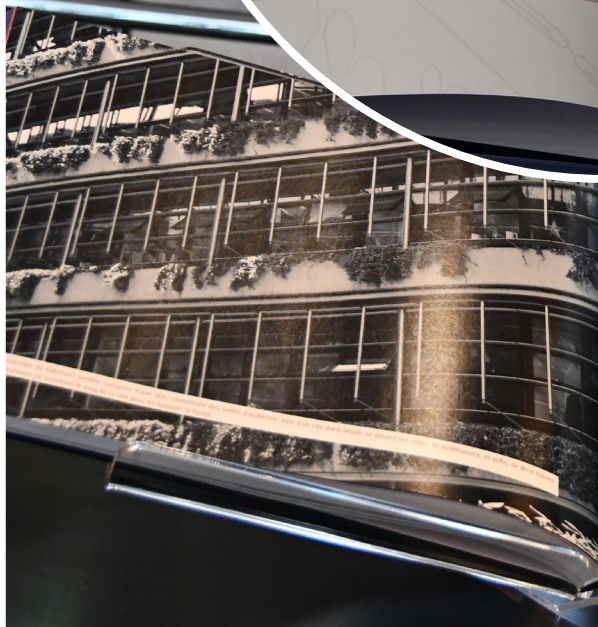
KEY CASES

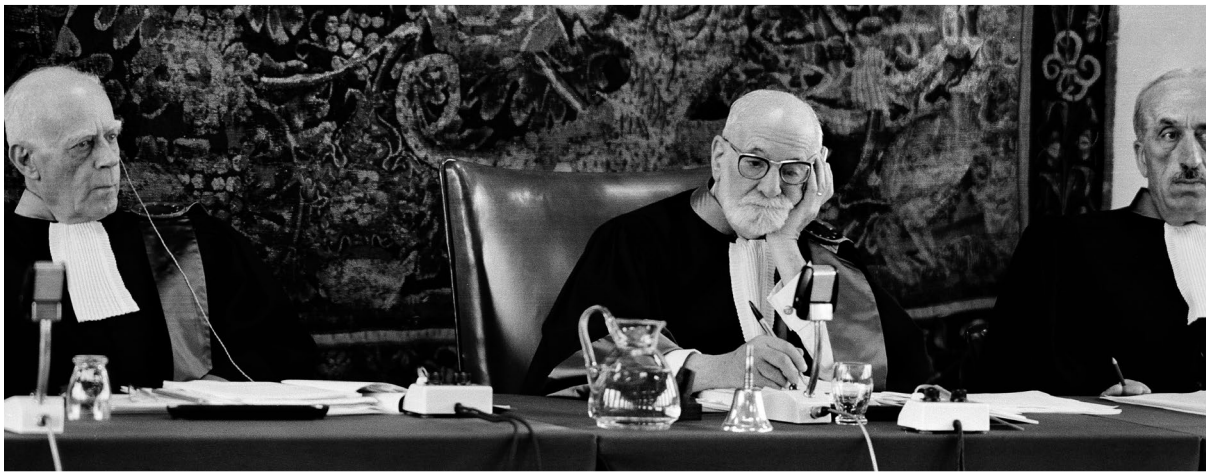
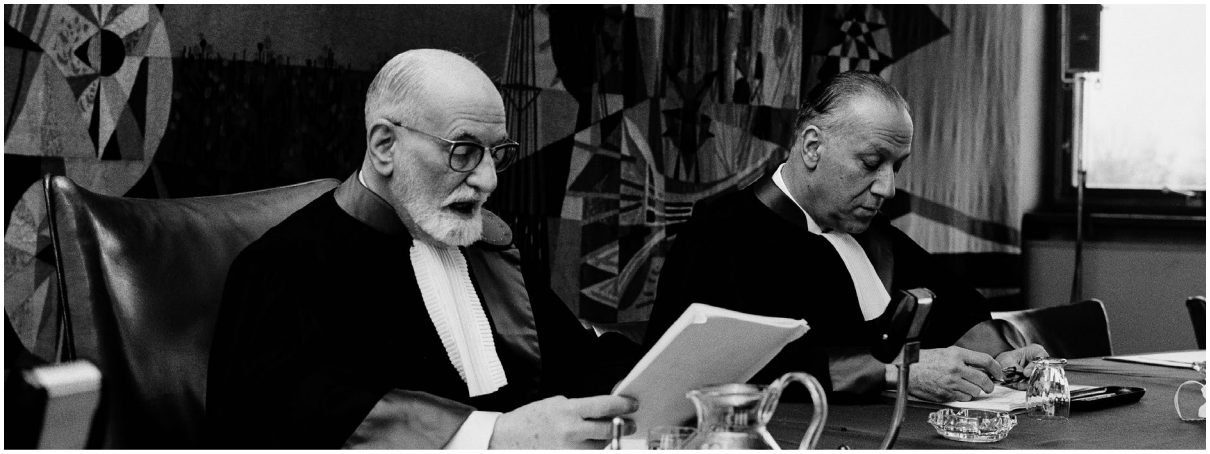
List approved by the Bureau following recommendation by the Jurisconsult of the Court

Cases are listed alphabetically by respondent State. By default, all references are to Chamber judgments. Grand Chamber cases, whether judgments or decisions, are indicated by “[GC]”. Decisions are indicated by “(dec.)”. Chamber judgments that are not yet “final” within the meaning of Article 44 of the Convention are marked “(not final)”.

ALBANIA	<i>Tërshana v. Albania</i> , no. 48756/14, 4 August 2020
AZERBAIJAN	<i>Farzaliyev v. Azerbaijan</i> , no. 29620/07, 28 May 2020 <i>Makuchyan and Minasyan v. Azerbaijan and Hungary</i> , no. 17247/13, 26 May 2020
BELGIUM	<i>M.N. and Others v. Belgium</i> (dec.) [GC], no. 3599/18, 5 May 2020 <i>Mugemangango v. Belgium</i> [GC], no. 310/15, 10 July 2020
CROATIA	<i>Mile Novaković v. Croatia</i> , no. 73544/14, 17 December 2020 <i>Miljević v. Croatia</i> , no. 68317/13, 25 June 2020 <i>S.M. v. Croatia</i> [GC], no. 60561/14, 25 June 2020 <i>Slovenia v. Croatia</i> (dec.) [GC], no. 54155/16, 18 November 2020
FINLAND	<i>Kotilainen and Others v. Finland</i> , no. 62439/12, 17 September 2020

- FRANCE** *Ayoub and Others v. France*, nos. 77400/14, 34532/15 and 34550/15, 8 October 2020
Baldassi and Others v. France, nos. 15271/16 and 6 others, 11 June 2020
Ghoumid and Others v. France, nos. 52273/16 and 4 others, 25 June 2020
N.H. and Others v. France, nos. 28820/13 and 2 others, 2 July 2020
- GERMANY** *Akbay and Others v. Germany*, nos. 37273/15 and 2 others, 15 October 2020
Breyer v. Germany, no. 50001/12, 30 January 2020
- GREECE** *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, 18 June 2020
Stavropoulos and Others v. Greece, no. 52484/18, 25 June 2020
- HUNGARY** *Albert and Others v. Hungary* [GC], no. 5294/14, 7 July 2020
Magyar Kétfarkú Kutya Párt v. Hungary [GC], no. 201/17, 20 January 2020
Makuchyan and Minasyan v. Azerbaijan and Hungary, no. 17247/13, 26 May 2020
- ICELAND** *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68271/14 and 68273/14, 22 December 2020
Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020
- LITHUANIA** *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020
- POLAND** *Ćwik v. Poland*, no. 31454/10, 5 November 2020
M.K. and Others v. Poland, nos. 40503/17 and 2 others, 23 July 2020
- ROMANIA** *A and B v. Romania*, no. 48442/16, 2 June 2020
Ádám and Others v. Romania, nos. 81114/17 and 5 others, 13 October 2020 (not final)
Buturugă v. Romania, no. 56867/15, 11 February 2020
Muhammad and Muhammad v. Romania [GC], no. 80982/12, 15 October 2020
Napotnik v. Romania, no. 33139/13, 20 October 2020
- SLOVAKIA** *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, 10 December 2020
- SLOVENIA** *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020
- SPAIN** *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020
Saqueti Iglesias v. Spain, no. 50514/13, 30 June 2020
- SWITZERLAND** *B and C v. Switzerland*, nos. 43987/16 and 889/19, 17 November 2020
- TURKEY** *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020





Chapter 5

Judicial activities

For more information go to www.echr.coe.int under Statistics.

62,000

pending applications

increase of 4%

381

judgments

delivered by Chambers

480

judgments

delivered by
Committees of
three judges

31,069

applications

declared inadmissible
or struck out by
single judges

10

judgments

delivered by the
Grand Chamber

9

oral hearings

held by the Grand
Chamber

5,002

applications

declared inadmissible
or struck out by
Committees

2

cases

relinquished to the
Grand Chamber

5

cases

referred to the
Grand Chamber

190

applications

declared inadmissible
or struck out by
Chambers

3

advisory-opinion requests

submitted to the Grand Chamber

1

advisory opinion

delivered by the Grand Chamber

COMPOSITION OF THE COURT

At 31 December 2020, in order of precedence, from left to right

ROBERT SPANO Iceland President	Jon Fridrik Kjølbro Denmark Vice-President	Ksenija Turković Croatia Vice-President
PAUL LEMMENS Belgium Section President	Síofra O'Leary Ireland Section President	Yonko Grozev Bulgaria Section President
GANNA YUDKIVSKA Ukraine	LINOS-ALEXANDRE SICILIANOS Greece	ALEŠ PEJCHAL Czech Republic
KRZYSZTOF WOJTYCZEK Poland	VALERIU GRITCO Republic of Moldova	FARIS VEHAHOVIĆ Bosnia and Herzegovina
DMITRY DEDOV Russian Federation	EGIDIJUS KŪRIS Lithuania	IULIA ANTOANELLA MOTOC Romania
BRANKO LUBARDA Serbia	CARLO RANZONI Liechtenstein	MĀRTIŅŠ MITS Latvia
ARMEN HARUTYUNYAN Armenia	STÉPHANIE MOUROU- VIKSTRÖM Monaco	GEORGES RAVARANI Luxembourg
GABRIELE KUČSKO- STADLMAYER Austria	PERE PASTOR VILANOVA Andorra	ALENA POLÁČKOVÁ Slovak Republic
PAULIINE KOSKELO Finland	GEORGIOS SERGHIDES Cyprus	MARKO BOŠNJAK Slovenia
TIM EICKE United Kingdom	LƏTIF HÜSEYNOV Azerbaijan	JOVAN ILIEVSKI North Macedonia
JOLIEN SCHUKKING Netherlands	PÉTER PACZOLAY Hungary	LADO CHANTURIA Georgia
MARÍA ELÓSEGUI Spain	IVANA JELIĆ Montenegro	GILBERTO FELICI San Marino
ARNFINN BÅRDSEN Norway	DARIAN PAVLI Albania	ERIK WENNERSTRÖM Sweden
RAFFAELE SABATO Italy	SAADET YÜKSEL Turkey	LORRAINE SCHEMBRI ORLAND Malta
ANJA SEIBERT-FOHR Germany	PEETER ROOSMA Estonia	ANA MARIA GUERRA MARTINS Portugal
MATTIAS GUYOMAR France	MARIALENA TSIRLI Greece Registrar	ABEL CAMPOS Portugal Deputy Registrar

Note: the post of the judge in respect of Switzerland is vacant.

COMPOSITION OF THE SECTIONS

At 31 December 2020, in order of precedence

section

KSENIJA TURKOVIĆ *President*
 KRZYSZTOF WOJTYCZEK *Vice-President*
 LINOS-ALEXANDRE SICILIANOS
 ALENA POLÁČKOVÁ
 PÉTER PACZOLAY
 GILBERTO FELICI
 ERIK WENNERSTRÖM
 RAFFAELE SABATO
 LORRAINE SCHEMBRI ORLAND
 ABEL CAMPOS *Registrar*
 RENATA DEGENER *Deputy Registrar*

1

section

JON FRIDRIK KJØLBRO *President*
 MARKO BOŠNJAK *Vice-President*
 ALEŠ PEJCHAL
 VALERIU GRITCO
 EGIDIUS KÜRIS
 BRANKO LUBARDA
 CARLO RANZONI
 PAULIINE KOSKELO
 SAADET YÜKSEL
 STANLEY NAISMITH *Registrar*
 HASAN BAKIRCI *Deputy Registrar*

2

section

PAUL LEMMENS *President*
 GEORGIOS SERGHIDES *Vice-President*
 ROBERT SPANO
 DMITRY DEDOV
 GEORGES RAVARANI
 MARÍA ELÓSEGUI
 DARIAN PAVLI
 ANJA SEIBERT-FOHR
 PEETER ROOSMA
 MILAN BLASKO *Registrar*
 OLGA CHERNISHOVA *Deputy Registrar*

3

section

YONKO GROZEV *President*
 TIM EICKE *Vice-President*
 FARIS VEHAHOVIĆ
 IULIA ANTOANELLA MOTOC
 ARMEN HARUTYUNYAN
 GABRIELE KUCSKO-STADLMAYER
 PERE PASTOR VILANOVA
 JOLIEN SCHUKKING
 ANA MARIA GUERRA MARTINS
 ANDREA TAMIETTI *Registrar*
 ILSE FREIWIRTH *Deputy Registrar*

4

section

SÍOFRA O'LEARY *President*
 MĀRTIŅŠ MITS *Vice-President*
 GANNA YUDKIVSKA
 STÉPHANIE MOUROU-VIKSTRÖM
 LĀTIF HÜSEYNOV
 JOVAN ILIEVSKI
 LADO CHANTURIA
 IVANA JELIĆ
 ARNFINN BÅRDSSEN
 MATTIAS GUYOMAR
 VICTOR SOLOVEYTCHIK *Registrar*
 MARTINA KELLER *Deputy Registrar*

5

In order to deal with the COVID-19 public-health crisis¹ and take account of the decisions of the French authorities and of the Council of Europe, the European Court of Human Rights had to take a number of exceptional measures.

The Court's core activities continued, and especially the handling of priority cases. Remote working became the norm at the Court.

Procedures were put in place for the examination of urgent requests for interim measures under Rule 39 of the [Rules of Court](#), which is applied only where there is an imminent risk of irreversible harm.

The premises of the European Court of Human Rights were no longer accessible to the public.

Some of the time-limits inherent in the procedure were temporarily suspended.

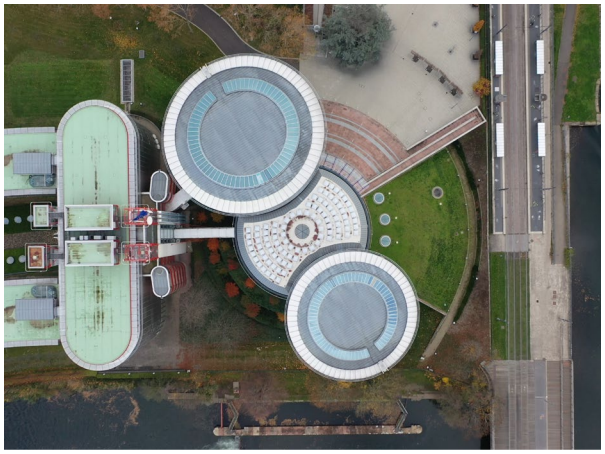
The six-month time-limit for lodging an application, laid down by Article 35 of the [European Convention on Human Rights](#), was suspended on an exceptional basis for one month from Monday 16 March 2020. It was extended by a further two months from 16 April 2020 until 15 June 2020 inclusive. The time-limits which had been allotted in pending proceedings, extended for one month from 16 March 2020, were extended for a further two-month period from 16 April 2020. This extension did not apply to the three-month period under Article 43 of the Convention for requesting the referral of a case to the Grand Chamber.

During the second lockdown in France no special arrangements were made with regard to procedures and time-limits.

During the public-health crisis all the Court's core activities continued, including the registering of incoming applications and their allocation to the relevant judicial formations.

On 10 June 2020, for the first time in its history, the Court held a hearing by video-conference, under the special measures adopted on account of the global health crisis. That hearing and those that followed (a total of six in 2020) took place without members of the public being present. In most cases, the parties made their oral pleadings by videolink. All the Court's hearings are filmed and retransmitted on the Court's website.

1. The activities of the European Court of Human Rights during the public-health crisis: [PR no. 103](#). The functioning of the Court during lockdown: [PR no. 111](#).



Chapter 6

Statistics

A glossary of statistical terms ([Understanding the Court's statistics](#)) and further statistics are available on www.echr.coe.int under **Statistics**.

Allocated applications*	2020	2019	+/-
Total	41,700	44,500	- 6%

Communicated applications	2020	2019	+/-
Total	7,681	6,442	19%

Decided applications	2020	2019	+/-
Total	39,190	40,667	- 4%
by judgment delivered	1,901	2,187	- 13%
by decision (inadmissible/struck out)	37,289	38,480	- 3%

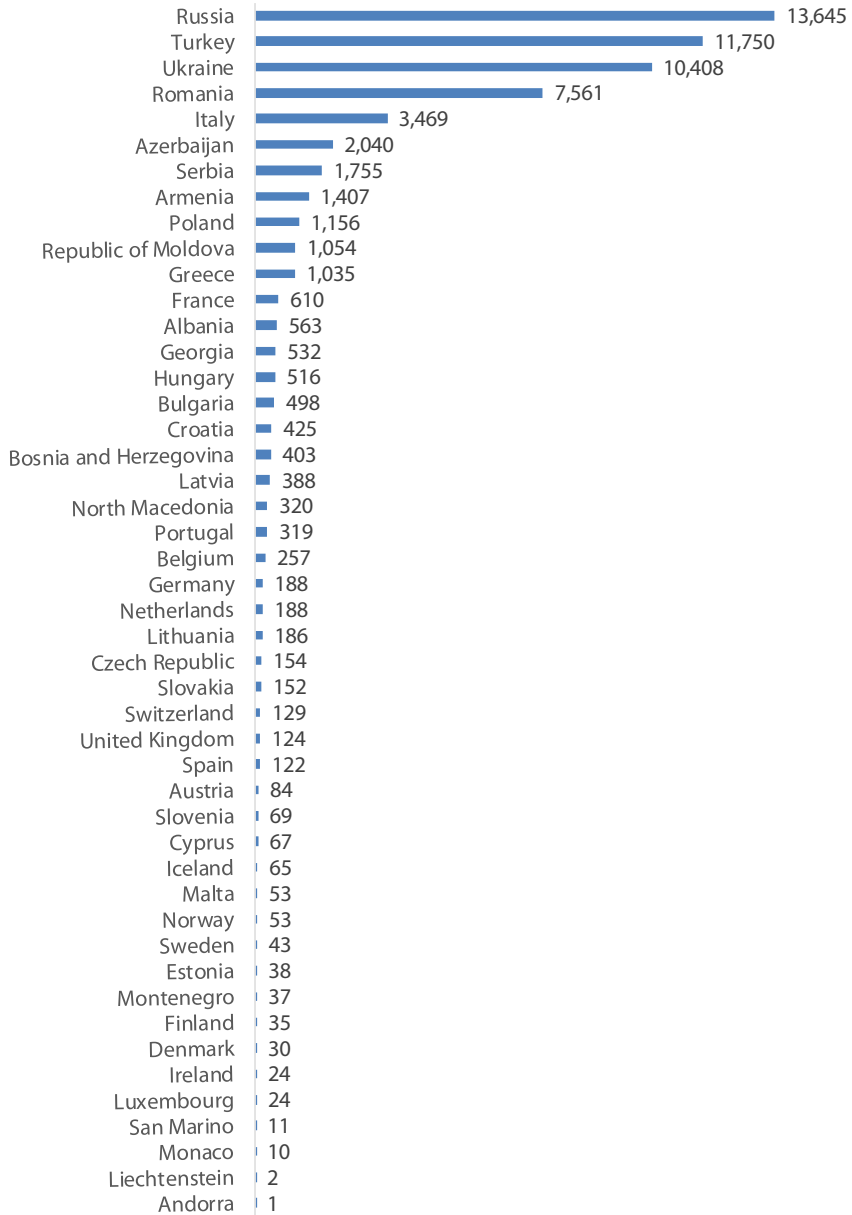
Pending applications*	31/12/20	01/01/20	+/-
Total	62,000	59,800	4%
Chamber and Grand Chamber	23,300	20,050	16%
Committee	34,100	34,600	- 1%
Single-judge formation	4,600	5,150	- 11%

Pre-judicial applications*	31/12/20	01/01/20	+/-
Total	8,100	8,800	- 8%

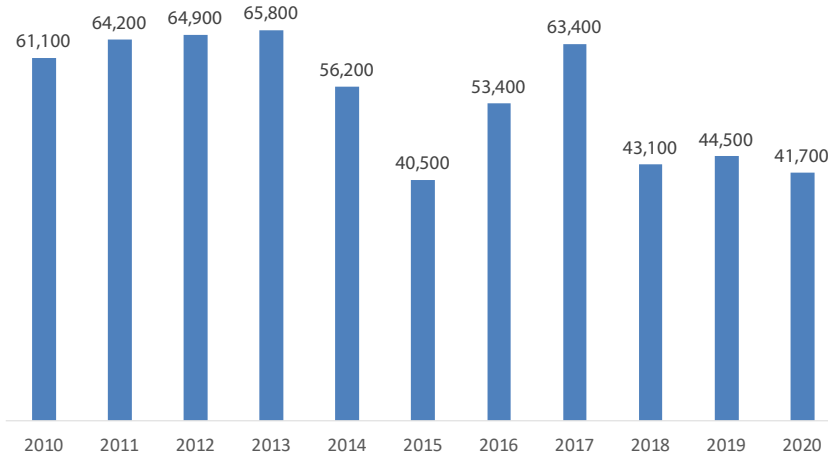
Applications disposed of administratively	2020	2019	+/-
Total	14,150	20,450	- 31%

* Round figures [50]

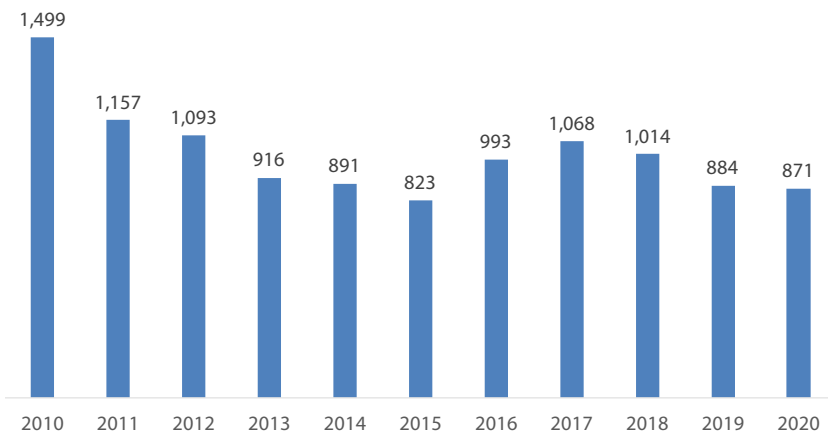
PENDING CASES (BY STATE)



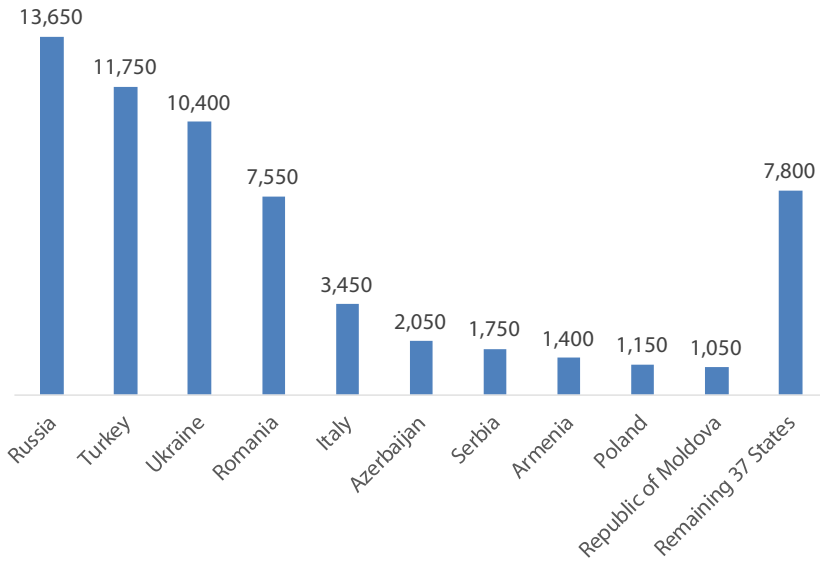
ALLOCATED APPLICATIONS (2010-20)



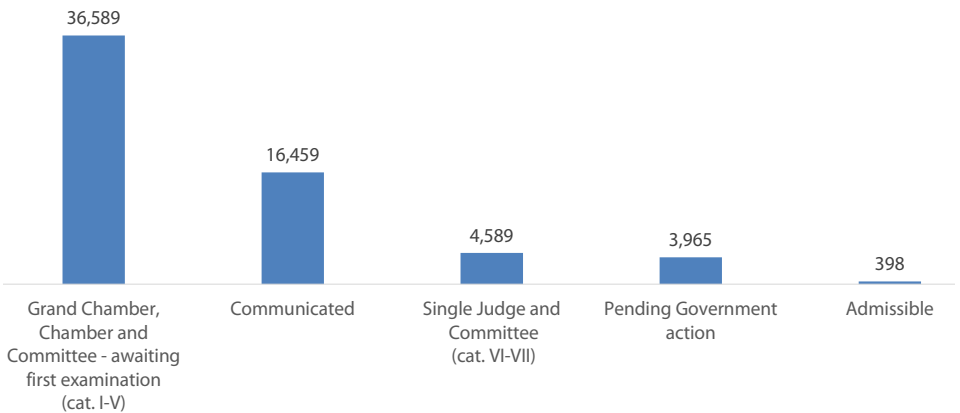
JUDGMENTS (2010-20)



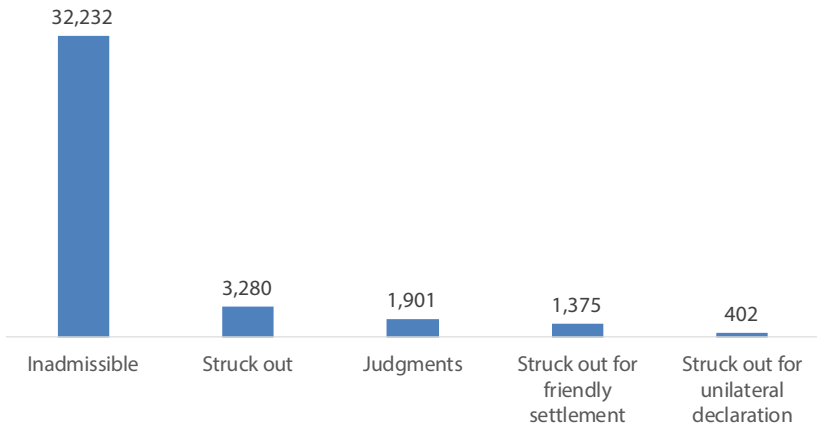
PENDING CASES (MAIN STATES)



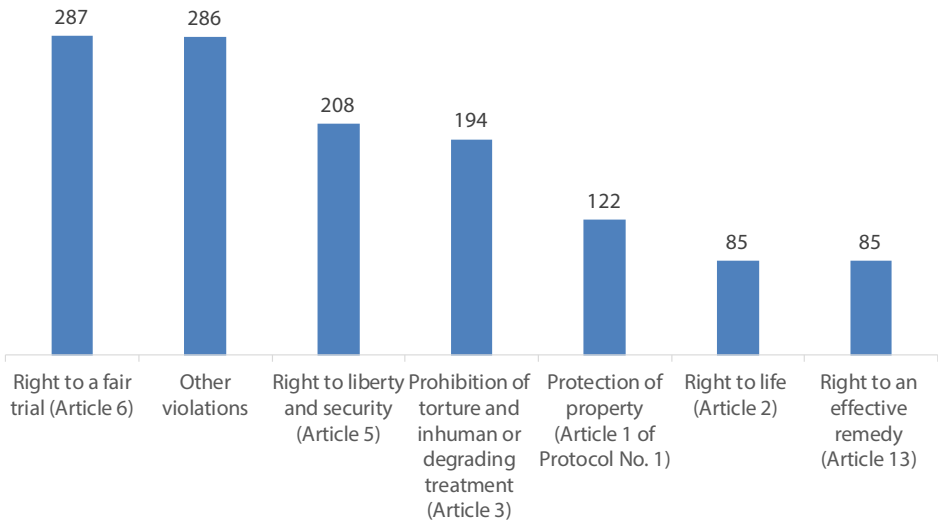
COURT'S WORKLOAD



DECIDED APPLICATIONS



VIOLATIONS BY SUBJECT MATTER



ALLOCATED APPLICATIONS BY STATE AND BY POPULATION (2017-20)

State	Applications allocated to a judicial formation				Population (1,000)				Allocated/population (10,000)			
	2017	2018	2019	2020	1.1.2017	1.1.2018	1.1.2019	1.1.2020	2017	2018	2019	2020
Albania	95	99	88	76	2,886	2,870	2,862	2,846	0.33	0.34	0.31	0.27
Andorra	2	3	6	11	73	75	76	77	0.27	0.40	0.79	1.43
Armenia	356	167	148	213	2,986	2,973	2,965	2,960	1.19	0.56	0.50	0.72
Austria	228	239	199	215	8,773	8,822	8,859	8,901	0.26	0.27	0.22	0.24
Azerbaijan	679	313	397	525	9,810	9,898	9,981	10,067	0.69	0.32	0.40	0.52
Belgium	153	177	139	124	11,366	11,399	11,455	11,550	0.13	0.16	0.12	0.11
Bosnia and Herzegovina	866	898	1,784	870	3,510	3,502	3,492	3,492	2.47	2.56	5.11	2.49
Bulgaria	582	774	750	608	7,102	7,050	7,000	6,951	0.82	1.10	1.07	0.87
Croatia	723	669	712	615	4,154	4,105	4,076	4,058	1.74	1.63	1.75	1.52
Cyprus	31	52	45	55	855	864	876	888	0.36	0.60	0.51	0.62
Czech Republic	385	349	300	381	10,579	10,610	10,650	10,694	0.36	0.33	0.28	0.36
Denmark	58	37	59	63	5,749	5,781	5,806	5,823	0.10	0.06	0.10	0.11
Estonia	156	132	121	128	1,316	1,319	1,325	1,329	1.19	1.00	0.91	0.96
Finland	181	174	131	120	5,503	5,513	5,518	5,525	0.33	0.32	0.24	0.22
France	887	871	693	638	67,024	66,926	67,013	67,099	0.13	0.13	0.10	0.10
Georgia	89	99	131	130	3,718	3,730	3,723	3,717	0.24	0.27	0.35	0.35
Germany	586	489	584	569	82,800	82,792	83,019	83,167	0.07	0.06	0.07	0.07
Greece	422	420	344	658	10,757	10,741	10,724	10,710	0.39	0.39	0.32	0.61
Hungary	1,952	902	950	1,036	9,798	9,778	9,773	9,769	1.99	0.92	0.97	1.06
Iceland	27	24	40	28	338	348	357	364	0.80	0.69	1.12	0.77
Ireland	54	30	37	42	4,775	4,830	4,904	4,964	0.11	0.06	0.08	0.08
Italy	1,374	1,692	1,454	1,497	60,589	60,484	60,360	60,245	0.23	0.28	0.24	0.25
Latvia	275	259	233	414	1,950	1,934	1,920	1,908	1.41	1.34	1.21	2.17
Liechtenstein	9	9	6	9	38	38	38	39	2.37	2.37	1.58	2.31

State	Applications allocated to a judicial formation				Population (1,000)				Allocated/population (10,000)			
	2017	2018	2019	2020	1.1.2017	1.1.2018	1.1.2019	1.1.2020	2017	2018	2019	2020
Lithuania	401	438	396	398	2,848	2,809	2,794	2,794	1.41	1.56	1.42	1.42
Luxembourg	38	35	23	29	591	602	614	626	0.64	0.58	0.37	0.46
Malta	22	30	35	40	440	476	494	514	0.50	0.63	0.71	0.78
Republic of Moldova	758	814	635	523	3,553	3,547	3,547	3,547	2.13	2.29	1.79	1.47
Monaco	7	5	8	3	38	38	38	38	1.84	1.32	2.11	0.79
Montenegro	138	318	427	218	622	622	622	622	2.22	5.11	6.86	3.50
Netherlands	532	429	400	386	17,082	17,181	17,282	17,407	0.31	0.25	0.23	0.22
North Macedonia	345	305	262	275	2,074	2,075	2,077	2,076	1.66	1.47	1.26	1.32
Norway	123	84	102	99	5,258	5,296	5,328	5,367	0.23	0.16	0.19	0.18
Poland	2,066	1,941	1,834	1,628	37,973	37,977	37,973	37,958	0.54	0.51	0.48	0.43
Portugal	197	149	188	261	10,310	10,291	10,277	10,296	0.19	0.14	0.18	0.25
Romania	6,509	3,369	2,656	2,994	19,638	19,531	19,414	19,318	3.31	1.72	1.37	1.55
Russia	7,957	12,148	12,782	8,923	143,667	143,667	143,667	143,667	0.55	0.85	0.89	0.62
San Marino	11	4	10	6	33	34	35	35	3.33	1.18	2.86	1.71
Serbia	1,431	2,128	2,160	1,836	7,040	7,001	6,964	6,927	2.03	3.04	3.10	2.65
Slovak Republic	425	390	300	289	5,435	5,443	5,450	5,458	0.78	0.72	0.55	0.53
Slovenia	374	274	210	180	2,066	2,067	2,081	2,096	1.81	1.33	1.01	0.86
Spain	669	592	606	440	46,529	46,659	46,937	47,330	0.14	0.13	0.13	0.09
Sweden	150	194	209	174	9,995	10,120	10,230	10,327	0.15	0.19	0.20	0.17
Switzerland	266	272	279	278	8,418	8,484	8,544	8,606	0.32	0.32	0.33	0.32
Turkey	25,978	6,717	7,274	9,104	79,815	80,810	82,004	83,155	3.25	0.83	0.89	1.09
Ukraine	4,387	3,207	3,991	4,271	45,246	45,246	45,246	45,246	0.97	0.71	0.88	0.94
United Kingdom	415	354	344	301	65,809	66,274	66,647	67,025	0.06	0.05	0.05	0.04
TOTAL	63,369	43,075	44,482	41,681	830,929	832,632	835,037	837,578	0.76	0.52	0.53	0.50

The Council of Europe member States had a combined population of more than 837 million inhabitants on 1 January 2020. The average number of applications allocated per 10,000 inhabitants was 0,50 in 2020. Sources 2018 and 2020: Internet sites of United Nations Statistics Division and Eurostat service ("Population and social conditions").

	Total of judgments					Freedom of assembly and association																		Right to marry			Protection of property			Right to education			Other Articles of the Convention			
	At least one violation	No violation	Friendly settlements / striking-out	Other judgments ¹	Lack of effective investigation	Inhuman degrading treatment	Lack of effective treatment	Prohibition of slavery ²	Right to liberty and security	Conditional violations ³	Prohibition of investigation	Right to liberty and security	Length of proceedings	Right to a fair trial ²	Non-enforcement	Respect for private and family life ²	Freedom of thought, conscience, religion	Freedom of expression	Freedom of assembly and association	Right to an effective remedy	Prohibition of discrimination	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4									
					Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4								
Lithuania	13	6	5	1	1							1	2					1					1	1	1											
Luxembourg																																				
Malta	10	9	1											1	4							5				9										
Republic of Moldova	32	28	2		2	1	1		5	4		2	10		5		2					2	1	15		1		1								
Monaco	1		1																																	
Montenegro	10	10												1	7		1									1										
Netherlands	4		4																																	
North Macedonia	14	14						1	3					3	1		3		1			1			3											
Norway	4	4																																		
Poland	19	18			1	1	2	1	2				2	3	2		4		2			2			1				2							
Portugal	5	5						1	1						4											1										
Romania	82	64	15	2	1	1	7		9	1			1	11	2	1	1	10	2	4			3	2	13			2	1							
Russian Federation	185	173	5	1	6	20	27	13	41	20			82	54	2	7	1	24	1	23	23	27	3	16				3	5							
San Marino	5	4	1													2		2								2										
Serbia	5	4	1												2		2									2										
Slovak Republic	12	10	1		1			2	2				2	5	2							1	1	1												
Slovenia	3	2	1											2						1																
Spain	10	9	1											6				1			1								1							
Sweden																																				
Switzerland	14	6	8			1	1			1		1	1	1	1					1				1												
Turkey	97	85	6	1	5	0	2		2	4			16	21	1	1		3		31	11				14		1		1							
Ukraine	86	82	1		3	1	2		29	8			49	10	16	2		3	1	2			18	2	10			1	2							
United Kingdom	4	2	1	1																2																
Sub-total		762	84	6	24	31	54	15	123	56	2	1	208	190	66	31	4	93	9	80	45	0	85	15	122	0	3	7	27							
Total⁴		871																																		

VIOLATIONS BY ARTICLE AND BY STATE (1959-2020)

	Friendly settlements / striking-out					Lack of effective investigation					Right to liberty and security					Freedom of assembly and association					Freedom of thought, conscience, religion					Right not to be tried / punished twice					
	At least one violation		No violation			Prohibition of torture ²		Lack of degrading treatment			Right to a fair trial ¹		Length of proceedings			Non-enforcement		Respect for private and family life ³			Freedom of expression		Prohibition of discrimination			Protection of property		Right to education		Other Articles of the Convention	
	Total of judgments					Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4			
Albania	83	69	5	2	7		2	1	4	3				6	35	7	24	1	2				31				32			2	
Andorra	9	4	3	1	1										2			1						1	1						
Armenia	137	126	6		5	4	6	1	11	6				48	46	5	6		4	5	1	12		8	1	34		1		10	
Austria	397	279	77	24	17			1	4		1			13	95	115			20	1	35	1		18	27	4		1	4		
Azerbaijan	215	206	1	2	6	4	11	2	25	22				78	84	7	21		15	4	11	37		9	1	38		25		34	
Belgium	269	190	45	18	16	3	1	1	27	4	3			54	63	62	1		13	1	4			18	9	1		2		2	
Bosnia and Herzegovina	91	84	7						1	2				10	15	8	40	1	2	1				1	4	55				9	
Bulgaria	737	663	48	5	21	15	30	4	84	41	5			276	104	181	14		86	10	19	18		193	8	127	1	5	2	23	
Croatia	437	346	58	26	7	2	10		15	12		2	29	118	102	3	3	50		8	2	1	36	7	39					2	
Cyprus	84	70	7	3	4		3		9	4		1	16	12	35			1	7		1			12	3	4		1		1	
Czech Republic	235	191	22	13	9	1	1		2	2				32	70	81			20		1	1		16	2	13					
Denmark	54	18	24	11	1				1		1			2	1	8			2		1	1		2	1	1					
Estonia	62	45	16	1					8	2				10	15	7		4	4		1			8		1					
Finland	191	142	36	9	4	2			2					2	37	62			24		20			10		2				6	
France	1,048	759	187	64	38	9	4	2	42	1	13	2	72	280	284	2	3	52	4	40	6		39	10	30				1	7	
Georgia	119	95	20	1	3	6	9	1	27	16				24	31	5	1	1	7	3	1	1		4	9	7		2		8	
Germany	356	199	129	13	15				5	1				32	29	102	1	10	23		9	2		25	13	4				1	
Greece	1,047	935	44	20	48	4	7	1	121	11	1	4		85	141	542	19		13	14	15	7	1	277	15	84	2	3	2	2	
Hungary	581	547	19	6	9	2	1		33	10				56	21	335			1	24		33	12		53	6	55		3	4	
Iceland	34	25	5	3	1									1	10				1		7	2				1				3	
Ireland	39	25	9	1	4				1					2	5	14			5		2			10	1						
Italy	2,427	1,857	73	355	142	4	6	9	33	14				43	290	1,202	18	5	172		10	3		96	8	373	1	17	1	30	
Latvia	153	123	25	3	2	1	2		19	13				60	21	21			1	33	3	4	1		5	2	3		3	9	
Liechtenstein	9	8	1											1	3	4					1			2							

	Friendly settlements striking-out					Lack of effective investigation		Inhuman degrading treatment		Lack of effective investigation		Prohibition of slavery forced labour		Right to liberty and security		Length of proceedings		Freedom of thought, conscience, religion		Freedom of assembly and association		Freedom of expression		Right to marry		Prohibition of discrimination		Protection of property		Right not to be tried punished twice		Other Articles of the Convention									
	At least one violation					Right to life		Prohibition of torture ²		Conditional violations ³		Art. 4		Art. 5		Art. 6		Art. 7		Art. 8		Art. 9		Art. 10		Art. 11		Art. 12		Art. 13		Art. 14		P. 1-1		P. 1-2		P. 1-3		P. 7-4	
	No violation					Right to life		Prohibition of torture ²		Conditional violations ³		Art. 4		Art. 5		Art. 6		Art. 7		Art. 8		Art. 9		Art. 10		Art. 11		Art. 12		Art. 13		Art. 14		P. 1-1		P. 1-2		P. 1-3		P. 7-4	
	Total of judgments					Right to life		Prohibition of torture ²		Conditional violations ³		Art. 4		Art. 5		Art. 6		Art. 7		Art. 8		Art. 9		Art. 10		Art. 11		Art. 12		Art. 13		Art. 14		P. 1-1		P. 1-2		P. 1-3		P. 7-4	
Lithuania	226	156	51	13	6	3	6		27	9				26	32	27	2	1	23	1	2	1			7	6	32							1	1						
Luxembourg	46	34	9	3			1							1	14	17				4		3	1			3	1	1													
Malta	111	83	17		11	1			3					26	13	13	1	2	4			5			12	4	39											1			
Republic of Moldova	473	413	31	3	26	3	10	9	101	52				105	162	11	33	1	33	4	19	16			60	5	143									3		11			
Monaco	4	3	1											1	3																										
Montenegro	63	58	3		2		1		4	2				5	9	27	6			4		2			5	1	7														
Netherlands	169	93	48	16	12		4	1	10					30	30	8				17		7			2	3	1														
North Macedonia	179	159	12	3	5	2	2	3	6	14				17	50	66	5			10		3	5			11		15											1		
Norway	57	38	19											1	12	2				16		6					1	1													
Poland	1,197	1,007	130	42	18	8	9	3	58	13				307	119	443	4			120	1	35	1	2	29	4	56											9			
Portugal	359	275	19	56	9	2	5		2					7	42	144	6			15		27			43	2	48														
Romania	1,578	1,393	77	38	70	12	53	2	302	92				123	462	150	53	4	106	4	33	6			28	40	495	1	6	4	17										
Russian Federation	2,884	2,724	109	15	36	330	373	76	916	241	40	1	1,203	935	207	158	3	244	11	95	68			660	22	671	3	6	7	149											
San Marino	20	12	5	2	1									1	9	2				1	1						1														
Serbia	221	199	15		7		3		6	8				9	33	52	73			16		7			18	2	79									1	1				
Slovak Republic	386	344	12	22	8	2	2	1	6	5				57	47	210	2			22		10			39	4	21											1			
Slovenia	371	340	24	4	3		3		21	6				6	25	263	3	1	12			3			266	3	7														
Spain	181	124	50	3	4				1	12				5	58	16	1	4	18			8	1			2	4	2											4		
Sweden	153	61	59	28	5	1		1	4				5	2	28	12	1			9		2	1			3	1	6											1		
Switzerland	209	121	80	5	3	1	2		2	1	6			21	37	8				25	1	19	1	1	2	6															
Turkey	3,742	3,309	93	219	121	141	223	31	341	223				787	953	608	67	5	126	12	387	108			281	19	688	7	12									36			
Ukraine	1,499	1,465	20	4	10	13	60	19	253	109				428	582	445	39	1	90	6	16	8	1	340	9	368			2	2	65										
United Kingdom	556	322	142	69	23	2	20	2	17		1	1	70	93	30				1	74	1	12	4	4	34	45	3	2	8											2	
Sub-total		19,739	1,893	1,126	740	578	870	172	2,555	949	76	11	4,190	5,276	5,950	604	55	1,568	88	925	327	10	2,719	309	3,592	18	102	37	438												
Total ⁴		23,406																																							

VIOLATIONS
BY ARTICLE
AND BY STATE
(2020)

This table has been generated automatically, using the conclusions recorded in the metadata for each judgment contained in HUDOC, the Court's case-law database.

1. Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.
2. Figures in this column may include conditional violations.
3. Cases in which the Court held there would be a violation of Article 2 and/or 3 if the applicant was removed to a State where he/she was at risk.
4. 5 judgments are against more than 1 State: Republic of Moldova and Russian Federation (2 judgments); Slovakia and Ukraine (1 judgment); Azerbaijan and Hungary (1 judgment); and Azerbaijan and Turkey (1 judgment).

VIOLATIONS
BY ARTICLE
AND BY STATE
(1959-2020)

1. Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.
2. Figures in this column may include conditional violations.
3. Cases in which the Court held there would be a violation of Article 2 and/or 3 if the applicant was removed to a State where he/she was at risk. Figures in this column are available only from 2013 onwards.
4. Including 79 judgments which concern 2 or more respondent States.



Chapter 7

The year in pictures



28.01 | VISIT BY THE PRESIDENT OF GEORGIA

On 28 January 2020, Salome Zourabichvili, President of Georgia, visited the Court and was received by President Linos-Alexandre Sicilianos, Lado Chanturia, judge elected in respect of Georgia, and Roderick Liddell, Registrar, also attended the meeting.





29.01 | VISIT BY THE PRESIDENT OF THE REPUBLIC OF MOLDOVA

On 29 January 2020, Igor Dodon, President of the Republic of Moldova, was received by President Linos-Alexandre Sicilianos. Valeriu Grițco, judge elected in respect of the Republic of Moldova, and Roderick Liddell, Registrar, also attended the meeting.





31.01 | OPENING OF THE JUDICIAL YEAR

The official opening of the ECHR's judicial year took place on 31 January 2020. The event included a seminar on the topic of "The European Convention on Human Rights: living instrument at 70", and was attended by eminent figures from the European judicial scene. The seminar was followed by the ceremony to mark the official opening of the judicial year 2020. Mr Linos Alexandre Sicilianos, President of the Court, and Chief Justice Frank Clarke, President of the Supreme Court of Ireland, addressed representatives from the highest courts of the 47 member States of the Council of Europe and from local, national and international authorities.





17.02 | CONFERENCE ON WOMEN'S HUMAN RIGHTS

On 17 February 2020 the Court, in cooperation with the René Cassin Foundation and the Consulate General of Japan in Strasbourg, held a conference on "Women's Human Rights in the 21st Century: Developments and Challenges in International and European Law".





**18.05 | NEW
PRESIDENT OF
THE ECHR**

Robert Spano, judge elected in respect of Iceland, took office as President of the European Court of Human Rights on 18 May 2020. He succeeded Linos Alexandre Sicilianos, judge elected in respect of Greece.





10.06 | FIRST ECHR HEARING BY VIDEO-CONFERENCE

On 10 June 2020, for the first time in its history, the Court held a hearing by videolink, in line with the special measures adopted due to the global health crisis. The hearing in *M.A. v. Denmark* took place without an audience and the parties' oral arguments were transmitted by videolink. A total of 5 hearings took place by video-conference in 2020.





10.07 | SCN WEBINARS

On account of the health crisis, the Forum of the Superior Courts Network (SCN) took place on 10 July 2020 in the form of a first webinar on the theme of “Adapting judicial systems to the COVID-19 pandemic and its potential impact on the right to a fair trial”. A second Superior Courts Network webinar on the theme of “Detention and health” took place on 23 October 2020.





5.10 | CONFERENCE “HUMAN RIGHTS FOR THE PLANET”

On 5 October 2020 the Court hosted a web conference on the topic of human rights and environmental protection.

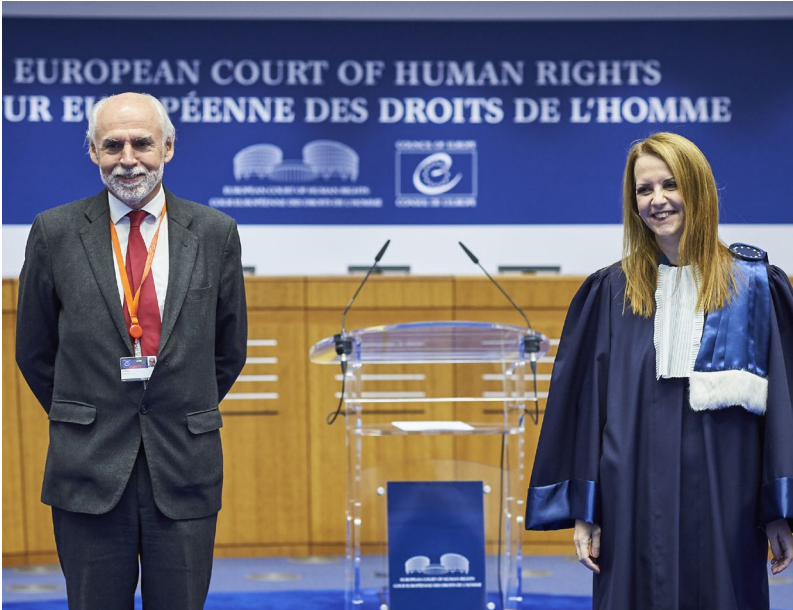




**18.09 | CONFERENCE:
70th ANNIVERSARY
OF THE
CONVENTION**

To mark the 70th anniversary of the Convention, the Court held a conference on 18 September 2020 entitled “The European Convention on Human Rights at 70 – Milestones and major achievements”. Leading figures from the judicial world took part in the celebrations, including by videolink.





1.12 | NEW REGISTRAR OF THE ECHR

The plenary Court elected Marielena Tsirlis Registrar of the Court. She took up her post on 1 December 2020.





**25th ANNIVERSARY
OF THE HUMAN
RIGHTS BUILDING**

In 2020, the Court celebrated the 25th anniversary of the Human Rights Building. On 29 June 1995, the new building was inaugurated in the presence of Václav Havel (President of the Czech Republic), Jacques Toubon (French Minister of Justice) and a number of international figures.



The Annual Report of the European Court of Human Rights provides information for the year 2020 on the organisation, activities and case-law of the Court.

In 2020 the Court celebrated the 70th anniversary of the European Convention on Human Rights. Signed in Rome on 4 November 1950, it was the first instrument to crystallise and give binding effect to the rights set out in the Universal Declaration of Human Rights. Forty-seven countries have now undertaken to secure the Convention rights and fundamental freedoms not just to their own nationals – over 830 million people – but to everyone within their jurisdiction, including non-Europeans. Also in 2020, the Human Rights Building celebrated its 25th anniversary, which was marked by the publication of hitherto unpublished photos of the building.

This Annual Report includes a foreword by the President of the Court, a summary of the main events that marked the year, the speeches delivered at the opening of the judicial year, an overview of the case-law, the year's judicial activities and the statistical data and tables of violations by member State for the year 2020. The report outlines the Court's knowledge-sharing activities and provides an update on the Superior Courts Network. Lastly, it sets out the measures taken by the Registry to deal with the challenges posed by the COVID-19 pandemic.

The Court's Annual Reports and other materials about the work of the Court and its case-law are available to download from the Court's website (www.echr.coe.int).



ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

