



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

# Overview of the Court's case-law 2021

1 January-15 June 2021

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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# Case-law overview

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This overview<sup>1</sup> contains a selection by the Jurisconsult of the most interesting cases from 2021.

## JURISDICTION AND ADMISSIBILITY

### Jurisdiction of States (Article 1)

The judgment in *Georgia v. Russia (II)*<sup>2</sup> concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities.

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

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

(i) This is the first case, since the decision in *Banković and Others v. Belgium and Others*<sup>3</sup>, in which the Court has examined the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. The Grand Chamber did so in the light of two existing lines of case-law: on the one

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1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court. This provisional version will be superseded by the final version covering all of 2021.

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

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

hand, the exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State of an area and/or on “State agent authority and control” over the direct victim of the alleged violation (*Al-Skeini and Others v. the United Kingdom*<sup>4</sup>); and, on the other hand, the general principle of *Banković and Others* according to which the provisions of Article 1 do not admit of a mere “cause and effect” notion of “jurisdiction” so that a State’s responsibility cannot be engaged by an “instantaneous extraterritorial act” (explicitly restated in *Medvedyev and Others v. France*<sup>5</sup>; see also *M.N. and Others v. Belgium*<sup>6</sup>). It also found that neither of the two conditions of extraterritorial jurisdiction (State agent authority and control over individuals or effective control over an area) are met in the case of military operations carried out during an international armed conflict. The reality of fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no actual “control” either over that area or over the individuals therein. This interpretation is confirmed by the practice of the member States in not derogating under Article 15 in situations where they have engaged in an international armed conflict outside their own territory. Having regard to the fact that such situations are predominantly regulated by legal norms other than those of the Convention (namely, international humanitarian law) and that the Contracting Parties have not endowed the Court with the necessary legal basis for assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, the Grand Chamber concluded that it could not develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date. Accordingly, the events of the active phase of hostilities fell outside the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention.

(ii) Nevertheless, the Grand Chamber held that the respondent State had to be deemed to have had “jurisdiction” in respect of the complaint under the procedural limb of Article 2 of the Convention, even in respect of deaths which took place during the active phase of the military conflict. The Grand Chamber followed the case-law set out in *Güzelyurtlu and Others v. Cyprus and Turkey*<sup>7</sup>, according to which a jurisdictional link to the obligation to investigate under Article 2 may be established if the respondent State has begun an investigation or proceedings in accordance with its domestic law in respect of a death which has

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

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

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

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

occurred outside its jurisdiction or if there were “special features” in a given case. In the present situation, both of these conditions had been met: the fact that the Russian Federation had an obligation to investigate the events in issue in accordance with the relevant rules of international humanitarian law, that it had established “effective control” over the territories in question shortly after the hostilities and that Georgia had been prevented from carrying out an adequate and effective investigation into the allegations all constituted “special features” sufficient to establish Russia’s jurisdiction in respect of this specific complaint.

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

*Hanan v. Germany*<sup>8</sup> concerned, in particular, whether there existed a “jurisdictional link” such as to trigger a procedural obligation under Article 2 to investigate an airstrike (ordered in the framework of a UN Security Council multinational military operation).

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

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

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

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

(i) The Grand Chamber examined the existence of a “jurisdictional link”, in relation to the Article 2 obligation to investigate, for the purposes of Article 1 on the basis of the principles set out in *Güzelyurtlu and Others v. Cyprus and Turkey*<sup>9</sup>.

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

(b) Reiterating that “special features” may establish a jurisdictional link bringing the procedural obligation imposed by Article 2 into effect, even in the absence of an investigation or proceedings having been instituted in a Contracting State (*Güzelyurtlu and Others*, cited above, § 190), the Grand Chamber considered that this also applied in respect of extraterritorial situations, outside the legal space of the Convention and in respect of events occurring during the active hostilities phase of an armed conflict (see, in respect of the latter aspect, *Georgia v. Russia (II)*<sup>10</sup>) and it went on to find such special features in the present case: (i) Germany was obliged under customary IHL to investigate the airstrike (it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime), which reflected the gravity of the alleged offence; (ii) the Afghan authorities were, for legal reasons, prevented from instituting a criminal investigation (according to the ISAF Status of Forces Agreement the troop-contributing States had exclusive jurisdiction over personnel contributed to the ISAF in respect of any criminal or disciplinary offences on the territory of Afghanistan); and (iii) the German prosecution authorities were obliged under domestic law (related to Germany’s ratification of the Rome

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

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



Statute) to investigate any liability of German nationals for, *inter alia*, war crimes (as in the majority of Contracting States participating in military deployments overseas). In sum, the fact that Germany retained exclusive jurisdiction over its troops with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted “special features” which, combined, triggered the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2 of the Convention.

(ii) Although it did not have to consider whether there was a jurisdictional link as regards any substantive obligation under Article 2 (it was not relied on by the applicant), the Court clarified that the mere establishment of a jurisdictional link in relation to the procedural obligation did not mean that the substantive act fell also within the jurisdiction of a State or that the said act was attributable to that State and, consequently, the Court did not call into question *Banković and Others v. Belgium and Others*<sup>11</sup> or *Behrami v. France and Saramati v. France, Germany and Norway*<sup>12</sup>, both cases concerning the substantive limb of Article 2 of the Convention.

In the inter-State application *Ukraine v. Russia (re Crimea)*<sup>13</sup> (Article 33) the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 26 August 2015 in the course of which the region of Crimea (including the city of Sevastopol) was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the “jurisdiction” of the Russian Federation within the meaning of Article 1. It also addressed the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another (as opposed to its military occupation or the provision of political/military support for a separatist entity), and clarified the standard of proof applicable at the admissibility stage to the question of jurisdiction.

Having clarified that the question of the respondent State’s “jurisdiction” under Article 1 of the Convention had to be examined to the “beyond reasonable doubt” standard of proof, the Grand Chamber

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

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

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

determined that “jurisdiction” question by examining two periods separately: before and after 18 March 2014, that being the date on which the Russian Federation, the “Republic of Crimea” and the City of Sevastopol signed a “Treaty of Unification” providing for the incorporation of Crimea into Russia. In this regard, the Grand Chamber stated that it would follow the recent approach of the International Court of Justice, of several international arbitral tribunals and of the Swiss Federal Court, in declaring that it was not called upon to decide in the abstract on the legality *per se* under international law of a purported “annexation” of Crimea or of the consequent legal status of that territory. These questions had not been referred to the Court and did not constitute the subject matter of the dispute before it. The Grand Chamber went on to find that the facts of the case fell within the “jurisdiction” of the respondent State, during both periods, for the following reasons:

(a) As to the period prior to 18 March 2014, the Grand Chamber followed the usual approach defined in *Al-Skeini and Others v. the United Kingdom*<sup>14</sup>, which amounted to an exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State over the area in question. The Court based its conclusion on a detailed assessment of the evidence related to the particular facts of the case, evaluating both the strength and the actual conduct of the Russian military forces in Crimea. On the first point (strength), the Grand Chamber considered, *inter alia*, that the question of whether the increase of the respondent State’s military presence in Crimea at the time was formally in compliance with the existing bilateral agreements between the two States was not decisive: more weight had to be given to the relative size, strength and combat potential of the respondent State’s armed forces in that territory, as well as to the purported justification for increasing their presence there. As to the second point (actual conduct), the Grand Chamber took into account the degree of active involvement of Russian military servicemen in the impugned events in Crimea, as well as the public statements of several high-ranking officials of the respondent State.

(b) As to the period after 18 March 2014, the Grand Chamber considered that, while Article 19 of the Convention did not empower the Court to pass formal judgment on the legality/legitimacy of any transfer of sovereignty under international law, the Court could not entirely eschew the question since it was necessary to consider the nature or legal basis of the respondent State’s jurisdiction over Crimea in relation

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

to some specific complaints (under Article 6 § 1 of the Convention and Article 2 of Protocol No. 4 taken alone and in conjunction with Article 14 of the Convention). In the present case, the Court relied on the fact that, in the first place, both Contracting States had ratified the Convention in respect of their respective territories within the internationally recognised borders at that time; secondly, no change to the sovereign territories of both countries had been accepted or notified by either State; and thirdly, a number of States and international bodies had refused to accept any change to the territorial integrity of Ukraine in respect of Crimea within the meaning of international law. Accordingly, for the purposes of this admissibility decision, the aforementioned circumstances enabled the Court to proceed on the basis of the assumption that the applicant State's territorial jurisdiction continued to extend to the entirety of its territory, including Crimea, whereas the jurisdiction of the respondent State over that region was in the form or nature of "effective control over an area" (rather than in the form or nature of territorial jurisdiction).

## Admissibility (Articles 34 and 35)

### Six-month period (Article 35 § 1)

In *E.G. v. the Republic of Moldova*<sup>15</sup>, the Court examined the issue of the applicability of the six-month rule in the context of an amnesty and the ineffective execution of a sentence for the offence of sexual abuse.

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

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

As to applying the six-month time-limit to continuous situations, the Court reiterated that not all continuing situations are the same (*Mocanu and Others v. Romania*<sup>16</sup>). While there were therefore obvious distinctions between different continuing situations, the Court stressed that applicants must introduce their complaints "without undue delay"

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

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

once it is apparent that there is no realistic prospect of a favourable outcome or progress domestically (*Sokolov and Others v. Serbia*<sup>17</sup>). In the present case, the Court responded to the Government's argument that the applicant should have lodged her application within six months of the decision granting the amnesty.

## “CORE” RIGHTS

### Right to life (Article 2)

#### Obligation to protect life

The judgment in *Kurt v. Austria*<sup>18</sup> concerned the scope and content of the Osman positive operational (substantive) obligation in the context of domestic violence.

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

The Grand Chamber judgment is noteworthy in that it clarifies the scope, and develops the content, of the Osman positive obligation (to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, *Osman v. the United Kingdom*<sup>19</sup>) both generally and in the specific context of domestic violence.

(i) Regarding the content of the Osman positive obligation taken generally, the Court for the first time specified that the assessment of the nature and level of risk constituted an integral part of the duty to take preventive operational measures. It followed that an examination of the State's compliance with Article 2 under the Osman test had to comprise

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

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

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

an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken. As to the scope of the Osman positive obligation, the Court clarified that it was an obligation of means, not of result. Thus, in circumstances where the competent authorities have responded to the identified real and immediate risk by taking appropriate measures within their powers, the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. Furthermore, a given case in which a real and immediate risk materialised had to be assessed from the point of view of what was known to the competent authorities at the relevant time.

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

- Autonomous and proactive approach, requiring the authorities not to rely solely on the victim's perception of the risk, but to collect all the information and conduct their own assessment;
- Comprehensiveness, which can be facilitated through the use of standardised, internationally recognised checklists indicating specific risk factors that have been developed on the basis of sound criminological research and best practices; the relevant authorities should receive regular training and awareness-raising, particularly in respect of such tools; any risk assessment must be apt to systematically identify and address all the potential victims – direct or indirect – keeping in mind the possibility that the outcome could be a different level of risk for each of them. The Court observed that violence against children belonging to the common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner;
- Basic documenting of the conduct of the risk assessment, given the urgent nature of interventions and the necessity of sharing relevant information among all the authorities involved;

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

- Taking due account of the particular context of domestic violence cases, their special features and the ways in which they differ from Osman-type incident-based situations. Notably, the “immediacy” of the risk should be evaluated taking into account the common trajectory of the escalation of violence in such cases and the comprehensive research in this area. The risk of a further escalation must be assessed even after the issuance of a barring and protection order. However, an impossible or disproportionate burden must not be imposed on the authorities.

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

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

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

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

principles developed under Article 5 §§ (b) and (c) in the context of preventive measures.

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

*Ribcheva and Others v. Bulgaria*<sup>20</sup> concerned the death of a law-enforcement officer at the hands of a private individual during a police operation. In its judgment, the Court set out the scope and content of the substantive (preventive) and procedural obligations for States in this context.

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

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

(i) As regards the substantive obligation under Article 2 and, more particularly, as regards the application of the Osman positive operational obligation (to take preventive operational measures to protect an

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

individual whose life is at risk from the criminal acts of another individual, *Osman v. the United Kingdom*<sup>21</sup>) to this very specific context, the Court clarified as follows:

(a) It held that this positive operational obligation also applied to the death of a law-enforcement officer during a planned operation. Accordingly, and when deciding to involve the present applicants' relative in the operation in his capacity as a specialised officer tasked with dealing with dangerous individuals, the authorities had a positive duty to do what could reasonably be expected of them to protect him from the risks of such an operation. The Court proceeded to examine the standard to which compliance with that duty had to be assessed. Drawing on its well-established case-law, it emphasised that the standard of reasonableness in relation to this positive obligation (Article 2 § 1) was not as stringent as that in respect of the negative obligation (Article 2 § 2) to refrain from using no more force than is "absolutely necessary" (a strictly proportionate use of force excluding any margin of appreciation). Rather, the scope and content of the positive operational obligation in issue had to be defined in a way which does not impose an impossible or disproportionate burden on the authorities given the choices they face (priorities and resources) and given the unpredictability of human conduct (see, *inter alia*, *Osman*, cited above, § 116; *Önerlyıldız v. Turkey*<sup>22</sup>; *Finogenov and Others v. Russia*<sup>23</sup>; *Lambert and Others v. France*<sup>24</sup>; and *Gerasimenko and Others v. Russia*<sup>25</sup>).

In this respect, the Court explained as follows:

- the scope/content of the positive obligation to protect law-enforcement personnel against risks to their lives should not make it impossible to require them to engage in active operations against armed and dangerous individuals or make it unduly onerous for the authorities to organise them;

- while law-enforcement officers who had freely engaged to serve (especially in specialised units dealing with terrorists/dangerous individuals) surely had to be aware that this might on occasion put them in situations where they would face lethal threats which might be difficult to contain, the authorities had a duty to ensure that these officers were properly trained and prepared; and

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

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

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

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

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



– the authorities had, in addition, to fully comply with their negative obligation under Article 2 § 2 to any person targeted or, indeed, directly affected by the operation.

(b) Based on the above considerations, the Court held that, although the authorities had made mistakes in the planning and execution of the operation, the steps they had taken to minimise the risk to the officer's life could be seen as reasonable. While the operation had been unduly rushed and the likely degree of the target's resistance had been underestimated, the authorities had taken reasonable precautions: they had obtained intelligence about the target and drawn up plans as to how to go about arresting him and seizing his firearms; they had deployed a number of specially trained officers; and they had acted in a coordinated manner with an unbroken chain of command at all times. The Court did not take issue with the equipment and firearms made available to the anti-terrorist squad: it was for the national authorities (who are better placed to evaluate the relevant needs and take responsibility for the choices which have to be made between worthy needs) to decide how their limited resources should be allocated and the officers were not manifestly ill-equipped for their task. It stressed that it had to be extremely cautious about revisiting any of the choices that the authorities had made in those respects with the wisdom of hindsight (caution already applied even when the Court examined whether the authorities had used more force than was "absolutely necessary", where, as noted above, a much stricter standard applied).

(ii) As to the procedural obligation under Article 2 to carry out an effective investigation, the Court, relying on the established principles set out in its case-law (*inter alia*, *Mastromatteo v. Italy*<sup>26</sup>, and, more recently, *Kotilainen and Others v. Finland*<sup>27</sup>), found that the authorities had been required to investigate not only the responsibility of the person directly responsible for killing the applicants' relative, but also whether any officials had contributed to his death through negligence in the planning and conduct of the operation. The Court confirmed that this investigative duty, which arose when lives had been lost in circumstances potentially engaging the responsibility of the State due to alleged negligence, also applied in the context of police officers killed by private persons while performing their duties. On the facts, the Court found that the authorities had not properly discharged that duty due to two serious flaws in the internal investigations conducted: one of the investigations had not been opened at the authorities' initiative

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

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

(but was rather prompted by the deceased's mother's complaint) and, more importantly, there had been a complete lack of publicity and involvement of the applicants in both investigations.

#### Effective investigation<sup>28</sup>

*Hanan v. Germany*<sup>29</sup> concerned the existence of a "jurisdictional link" and the procedural obligation under Article 2 to investigate an airstrike (UN Security Council multinational military operation), and any impact of international humanitarian law (IHL) on the requirements of an effective investigation of deaths during extraterritorial active hostilities.

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

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

(i) The Grand Chamber first examined the existence of a "jurisdictional link", in relation to the Article 2 obligation to investigate,

28. See also, under Article 33 (Inter-State cases), *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

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

for the purposes of Article 1 on the basis of the principles set out in *Güzelyurtlu and Others v. Cyprus and Turkey*<sup>30</sup>.

(ii) Since there was no substantive normative conflict in respect of the requirements of an effective investigation under the applicable rules of IHL and under Article 2 of the Convention (see also *Georgia v. Russia (II)*<sup>31</sup>), the Grand Chamber did not have to address whether the requirements, allowing it to take account of the context and rules of IHL when interpreting and applying the Convention in the absence of a formal derogation under Article 15, were met and it confined itself to an analysis of compliance with its case-law under Article 2. In this regard, the Grand Chamber considered that the challenges for and constraints on the investigation authorities, given that the deaths occurred during active hostilities in an (extraterritorial) armed conflict, affected the investigation as a whole so that the standards to be applied to the investigation conducted by the civilian prosecution authorities in Germany should be guided by those established in respect of investigations into deaths in an extraterritorial armed conflict (*Al-Skeini and Others v. the United Kingdom*<sup>32</sup>, and *Jaloud v. the Netherlands*<sup>33</sup>). On the facts of the case, the Grand Chamber found that the investigation by the German authorities complied with these requirements. The cause of death of the applicant's sons and the person(s) responsible for it, were known and the facts surrounding the airstrike, including the decision-making and target verification process, had been established in a thorough and reliable manner to determine the legality of the use of force. The Federal Prosecutor General's assessment of Colonel K's potential criminal liability was primarily based on Colonel K's subjective assessment at the time of ordering the airstrike and his account (he had operated on the assumption that no civilians were present) was credible and corroborated by evidence that had been immediately secured and could not be tampered with (audio recordings of the relevant radio traffic and thermal images from infrared cameras). Lastly, since the Federal Constitutional Court, which had expressly found that the Federal Prosecutor General's investigation had complied with the standards of Article 2, would have been able to set aside the discontinuation decision, the Grand Chamber considered that the applicant had at his disposal a remedy to challenge the effectiveness of the investigation.

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

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

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

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

## Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)<sup>34</sup>

### Inhuman or degrading treatment

*Bivolaru and Moldovan v. France*<sup>35</sup> concerned the surrender of the applicants under European arrest warrants, the Bosphorus presumption of equivalent protection and a systemic problem of conditions of detention in the State which issued the arrest warrants.

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

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

(i) The Court first examined whether the presumption of equivalent protection in the legal system of the European Union (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*<sup>36</sup>, and *Avotiņš v.*

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

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

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

*Latvia*<sup>37</sup>) applied in this context. The application of that presumption is subject to two conditions: the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. In respect of the first condition, the Court noted that the case-law of the Court of Justice of the European Union (CJEU) on the execution of EAWs (see *Aranyosi and Căldăraru*<sup>38</sup>) authorised the executing judicial authority, in exceptional circumstances, to derogate from the principles of mutual trust and mutual recognition and to postpone or even refuse the execution of a EAW. The Court also noted the convergence – as regards the establishment by the executing judicial authority of a real and individual risk – of the requirements laid down by the CJEU and by its own case-law on Article 3. While the French courts therefore had a power of appreciation (to refuse to execute the EAW in the event of their finding such a real and individual risk of treatment contrary to Article 3), this power was exercised within the framework strictly defined by CJEU case-law to ensure the execution of a legal obligation in full compliance with EU law. In these circumstances, the Court found that the executing judicial authority could not be regarded as having had an autonomous margin of manoeuvre, which could lead to the non-application of the presumption of equivalent protection. Since the second condition was also satisfied (there was no serious difficulty which could have made necessary a request to the CJEU for a preliminary ruling), the presumption of equivalent protection applied in the present case.

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

(a) The Court noted that Mr Moldovan had submitted serious and precise evidence attesting to systemic or generalised deficiencies in the detention conditions in the issuing State, including in Gherla Prison, where the Romanian authorities envisaged his imprisonment. In view of the evidence produced by the applicant, the executing judicial authority requested supplementary information from the issuing judicial authority in Romania regarding the foreseen detention conditions of the applicant

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

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

to assess whether there was a real risk that he would be exposed to inhuman and degrading treatment. Upon receipt of that information, the French executing judicial authority held that there was no real risk of an Article 3 violation in the applicant's case.

However, the Court considered that the executing judicial authority had had sufficient factual information to recognise the existence of a real risk that the applicant would be exposed to inhuman and degrading treatment because of the conditions of his detention in Romania. In the first place, the Court found that the information provided by the Romanian authorities had not been sufficiently considered in the light of this Court's case-law concerning the endemic overcrowding of, and insufficient personal space in, Gherla Prison (for example, *Axinte v. Romania*<sup>39</sup>, delivered prior to the applicants' surrender, and the pilot judgment in *Rezmiveş and Others v. Romania*<sup>40</sup>, delivered after). The executing judicial authority had had information relating to the personal space reserved for the applicant that gave rise to a strong presumption of a violation of Article 3. Secondly, the Romanian authorities' commitments in relation to other aspects of the conditions in Gherla Prison (which would have been capable of excluding a real risk of an Article 3 violation) had been formulated in a stereotypical manner and these commitments had not been taken into account in the risk assessment. Thirdly, the recommendation by the executing judicial authority that he be detained in a prison offering identical or better conditions (the Romanian authorities had not ruled out that the applicant would be detained in a prison other than Gherla), was not sufficient to rule out a real risk of inhuman and degrading treatment: it did not allow for a risk assessment in respect of a specific prison and the evidence attested to systemic deficiencies as regards the conditions of detention in prisons in the receiving State. The Court therefore found that the presumption of equivalent protection had been rebutted in Mr Moldovan's case because the protection of Convention rights was manifestly deficient in the particular circumstances of his case. It concluded that there had been a violation of Article 3 in respect of him.

(b) By contrast, the Court found that Mr Bivolaru had not made sufficiently detailed and substantiated submissions before the executing judicial authority about the detention conditions he would face in Romania in the event of his surrender. In such circumstances, it was not incumbent on the executing judicial authority to request supplementary information from the Romanian authorities in order to identify whether

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

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

he would have faced a relevant real and individual risk of treatment contrary to Article 3 because of the conditions of his detention. The Court concluded that the executing judicial authority did not have a solid factual basis to determine that there was a real risk of a violation of Article 3 as regards Mr Bivolaru or, therefore, to refuse to execute the warrant on that basis. There had, therefore, been no violation of Article 3 in relation to this applicant.

#### Positive obligations

*X and Others v. Bulgaria*<sup>41</sup> concerned the States' positive obligations as regards allegations of sexual abuse of minors in public care, and their procedural obligations which are to be interpreted in the light of the Lanzarote Convention.

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

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

(i) As to the positive obligations under the substantive limb of Article 3, the Grand Chamber, relying on *O'Keeffe v. Ireland*<sup>42</sup> and *Nencheva and Others v. Bulgaria*<sup>43</sup> (an Article 2 case), reiterated that States had a heightened duty of protection towards children placed in public care, as they were in a particularly vulnerable situation. In this respect, the judgment makes a clear distinction between, on the one hand, an obligation to put in place a legislative and regulatory framework of protection and, on the other, an obligation to take operational measures

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

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

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

to protect specific individuals, in certain well-defined circumstances, against a risk of ill-treatment. In the instant case:

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

Since the applicants had been placed in the sole charge of the public authorities, the obligation on the latter to take preventive operational measures was heightened and required them to exercise particular vigilance. However, having applied the test set out in *Osman v. the United Kingdom*<sup>44</sup>, the Grand Chamber found that its first limb was not established: there was insufficient information to find that the Bulgarian authorities had known, or ought to have known, of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to the above obligation to protect them against such a risk.

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

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

Secondly, by analogy with its case-law under Article 2 (*Güzelyurtlu and Others v. Cyprus and Turkey*<sup>45</sup>), and referring to the Lanzarote Convention, the Grand Chamber considered the duty to cooperate with the authorities of another State to be a component of the procedural obligation under Article 3 in abuse cases with a transnational context such as the present one.

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

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

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



- They had not attempted to contact the applicants' (adoptive) parents in order to provide them with the necessary information and support in good time, so as to enable them to take an active part in the various proceedings;

- The interviews with other children from the orphanage had not always been adapted to their age and maturity and had not been video-recorded;

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

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

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

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

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

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

An amnesty and the ineffective execution of a sentence for the offence of sexual abuse were examined in *E.G. v. the Republic of Moldova*<sup>46</sup>.

The applicant was the victim of sexual abuse by three individuals. In December 2009 the three assailants (who were at large during the criminal proceedings) were convicted by a court of appeal and sentenced to imprisonment. After sentencing, two of them were immediately arrested and detained. In May 2010 the authorities issued a search warrant concerning the third one (V.B.). While at large, V.B. asked (through his lawyer) to be exonerated from the sentence in application of the Amnesty Act 2008. His request was initially dismissed at first-instance (as had the request of one of the other assailants been) but the court of appeal subsequently (in May 2012) accepted his appeal and granted an amnesty. The amnesty was subsequently quashed and granted again in several decisions. In the meantime, V.B. had been arrested but was released on the basis of the decision of the court of appeal of May 2012. Finally, on 18 November 2013 a decision dismissing V.B.'s amnesty request was adopted and at the end of January 2014 the prosecutor informed the police that V.B.'s amnesty had been quashed and requested that he be located. However, it was later found that, on 16 November 2013, V.B. had left the country for Ukraine. Despite an international arrest warrant (issued in 2015), he has not been located to this day. Relying on Articles 3 and 8, the applicant complained about the authorities' decision to grant an amnesty to V.B. and about their failure to effectively execute V.B.'s sentence of imprisonment. The Court found a violation of Articles 3 and 8 of the Convention.

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

(i) As to applying the six-month time-limit, in the present case, in response to the Government's argument that the applicant should have lodged her application within six months of the decision granting the amnesty in May 2012, the Court noted that the central tenet of her complaints under Articles 3 and 8 concerned the *de facto* impunity enjoyed by V.B. for the crime of sexual violence against her. The specific shortcomings identified by her in this regard (the application of an allegedly unlawful amnesty and the later inactivity of the authorities as regards searching for V.B.) were inextricably linked, which meant that

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

the entire period of non-enforcement of the criminal sanction could be viewed as a whole for the purposes of the six-month rule. Nothing suggesting to the Court that the execution of V.B.'s sentence during the relevant domestic proceedings had become unrealistic, the Court dismissed the Government's objection.

(ii) With respect to the application of an amnesty, the Court referred to its case-law developed in the context of ill-treatment by State agents, according to which amnesties and pardons should not be tolerated (*Mocanu and Others v. Romania*<sup>47</sup>), which the Court had already applied in a private party context, in so far as the treatment complained of reaches the threshold under Article 3 (*Pulfer v. Albania*<sup>48</sup>). However, the Court also reiterated that pardons and amnesties are primarily matters of the domestic law of States and are, in principle, not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights (*Marguš v. Croatia*<sup>49</sup>, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*<sup>50</sup>).

In the present case, the Court considered that the sexual abuse of the applicant amounted to a grave breach of her physical and moral integrity so that the grant of the amnesty to V.B. was susceptible of running counter to the State's obligations under Articles 3 and 8 of the Convention, under which the present case fell to be examined (see also, for instance, *Y v. Bulgaria*<sup>51</sup>). In this connection, the Court observed that there was a lack of consistency by the domestic courts in their application of amnesties under the 2008 Act: an amnesty had not been granted to another assailant of the applicant who was in a similar situation to V.B. The Court also noted that, while the amnesty had been annulled in the end, the fact that V.B. had benefited from an amnesty for a year and then used the opportunity to escape was contrary to the State's procedural obligation under Articles 3 and 8 of the Convention.

(iii) As regards the duty to execute a criminal sentence, the Court referred to its case-law under Article 2 according to which the enforcement of a sentence imposed must be regarded as an integral part of the State's procedural obligation (*Kitanovska Stanojkovic and Others v.*

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

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

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

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

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

*the former Yugoslav Republic of Macedonia*<sup>52</sup>; *Akeliënė v. Lithuania*<sup>53</sup>; and *Makuchyan and Minasyan*, cited above, § 50). The Court considered that the same applied in the present context concerning a conviction for sexual abuse falling under Articles 3 and 8 of the Convention.

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

### Expulsion

A duty to carry out a full and *ex nunc* risk assessment in expulsion cases was imposed in the judgment in *K.I. v. France*<sup>54</sup>, which also clarified that the relevant Convention test remained unchanged by EU law.

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

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

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

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

*v Commissaire général aux réfugiés et aux apatrides*<sup>55</sup> which clarified that a revocation, pursuant to Article 14 § 4 of the Qualification Directive, of refugee status did not mean that the person concerned was no longer a refugee (“*qualité de réfugié*”) for the purposes of Article 2 (d) of that Directive and Article 1A of the 1951 [Convention relating to the Status of Refugees](#): provided he or she continued to satisfy the material conditions of the definition of refugee, he or she would be entitled to protection against *refoulement*. In July 2020 the *Conseil d’État* rejected that appeal, although it confirmed he was still a refugee (because the CNDA had not applied the exclusion clause contained in Article 1F of the 1951 Geneva Convention). In the meantime, and in the second set of proceedings, an administrative court rejected (May 2019) his appeal against the order for his expulsion to the Russian Federation, finding that he would not run a real risk of treatment contrary to Article 3 in the event of his removal there. That judgment became final.

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

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

(i) Reiterating that it was not competent to examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Jeunesse v. the Netherlands*<sup>56</sup>), the Court observed that it had, to date, not ruled on the distinction made in EU and domestic law (the above-cited judgment of the CJEU) between refugee status, on the one hand, and being a refugee (“*qualité de réfugié*”), on the other. It reiterated that neither the Convention nor its Protocols protected, as such, the right to asylum: the

55. Judgment of the Court of Justice of the European Union of 14 May 2019 in *M v Ministerstvo vnitra and X and X v Commissaire général aux réfugiés et aux apatrides*, C-391/16, C-77/17 and C-78/17, ECLI:EU:C:2019:403.

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

Convention protection was confined to the rights enshrined therein, in particular in Article 3. In that respect, the Court embraced the prohibition of *refoulement* under the 1951 Geneva Convention (*N.D. and N.T. v. Spain*<sup>57</sup>) and confirmed its well-established case-law principles: the nature of the protection afforded by Article 3 is absolute so that any considerations as to whether an applicant presented a risk to the national security of the respondent State are irrelevant for the examination of whether substantial grounds have been shown for believing that there is a real risk that he or she will face treatment contrary to Article 3 in the receiving State were the expulsion to be implemented (for example, *Saadi v. Italy*<sup>58</sup>; *Auad v. Bulgaria*<sup>59</sup>; and *O.D. v. Bulgaria*<sup>60</sup>), with a full and *ex nunc* evaluation being required in that regard.

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

(ii) While this is the first time the Court has adjudicated on the merits of an Article 3 complaint about a removal of a Russian national of Chechen origin who argued that he would run a real risk of treatment contrary to Article 3 on account of his criminal conviction of acts of terrorism in the respondent State, the Court's finding of a violation was

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

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

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

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

exclusively of a procedural nature and it did not therefore exclude the possibility that the French authorities, after a full and *ex nunc* evaluation of all of the circumstances, could come to the conclusion that the applicant would not run a real risk of treatment contrary to Article 3 in the event of his removal to the Russian Federation.

## Prohibition of slavery and forced labour (Article 4)

### Positive obligations

*V.C.L. and A.N. v. the United Kingdom*<sup>61</sup> concerned the positive obligation to protect victims of trafficking (Article 4) and the impact on the fair trial of such victims (Article 6 § 1).

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

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

(i) As to the State's positive obligation under Article 4 of the Convention, the Court reiterated that this obligation must be construed

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

in the light of the [Council of Europe Convention on Action against Trafficking in Human Beings](#) (“the Anti-Trafficking Convention”) and the manner in which it has been interpreted by the Group of Experts on Action against Trafficking in Human Beings (GRETA). In this connection, the Court had regard, in particular, to Article 26 of the Anti-Trafficking Convention, which requires Contracting States to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to act as they did.

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

The Court also stressed that, given that an individual’s status as a victim of trafficking might affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – in so far as possible – only be taken once a trafficking assessment has been carried out by a qualified person. Any subsequent prosecutorial decision would have to take that assessment into account. While the Court accepted that the prosecutor might not be bound by the findings made in the course of such a trafficking assessment (see *S.M. v. Croatia*<sup>62</sup>, concerning the distinction between an administrative and criminal justice recognition of such victim status), he or she would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.

On the facts of the cases, the Court found that despite the applicants being discovered in circumstances which indicated that they had been victims of trafficking, they had been charged with a criminal offence to

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



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

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

## Right to liberty and security (Article 5)<sup>63</sup>

### Deprivation of liberty (Article 5 § 1)

The decision in *Terheş v. Romania*<sup>64</sup> concerned whether Article 5 § 1 is applicable to a general lockdown imposed by the national authorities in the context of a pandemic.

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

The decision is noteworthy as this is the first time that the Court has examined the applicability of Article 5 to the ordering of a national

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

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

lockdown on public-health grounds. The decision was delivered five months after the lodging of the application, with the COVID-19 pandemic still ongoing. The Court acknowledged that the pandemic was liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an “exceptional and unforeseeable context”.

The decision is of interest in that it applies the general case-law principles (*Austin and Others v. the United Kingdom*<sup>65</sup> and *De Tommaso v. Italy*<sup>66</sup>) to the unprecedented context of this pandemic and to the specific circumstances of the case. It sets out considerations leading to the finding that the level of restrictions imposed on citizens’ freedom of movement did not amount to a “deprivation of liberty” within the meaning of the Convention.

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

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

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

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

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

The judgment in *Denis and Irvine v. Belgium*<sup>67</sup> pertained to the link between the offences committed by persons “of unsound mind” and the lawfulness of their ensuing compulsory confinement.

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

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

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

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

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

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

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

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

The Court proceeded to find that all three of the minimum conditions for an individual to be validly detained as being of "unsound mind" (set out in *Winterwerp v. the Netherlands*<sup>68</sup>) had been satisfied in the present case: it had been reliably shown that the applicants were of unsound mind; that their mental disorders were of a kind or degree warranting compulsory confinement; and that the disorders persisted throughout the entire period of the confinement. As to this third and last condition, the Court reiterated that the assessment carried out by the domestic courts had to take into account any changes to the mental condition of the detainee following the adoption of the compulsory-confinement order and it did not require the authorities to take into account the nature of the acts committed by the individual concerned which had given rise to his or her compulsory confinement. In assessing the applicants' requests for final discharge, the competent authorities had considered whether their mental disorders had stabilised to a sufficient degree (and found they had not) and they did not take into account the nature of the punishable acts the applicants had committed. Accordingly, the applicants' confinement continued to have a valid legal basis, despite the legislative change in question, and was compatible with Article 5 § 1 (e) of the Convention.

#### Review of lawfulness of detention (Article 5 § 4)

The judgment in *Denis and Irvine v. Belgium*<sup>69</sup> pertained to the link between the offences committed by persons "of unsound mind" and the lawfulness of their ensuing compulsory confinement under Article 5 §§ 1 (e) and 4 (for the facts, see Article 5 § 1 (e) above).

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

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

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

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

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

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

## PROCEDURAL RIGHTS

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

#### Fairness of the proceedings

*V.C.L. and A.N. v. the United Kingdom*<sup>70</sup> concerned the impact of the positive obligation (Article 4) to protect victims of trafficking on the fair trial of such victims (Article 6 § 1).

The applications were lodged by two Vietnamese men who, while still minors, were charged with – and subsequently pleaded guilty to – drug-related offences after they were discovered working as gardeners

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

in cannabis factories in the United Kingdom. Following their convictions they were recognised as victims of trafficking by the designated competent authority. Although the prosecution service subsequently reviewed its decision to prosecute as a result of the authority's decision, it concluded that they were not victims of trafficking. The Court of Appeal subsequently found on the facts that the decision to prosecute had been justified. The Court found violations of Articles 4 and 6 of the Convention.

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

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

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

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

As regards the second question, the Court found, in particular, that in the absence of any assessment of whether the applicants were trafficked and, if so, of whether that fact could have had any impact on their criminal liability, those pleas were not made "in full awareness of the facts". Moreover, in such circumstances, any waiver of rights by the applicants would have run counter to the important public interest in combating trafficking and protecting its victims. The Court therefore did

not accept that the applicants' guilty pleas amounted to a waiver of their rights under Article 6 § 1.

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

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

The judgment in *Sabalić v. Croatia*<sup>71</sup> is noteworthy because the Court, for the first time, elaborated on how a failure to comply with the procedural obligation under Articles 3 and 14 may be considered to amount to a "fundamental defect" in those proceedings capable of setting aside their *res judicata* effect and allowing for their reopening to the detriment of an accused in accordance with Article 4 § 2 of Protocol No. 7 to the Convention.

The Court considered it important to reiterate that the principle of legal certainty in criminal matters was not absolute. Indeed Article 4 § 2 of Protocol No. 7 expressly permitted Contracting States to reopen a case to the detriment of an accused where, *inter alia*, a fundamental defect had been detected in the proceedings (compare *Taşdemir v. Turkey*<sup>72</sup>, in which the Court accepted that there may be *de facto* or *de jure* obstacles to reopening a case). Such a "fundamental defect" occurs where an accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings (*Mihalache v. Romania*<sup>73</sup>). Furthermore, an issue under the *ne bis in idem* principle could not even arise as regards grave breaches of fundamental human rights from the erroneous termination of the proceedings (*Marguš v. Croatia*<sup>74</sup>). Moreover, the Court considered that it would have been possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level: in cases where the domestic authorities institute two sets of proceedings but

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

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

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

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

later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way of, for instance, terminating or annulling the unwarranted set of proceedings and providing restitution for its effects, the Court may regard the situation as being remedied (*Sergey Zolotukhin v. Russia*<sup>75</sup>).

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

## OTHERS RIGHTS AND FREEDOMS

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

#### Applicability

The judgment in *Lacatus v. Switzerland*<sup>76</sup> concerned the applicability of Article 8 to begging, which is prohibited in the canton in question, and the criminal sanction imposed on a poor and vulnerable individual for unintrusive begging.

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

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

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



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

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

Regarding the applicability of Article 8, the Court referred to the notion of human dignity, which underlies the Convention and has been repeatedly referred to in the context of Article 8 (see, in particular, *Khadija Ismayilova v. Azerbaijan*<sup>77</sup>; *Beizaras and Levickas v. Lithuania*<sup>78</sup>; *Vinks and Ribicka v. Latvia*<sup>79</sup>; and *Hudorovič and Others v. Slovenia*<sup>80</sup>). The Court observed that human dignity was severely compromised if the person in question did not have sufficient means of subsistence. By begging, the applicant was adopting a particular way of life in a bid to deal with a humiliating and precarious situation. In cases of this kind the specific circumstances therefore had to be taken into consideration, and especially the reality of the person's economic and social situation. In the present case, by imposing a blanket prohibition on begging and convicting the applicant, the Swiss authorities had prevented her from approaching other people in order to obtain a form of help which, in her situation, was one possible means of meeting her basic needs. In the Court's view, the right to call on other people for assistance went to the very essence of the rights protected by Article 8.

*F.O. v. Croatia*<sup>81</sup> concerned the harassment of a student by a teacher in a public school.

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

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

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

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

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

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

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

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

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

The Court reiterated that, in order for Article 8 to come into play, an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one’s private life. In this connection, the Court referred to its case-law according to which measures taken in the field of education may, in certain circumstances, affect the right to respect for private life, but that not every act or measure which may be said to adversely affect the moral integrity of a person necessarily gives rise to such an interference (*Costello-Roberts v. the United Kingdom*<sup>82</sup>). However, distancing itself from the finding in *Costello-Roberts*, according to which an instance of corporal punishment at school did not fall within the scope of the prohibition contained in Article 8, the Court stressed the following:

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

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

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

### Private life

*Vavříčka and Others v. the Czech Republic*<sup>83</sup> concerned the fine imposed on a parent and the exclusion of children from preschool for the refusal to comply with a statutory duty to vaccinate children.

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

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

(i) Reiterating its case-law that healthcare policy matters came within the margin of appreciation of the national authorities (*Hristozov and Others v. Bulgaria*<sup>84</sup>), the Court went on to find that the margin as regards compulsory child vaccination should be a wide one. On the one hand, the duty to vaccinate may be regarded as relating to the effective

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

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

enjoyment of intimate rights (*Solomakhin v. Ukraine*<sup>85</sup>) and thus as calling for a narrower margin of appreciation: however, this consideration was less significant here since no vaccinations had been, nor could have been, forcibly administered. On the other hand, the following factors leant in favour of a wider margin: (i) the general consensus among the Contracting Parties, strongly supported by international specialised bodies, was that vaccination was one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination; (ii) the absence of consensus over a single model of child vaccination and the existence of a spectrum of policies (one based wholly on recommendation, those that made one or more vaccinations compulsory and those that made it a legal duty to ensure the complete vaccination of children); and (iii) while childhood vaccination, as a fundamental aspect of contemporary public health policy, would not in itself raise sensitive moral or ethical issues, making vaccination obligatory could be regarded as raising such issues, including from the perspective of “social solidarity”, since the purpose of the obligation was to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination.

(ii) The Court acknowledged that the chosen mandatory approach to vaccination was supported by the relevant expert data and weighty public health rationale, especially seen in the light of a positive obligation, under Articles 2 and 8, to take appropriate measures to protect life and health. Vaccination of children being at issue, the Court drew upon its well-established case-law (*Neulinger and Shuruk v. Switzerland*<sup>86</sup>) to set down an obligation on States to place the best interests of the child, and interestingly also those of children as a group, at the centre of all decisions affecting their health and development:

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

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

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

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

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

(iii) In its assessment of proportionality, the Court's examination focused on two aspects. The first was the relevant features of the domestic system and, in this regard, it examined the following features: the scope of the duty to vaccinate (diseases well known to medical science, against which vaccination was considered effective and safe); the possibility of exemptions and assessment of individual circumstances; the lack of forcible administration; the moderate severity of sanctions; the availability of procedural safeguards; a legislative framework allowing the authorities to react with flexibility to the epidemiological situation/developments in medical science and pharmacology; the transparency of the domestic system; the integrity of the policy-making process; the necessary precautions before vaccination (including routine check for contraindications and monitoring of the safety of vaccines in use); and the availability of compensation in case of injury (*Baytüre v. Turkey*<sup>87</sup>). As to the second aspect, the intensity of the impugned interferences, the Court noted that the fine imposed had not been excessive and there had been no repercussions on the education of the first applicant's (adolescent) children. As to the exclusion of the other applicants from pre-school, and while this meant the loss of an important opportunity to develop their personalities and to begin to acquire social and learning skills in a formative and pedagogical environment, they had not been deprived of all possibility of personal, social and intellectual development, even if this required additional effort and expense on their parents' part, and their subsequent admission to primary school had not been affected. In this context, the Court again emphasised the relevance of the value of social solidarity, considering that it was not disproportionate for a State to require those for whom vaccination represented a remote (very rare but potentially very serious) health risk to accept this universally practised protective measure, as a matter of legal duty, for the sake of the small number of vulnerable children who were unable to benefit from vaccination for medical reasons. The existence of a less prescriptive policy in some other European States or the notional availability of less intrusive means to protect the health

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

of the population did not detract from the validity or legitimacy of the choice of a mandatory approach to vaccination.

*Centrum för rättvisa v. Sweden*<sup>88</sup> concerned the bulk interception of cross-border communications and the safeguards against abuse under Article 8.

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

The Grand Chamber's judgment is noteworthy in that it sets out fundamental safeguards as regards, and defines the criteria for a global assessment of, the operation of bulk interception regimes<sup>89</sup>.

(i) In previous cases dealing with bulk interception regimes (*Weber and Saravia v. Germany*<sup>90</sup> and *Liberty and Others v. the United Kingdom*<sup>91</sup>) the Court applied the six minimum safeguards developed in targeted interception cases (set out for the first time in *Huvig v. France*<sup>92</sup> and *Kruslin v. France*<sup>93</sup>: (a) the nature of offences which may give rise to an interception order; (b) a definition of the categories of people liable to have their communications intercepted; (c) a limit on the duration of interception; (d) the procedure for examining, using and storing the data obtained; (e) the precautions to be taken when communicating the data to other parties; and (f) the circumstances in which intercepted data may or must be erased or destroyed). The Grand Chamber found that those safeguards had to be adapted for two main reasons. The first was to take account of the very wide reach of surveillance achieved through technological developments in the past decades. The second was to reflect the specific features of a bulk interception regime, which

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

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

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

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

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

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

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

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

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

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

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

Authorisation should be given by a body independent of the executive (not necessarily judicial), which should be informed of

both the purpose of the interception and the selection bearers or communication routes. At the very least, the types or categories of selectors to be used should be identified. The use of any strong selector linked to identifiable individuals must be justified with regard to the principles of necessity and proportionality and that justification should be scrupulously recorded and subject to a separate and objective verification.

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

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

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

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

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

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

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



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

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

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

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

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

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

*Lacatus v. Switzerland*<sup>94</sup> concerned the applicability of Article 8 to begging, which is prohibited in the canton in question, and the criminal sanction imposed on a poor and vulnerable individual for unintrusive begging.

The Court found a violation of Article 8.

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

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

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

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

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

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

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

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

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

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

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

*F.O. v. Croatia*<sup>95</sup> concerned the harassment of a student by a teacher in a public school.

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

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

events in question. His general practitioner gave a working diagnosis of post-traumatic stress disorder and a psychologist found that the applicant was suffering from an acute anxiety disorder. The applicant's father informed the school and various other domestic authorities of the applicant's harassment by the teacher, and requested protection for him. The school sought to settle the matter internally (interviews with the teacher, the applicant and his father); the relevant Ministry of Education agency found that the matter should be resolved by a discussion between the school authorities and the applicant's father; the State Attorney's Office rejected a criminal complaint (no elements of criminal-law responsibility); and the Constitutional Court declared his complaints inadmissible. Before the Court, the applicant complained about harassment by the teacher and the failure of the domestic authorities to respond effectively to his complaints of harassment. He relied on Articles 3, 8 and 13 of the Convention. The Court examined the case under Article 8 and found a violation of that provision.

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

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

On the facts of the case, the Court found that, while the teacher's first insults against the applicant had been aimed at disciplining him and his classmates, the two subsequent occasions could not be seen

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

### Positive obligations

In *E.G. v. the Republic of Moldova*<sup>96</sup>, the Court examined the issue of the applicability of the six-month rule in the context of an amnesty and the ineffective execution of a sentence for the offence of sexual abuse.

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

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

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

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

With respect to the application of an amnesty, the Court referred to its case-law developed in the context of ill-treatment by State agents, according to which amnesties and pardons should not be tolerated (*Mocanu and Others v. Romania*<sup>97</sup>), which the Court had already applied in a private party context, in so far as the treatment complained of reaches the threshold under Article 3 (*Pulfer v. Albania*<sup>98</sup>). However, the Court also reiterated that pardons and amnesties are primarily matters of the domestic law of States and are, in principle, not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights (*Marguš v. Croatia*<sup>99</sup>, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*<sup>100</sup>).

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

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

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

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

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

for instance, *Y v. Bulgaria*<sup>101</sup>). In this connection, the Court observed that there was a lack of consistency by the domestic courts in their application of amnesties under the 2008 Act: an amnesty had not been granted to another assailant of the applicant who was in a similar situation to V.B. The Court also noted that, while the amnesty had been annulled in the end, the fact that V.B. had benefited from an amnesty for a year and then used the opportunity to escape was contrary to the State's procedural obligation under Articles 3 and 8 of the Convention.

As regards the duty to execute a criminal sentence, the Court referred to its case-law under Article 2 according to which the enforcement of a sentence imposed must be regarded as an integral part of the State's procedural obligation (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*<sup>102</sup>; *Akeliënė v. Lithuania*<sup>103</sup>; and *Makuchyan and Minasyan*, cited above, § 50). The Court considered that the same applied in the present context concerning a conviction for sexual abuse falling under Articles 3 and 8 of the Convention.

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

## Freedom of thought, conscience and religion (Article 9)

### Applicability

*Vavříčka and Others v. the Czech Republic*<sup>104</sup> concerned the fine imposed on a parent and the exclusion of children from preschool for the refusal to comply with a statutory duty to vaccinate children.

One of the applicants was fined for failing to have his school-age children vaccinated in conformity with the statutory duty to vaccinate children. The other applicants, minors, were refused admission to

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

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

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

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

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

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

## Freedom of expression (Article 10)

### Freedom of expression

*Big Brother Watch and Others v. the United Kingdom*<sup>105</sup> concerned the bulk interception of cross-border communications and receipt of intelligence from foreign intelligence services and the safeguards against abuse.

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

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

(i) Regarding Article 10 and access to confidential journalistic material by the intelligence services running a bulk interception operation, the Court distinguished two situations: intentional access through the deliberate use of selectors or search terms connected to a journalist or news organisation and unintentional access as a "bycatch"

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



of such an operation. As to intentional access, the Court considered that preventive independent review was required given the significant degree of interference with journalistic communications: since such access would very likely result in the acquisition of significant amounts of confidential material, it could undermine the protection of sources to an even greater extent than an order to disclose a source, the interference being commensurate with that occasioned by the search of a journalist's home or workplace. The Court therefore stipulated the following safeguard:

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

As regards unintentional access, it was considered to be materially different from the targeted surveillance of a journalist. In this connection, in *Weber and Saravia v. Germany*<sup>106</sup>, the Court accepted that the initial interception, without examination of the intercepted material, did not constitute a serious interference with Article 10, as it was not aimed at monitoring journalists. In the present judgment, however, the Court revised this position, noting that surveillance which was not targeted directly at individuals had the capacity to have a very wide reach indeed owing to recent technological developments. In particular, the examination of a journalist's communications or related communications data by an analyst would be capable of leading to the identification of a source. At the same time, in unintentional access the degree of interference cannot be predicted at the outset, making it impossible to assess its proportionality at the authorisation stage. Keeping this particularity in mind, the Court framed the requisite safeguard, considering it imperative that

domestic law contain robust safeguards regarding the storage, examination, use, onward transmission and destruction of such confidential material. Moreover, even if a journalistic communication or related communications data have not been selected for examination through the deliberate use of a selector or search

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

term known to be connected to a journalist, if and when it becomes apparent that the communication or related communications data contain confidential journalistic material, their continued storage and examination by an analyst should only be possible if authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether continued storage and examination is “justified by an overriding requirement in the public interest”.

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

(ii) With regard to receipt of intelligence from foreign intelligence services, the Court clarified that the interference with Article 8 did not lie in the interception itself, where it was carried out under the full control of foreign intelligence services and thus did not fall within the receiving State’s jurisdiction. Rather, the interference lay, in the first place, in the initial request and, secondly, in the receipt of intercept material, followed by its subsequent storage, examination and use by the intelligence services of the receiving State. The Court indicated the requisite safeguards for each of the above two stages of the process, by drawing upon its case-law on the interception of communications by Contracting States (*Roman Zakharov v. Russia*<sup>107</sup>).

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

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

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

the receiving State must have in place adequate safeguards for its examination, use and storage; for its onward transmission; and

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

for its erasure and destruction. ... If, as the Government contend, States do not always know whether material received from foreign intelligence services is the product of interception, then the Court considers that the same standards should apply to all material received from foreign intelligence services that could be the product of intercept.

Finally, the Court considers that any regime permitting the intelligence services to request either interception or intercept material from non-Contracting States, or to directly access such material, should be subject to independent supervision, and there should also be the possibility for independent *ex post facto* review.

## Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 3

*Sabalić v. Croatia*<sup>108</sup> concerned the procedural obligation in respect of homophobic acts of violence.

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

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

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

The judgment is noteworthy because, in the first place, it contains a comprehensive statement of the relevant principles under Articles 3 and 14 concerning the State's procedural obligation when confronted with violent incidents triggered by suspected discriminatory attitudes. Secondly, the Court, for the first time, elaborated on how a failure to comply with the procedural obligation under Articles 3 and 14 may be considered to amount to a "fundamental defect" in those proceedings capable of setting aside their *res judicata* effect and allowing for their reopening to the detriment of an accused in accordance with Article 4 § 2 of Protocol No. 7 to the Convention.

(i) As regards the State's procedural obligation under Articles 3 and 14, in the judgment the Court relied on the established principles set out in, for instance, *Identoba and Others v. Georgia*<sup>109</sup>, *M.C. and A.C. v. Romania*<sup>110</sup>, and *Škorjanec v. Croatia*<sup>111</sup>. The judgment describes the three contexts in which the Court has, so far, found violations of the procedural obligation under these Articles:

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

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

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

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

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

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

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

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

putting properly into practice the relevant provisions and requirements of the domestic criminal law.

The Court also considered it important to reiterate that the principle of legal certainty in criminal matters was not absolute. Indeed Article 4 § 2 of Protocol No. 7 expressly permitted Contracting States to reopen a case to the detriment of an accused where, *inter alia*, a fundamental defect has been detected in the proceedings (compare *Taşdemir v. Turkey*<sup>112</sup>, in which the Court accepted that there may be *de facto* or *de jure* obstacles to reopening a case). Such a “fundamental defect” occurs where an accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings (*Mihalache v. Romania*<sup>113</sup>). Furthermore, an issue under the *ne bis in idem* principle could not even arise as regards grave breaches of fundamental human rights from the erroneous termination of the proceedings (*Marguš v. Croatia*<sup>114</sup>). Moreover, the Court considered that it would have been possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level: in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the unwarranted set of proceedings and providing restitution for its effects, the Court may regard the situation as being remedied (*Sergey Zolotukhin v. Russia*<sup>115</sup>).

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

In sum, the Court found that by instituting the ineffective minor-offence proceedings and therefore erroneously discontinuing the

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

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

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

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

criminal proceedings on formal grounds, the domestic authorities failed to discharge adequately and effectively their procedural obligation under Article 3 of the Convention taken in conjunction with Article 14.

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

*Jurčić v. Croatia*<sup>116</sup> concerned the refusal to provide an employment-related benefit to a woman who had undergone fertility treatment just before taking up a new job.

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

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

(i) At the outset, the Court confirmed that, since only women could become pregnant, the applicant had been treated differently on grounds of sex, thereby reiterating the view expressed for the first time in the recent judgment in *Napotnik v. Romania*<sup>117</sup> (a case leading to no violation following the termination of the applicant's diplomatic posting due to pregnancy).

(ii) In reply to the Government's argument that the revocation of the applicant's insurance status had pursued the legitimate aim of

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

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

protecting public resources from fraudulent use, the Court stressed that a woman's pregnancy as such could not be considered fraudulent behaviour and, further, held that financial obligations on the State during a woman's pregnancy could not, of themselves, constitute sufficiently weighty reasons to justify a difference in treatment on the basis of sex, the Court referring in this regard to case-law of the Court of Justice of the European Union and relevant standards of the International Labour Organization (ILO).

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

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

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

(iv) Finally, the Court expressed concern about the overtones of the domestic authorities' conclusion – which implied that women should not work or seek employment during pregnancy or the mere possibility thereof – which the Court considered amounted to gender stereotyping presenting “a serious obstacle to the achievement of real substantive gender equality”, one of the major goals of the member States of the

Council of Europe (citing *Carvalho Pinto de Sousa Morais v. Portugal*<sup>118</sup>) and which was not only a breach of domestic law, but was at odds with relevant international gender equality standards (see the United Nations *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, the *Istanbul Convention*, the ILO's *Maternity Protection Convention 2000 (No. 183)* and the Appendix to the Council of Europe's *Recommendation Rec(2019)1* of the Committee of Ministers.

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

The judgment in *Georgia v. Russia (II)*<sup>119</sup> concerned internally displaced persons (IDPs) in the context of an international armed conflict.

In this inter-State case, the Grand Chamber examined for the first time the question of the rights of IDPs from the standpoint of Article 2 of Protocol No. 4, and not only under Article 8 of the Convention and Article 1 of Protocol No. 1, as it had done before (see, *inter alia*, *Cyprus v. Turkey*<sup>120</sup>, and *Chiragov and Others v. Armenia*<sup>121</sup>).

## ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL NO. 16)

In its decision of 1 March 2021 on a request by the Supreme Court of the Slovak Republic for an advisory opinion<sup>122</sup>, the panel of five judges of the Grand Chamber considered that the question raised did not concern an issue on which the requesting court would need the Court's guidance, and thus rejected the request.

This decision is noteworthy in that it represents the first time a request to the Grand Chamber for an advisory opinion has not been accepted on the grounds that the request did not meet the requirements of Article 1 of Protocol No. 16, namely that the highest courts or tribunals may request the Court to give advisory opinions on "questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention or the Protocols thereto", "in the context of a case pending before [them]".

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

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

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

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

122. *Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention* [GC], request no. P16-2020-001, Supreme Court of the Slovak Republic, 1 March 2021.



It was observed in the decision, firstly, that the requesting court or tribunal had to consider that the opinion on the question of principle was necessary for its adjudication of the case.

In so far as this particular request related to the interpretation of Articles 2 and 3 of the Convention, there was no indication in the domestic procedural background or the arguments of the parties to the domestic proceedings, as described in the request, that the defendant or any other person had relied on the rights under those Articles. Therefore, in so far as it concerned the interpretation of Articles 2 and 3, the request did not appear to be related to points that were “directly connected to proceedings pending at domestic level” for the purposes of Article 1 §§ 1 and 2 of Protocol No. 16.

With regard to Article 6, which was also relied on by the requesting court, it was noted in the decision that in a unifying opinion issued by its Criminal Law Bench in accordance with a related judgment of the Court, the Supreme Court had itself already provided relevant indications as to the answer to the question submitted to the Court.

It was concluded in the decision that the questions raised in this request for an advisory opinion, “on account of their nature, degree of novelty and/or complexity or otherwise, do not concern an issue on which the requesting court would need the Court’s guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it”. The request did not therefore meet the requirements of Article 1 of Protocol No. 16, which the Court was able to clarify in this decision, thus providing guidance for the highest domestic courts and tribunals that might be considering making use of this advisory procedure in the future.

## OTHER CONVENTION PROVISIONS

### Restrictions not prescribed by the Convention (Article 18)

*Azizov and Novruzlu v. Azerbaijan*<sup>123</sup> concerned the applicability of Article 18 in conjunction with Article 5 § 3 to procedural safeguards.

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

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

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

The judgment is noteworthy in that the Court has, for the first time, applied Article 18 in conjunction with Article 5 § 3, rather than with Article 5 § 1 as in many previous similar cases. This is also the first time, since *Merabishvili v. Georgia*<sup>124</sup>, that the Court examined the case from the standpoint of a potential plurality of purposes. In this latter connection, two aspects are interesting: the fact that the Court proceeded on the assumption that the applicants' pre-trial detention pursued a legitimate purpose; and the manner in which the Court distinguished between the elements relevant for each step of the two-tier test set out in *Merabishvili* (whether a given restriction pursued an ulterior purpose; and whether the established ulterior purpose was predominant).

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

The question whether Article 18 could be invoked in conjunction with Article 5 § 3 was, for the first time, raised in the Grand Chamber judgment in *Selahattin Demirtaş v. Turkey (no. 2)*<sup>125</sup> (see also the Chamber judgment<sup>126</sup>). The Grand Chamber in that case, in contrast to the present case, found a lack of a reasonable suspicion in breach of Article 5 § 1 and that the pre-trial detention had pursued solely an ulterior purpose contrary to Article 18 taken in conjunction therefore with Article 5 § 1 (see also *Navalnyy v. Russia*<sup>127</sup> and, against Azerbaijan, *Aliyev v. Azerbaijan*<sup>128</sup>;

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

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

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

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

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

*Natig Jafarov v. Azerbaijan*<sup>129</sup>; *Khadija Ismayilova v. Azerbaijan (no. 2)*<sup>130</sup>; and *Yunusova and Yunusov v. Azerbaijan (no. 2)*<sup>131</sup>, including, notably, the cases brought by other members of NIDA: *Rashad Hasanov and Others v. Azerbaijan*<sup>132</sup> and *Ibrahimov and Mammadov v. Azerbaijan*<sup>133</sup>).

In the instant case and unlike in the above cases, the applicants' complaint under Article 5 § 1 regarding the absence of a "reasonable suspicion" of their having committed a criminal offence was rejected for a failure to exhaust domestic remedies. The Court went on to confirm that Article 18 can be invoked in conjunction with Article 5 § 3 of the Convention (compare with the Court's finding in *Ilgar Mammadov v. Azerbaijan (no. 2)*<sup>134</sup> to the effect that the question of whether Article 6 contains any express or implied restrictions which may form the subject of the Court's examination under Article 18 remained open).

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

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

- its findings in *Rashad Hasanov and Others* pinpointing specific targeting of NIDA and its members by law-enforcement authorities: it was clear from the latter's joint press statement that they had tried to link the applicants' alleged possession of narcotic substances to their NIDA membership, describing the organisation as a "destructive force" and qualifying its activities as illegal, without any reason or evidence;

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

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

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

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

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

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

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

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

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

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

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

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

### Inter-State cases (Article 33)

The judgment in *Georgia v. Russia (II)*<sup>135</sup> concerned the jurisdiction of the attacking or invading State during the active combat phase of hostilities; the relationship between Convention law and international humanitarian law (IHL) in the context of an armed conflict; the duty to investigate deaths occurring during the active combat phase; the definition of administrative practice; and the application of Article 2 of

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

Protocol No. 4 to internally displaced persons (IDPs) (Articles 1, 2, 5 and 35 § 1 of the Convention and Article 2 of Protocol No. 4).

In this inter-State application (Article 33) the Georgian Government made a series of complaints concerning the armed conflict between Russia and Georgia in August 2008. The Court examined two phases of the impugned events separately, namely, before and after the ceasefire agreement of 12 August 2008. It held that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, whereas the events which occurred after the ceasefire and the cessation of the hostilities did fall within its jurisdiction. On the merits, the Court found that there had been an administrative practice contrary to Articles 2, 3, 5 and 8 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4; a violation of the procedural limb of Article 2; and that there had been a failure to comply with the obligation to cooperate with the Court under Article 38 of the Convention.

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

(i) This is the first case, since the decision in *Banković and Others v. Belgium and Others*<sup>136</sup>, in which the Court has examined the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. The Grand Chamber did so in the light of two existing lines of case-law: on the one hand, the exceptional recognition of extraterritorial jurisdiction based on “effective control” by the State of an area and/or on “State agent authority and control” over the direct victim of the alleged violation (*Al-Skeini and Others v. the United Kingdom*<sup>137</sup>); and, on the other hand, the general principle of *Banković and Others* according to which the provisions of Article 1 do not admit of a mere “cause and effect” notion of “jurisdiction” so that a State’s responsibility cannot be engaged by an “instantaneous extraterritorial act” (explicitly restated in *Medvedyev and*

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

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

*Others v. France*<sup>138</sup>; see also *M.N. and Others v. Belgium*<sup>139</sup>). It also found that neither of the two conditions of extraterritorial jurisdiction (State agent authority and control over individuals or effective control over an area) are met in the case of military operations carried out during an international armed conflict. The reality of fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no actual “control” either over that area or over the individuals therein. This interpretation is confirmed by the practice of the member States in not derogating under Article 15 in situations where they have engaged in an international armed conflict outside their own territory. Having regard to the fact that such situations are predominantly regulated by legal norms other than those of the Convention (namely, IHL) and that the Contracting Parties have not endowed the Court with the necessary legal basis for assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, the Grand Chamber concluded that it could not develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date. Accordingly, the events of the active phase of hostilities fell outside the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention.

(ii) Nevertheless, the Grand Chamber held that the respondent State had to be deemed to have had “jurisdiction” in respect of the complaint under the procedural limb of Article 2 of the Convention, even in respect of deaths which took place during the active phase of the military conflict. The Grand Chamber followed the case-law set out in *Güzelyurtlu and Others v. Cyprus and Turkey*<sup>140</sup>, according to which a jurisdictional link to the obligation to investigate under Article 2 may be established if the respondent State has begun an investigation or proceedings in accordance with its domestic law in respect of a death which occurred outside its jurisdiction or if there were “special features” in a given case. In the present situation, both of these conditions had been met: the fact that the Russian Federation had an obligation to investigate the events in issue in accordance with the relevant rules of international humanitarian law, that it had established “effective control” over the territories in question shortly after the hostilities and that Georgia had been prevented from carrying out an adequate and effective investigation into the allegations all constituted “special

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

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

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

features” sufficient to establish Russia’s jurisdiction in respect of this specific complaint.

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

(iv) The Grand Chamber also clarified the methodology to be applied in cases of a prima facie conflict between Convention law and IHL. It observed that, generally speaking, IHL applied in a situation of “occupation”: if there is “occupation” for the purposes of IHL there will also be “effective control” within the meaning of the Court’s case-law, although the Court’s term of “effective control” is broader and covers other situations as well. In this regard, the Grand Chamber restated the principles defined in *Hassan v. the United Kingdom*<sup>141</sup>, according to which in the context of an armed conflict, the Convention must be interpreted in harmony with the relevant rules of IHL. The Grand Chamber went on to examine the interrelation between the two legal regimes with regard to each particular aspect of the case and each Convention Article alleged to have been breached, to ascertain each time whether there was a conflict between the two legal regimes. In the circumstances of the present case, it held that there was no conflict between Articles 2, 3 and 8 of the Convention and Articles 1 and 2 of Protocol No. 1, on the one hand, and the respective rules of IHL applicable in a situation of occupation, on the other hand. As for Article 5, the Grand Chamber reiterated that there might be such a conflict (*Hassan*, cited above, §§ 97-98); however, there was none in the present case since the justification for detaining civilians put forward by the respondent Government was not permitted under either set of rules.

(v) Regarding the definition of the concept of “administrative practice” violating the Convention, it has been repeatedly characterised in the case-law as comprising two elements: the “repetition of acts” and “official tolerance” (see, most recently, *Ukraine v. Russia (re Crimea)*<sup>142</sup>), the former being defined as “an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to

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

142. *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021.

amount not merely to isolated incidents or exceptions but to a pattern or system" (see *Georgia v. Russia (I)*<sup>143</sup>, with further references). While these criteria defined a general framework, they did not indicate the number of incidents required to establish the existence of an administrative practice: this was a question left for the Court to assess on a case-by-case basis.

(vi) Finally, the Grand Chamber examined for the first time the question of the rights of IDPs from the standpoint of Article 2 of Protocol No. 4, and not only under Article 8 of the Convention and Article 1 of Protocol No. 1, as it had done before (see, *inter alia*, *Cyprus v. Turkey*<sup>144</sup>, and *Chiragov and Others v. Armenia*<sup>145</sup>).

In the inter-State application *Ukraine v. Russia (re Crimea)*<sup>146</sup> the Ukrainian Government made a series of complaints about the events of 27 February 2014 to 26 August 2015 in the course of which the region of Crimea (including the city of Sevastopol) was purportedly integrated into the Russian Federation. In its decision, the Grand Chamber held that the impugned facts fell within the "jurisdiction" of the Russian Federation within the meaning of Article 1; it dismissed the respondent Government's preliminary objections (incompatibility *ratione loci* with the provisions of the Convention, the alleged absence of the "requirements of a genuine application" and non-exhaustion of domestic remedies); and declared admissible the applicant Government's complaints about an alleged administrative practice contrary to Articles 2, 3, 5, 6, 8, 9, 10 and 11 of the Convention, Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention taken in conjunction with Articles 8, 9, 10 and 11 of the Convention and Article 2 of Protocol No. 4.

The decision is interesting in several respects: the alleged absence of a "genuine application"; jurisdiction in the case of an "annexation"; the standard of proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice; and the duty to exhaust domestic remedies in the case of allegations of an administrative practice (Articles 1, 19, 33 and 35 § 1).

143. *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 122-24, ECHR 2014 (extracts).

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

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

146. *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, adopted on 16 December 2020 and delivered on 14 January 2021. See also under Article 1 (Jurisdiction of States) above.



The Court addressed, for the first time, the relevance of any political motives for lodging an inter-State application and, importantly, the “jurisdiction” of a respondent State in the context of a purported “annexation” of territory from one Contracting State to another (as opposed to its military occupation or the provision of political/military support for a separatist entity). The decision also clarifies the standard of proof applicable at the admissibility stage to the question of jurisdiction and to the existence of an administrative practice. Finally, it references extensively the case-law of the International Court of Justice (ICJ).

(i) Following the approach of the ICJ to its own jurisdiction, the Grand Chamber held that any political motives for lodging an inter-State application, or any political implications of this Court’s ruling, were of no relevance to the establishment of its jurisdiction under Article 19 of the Convention to adjudicate the legal issues submitted to it. It therefore dismissed the respondent State’s objection as to the alleged absence of a “genuine application” amounting to an “abuse of process”.

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

(iii) Having established that the present case was expressly limited to general allegations of an “administrative practice” (as opposed to one requiring an individual assessment of specific incidents allegedly violating the rights of one or more clearly identified/identifiable person or persons (*Cyprus v. Turkey*<sup>147</sup>), the Grand Chamber clarified that the close interplay between the two admissibility issues which arose – the

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147. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 43-45, ECHR 2014.

formal rule of the exhaustion of domestic remedies (Article 35 § 1) and the substantive admissibility of the complaint of an “administrative practice” (with its component elements of the “repetition of acts” and “official tolerance”) – required the application of a uniform standard of proof to both. The Grand Chamber set this standard of proof at whether there was “sufficiently substantiated prima facie evidence”, as opposed to the “beyond reasonable doubt” standard that would apply to the examination of the merits of the respective complaints. Accordingly, while the duty to exhaust domestic remedies did not apply to allegations of an “administrative practice”, without such prima facie evidence of an administrative practice, the complaint could not be admissible on substantive grounds unless there were other grounds (such as the ineffectiveness of domestic remedies) exempting the applicant Government from the exhaustion requirement.