



# ENSURING ACCESS TO RIGHTS FOR ROMA AND TRAVELLERS

” A handbook  
for lawyers  
defending Roma  
and Travellers

Edited and  
updated by  
**Marc Willers**

COUNCIL OF EUROPE



## **ENSURING ACCESS TO RIGHTS FOR ROMA AND TRAVELLERS\***

### **THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

### **A HANDBOOK FOR LAWYERS DEFENDING ROMA AND TRAVELLERS**

\*The terms "Roma and Travellers" are being used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Café, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term "*Gens du voyage*", as well as persons who identify themselves as Gypsies

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## **Foreword**

I can only welcome the publication of a handbook intended to familiarise those providing legal assistance to NGOs, in particular to Roma and Traveller communities with the European Convention of Human Rights and the workings of the European Court of Human Rights.

If properly understood and employed, the Convention and the Court can turn into two dynamic tools for the assertion of minority rights and their protection against prejudice and the abuse of power. Much has already been achieved through the operation of their intrinsic resources, and yet, plenty more remains to be done. It is wrong to see in the Convention the infallible cure for all evils. It would be even worse to underestimate its actual and latent energies. What can be achieved through and by the Court will be fortified if it goes hand in hand with education for awareness, with collective action and political leverage. Without this symbiosis, the resources of the Convention can never yield the maximum in returns.

This publication unfolds in four sections – starting with a practical and a theoretical approach towards the Convention and the implementation mechanism entrusted to the Court. The last two sections contain an analysis of relevant case-law concerning Roma, with an explanation of the specific Convention Articles mentioned and their reference to the everyday situation of Roma in the Contracting States, and finally a moot trial exercise on the well-known pattern of similar assignments, including feedback and an evaluation of frequently asked questions. This section aims to show readers how the Court works and how lawyers should react to perceived violations of articles of the Convention. A guiding principle throughout has been to present all the topics in the most comprehensive way, compatible with the utmost clarity.

Of course, this handbook should only be viewed as a first lifting of the curtain, as an invitation to explore further, as a step towards the hidden riches of the Court's case-law; then to approach with boldness and creativity the myriad factual situations still to be tackled, and the myriad legal issues still to be highlighted and considered.

My desire is that those who handle this work will keep in mind the necessity of using the Convention and the Court properly and to their maximum effect. This advice includes the inescapable need of choosing judiciously which cases to bring to the Court, as a poor case lost can do more, on the scale of harm, than a good case won can do on the scale of achievement. This also comprises a plea to construct the factual basis of the case with the utmost thoroughness, both in the

national fora and before the Court. And it rounds off with an appeal to be adventurous – to succumb with calculated daring to the risks of novelty.

The Court should hardly be expected to turn into a hothouse of revolutionary brainstorms, but new ideas and a stealthy evolutionary process, also have a place on its agenda. Concepts unthinkable a few years ago first started claiming attention, and then credit. It is not that I believe that all the wrongs of the world will be righted overnight by the Court’s magic wand. What I do believe is that, step after painful step, the legal protection of unfavoured minorities will progress. What it takes is a rich mix of perseverance, strategic design and fine lawyering too.

My plea has always been not to shy away from bringing worthy cases to the Court. Mostly these will be complaints which failed the test of the domestic courts, or for which no remedy exists in the national order. Keep the Court busy. If it is true that hard cases make bad law, no cases make no law at all. The judgments of the Court will then percolate back into the domestic system.

This handbook should primarily be seen as an organic introduction to human rights law. If it serves to whet the appetite of those who work for and with disadvantaged minorities to delve deeper into the case-law, the doctrine of human rights and the fuller textbooks (excellent ones do exist), it will have served its purpose.

I can only congratulate and thank all those who worked hard for this project’s achievement: in particular, Maria Ochoa-Llido and the Roma and Travellers Division Secretariat, Jean Garland and Luke Clements. They have done a splendid job and deserve the praise of all human rights activists, and, better still, of human rights sufferers.

Giovanni Bonello

## Defending Roma Rights – a lawyer's perspective

In 1993 when I first moved to Central Europe, I was invited to a reception with a group of high-ranking Slovak judges and lawyers. I found myself in a conversation with a small group of English speakers discussing Bill Clinton, world politics and rock-and-roll music, among other topics. I found them to be intelligent and interesting, warm and engaging. These are wonderful people, I thought. This is a friendly and fascinating part of the world. Then the topic of conversation switched to Roma, and the beautiful people I was speaking to suddenly became very ugly. The jokes and comments were appalling. But in Central and Eastern Europe in the 90s, it was absolutely acceptable for politicians, judges, government officials – the kind of people one normally looks up to – to make derisive and racist comments about the Roma.

In Slovakia, a young Roma man was doused with gasoline and set on fire by a group of skinheads, in full view of his horrified family. Also in Slovakia, a group of young thugs decided they would attack a Roma family for no reason other than the fact that they were Roma – brutally beating to death the mother of six children. In Romania, an angry mob killed three Romani men who had been involved in a fight and burned 14 Romani family homes. In Bulgaria, police beat to death a young Romani man who had been arrested for theft. In the Czech Republic, more than 50% of the children in special schools for the mentally handicapped are Roma, even though they make up about only 5% of the total population. In Croatia, education officials apologetically explained to me that they could only have separate Romani classes in the lower grades because there were not enough Roma in the higher grades to make separate classes financially feasible.

Western Europe is not much different. In Aspropyrgos, Greece, I saw bulldozers destroying make-shift Romani family homes in an effort to “clean up” Athens before the Olympic Games. Denmark and Germany expelled Roma refugees back to a dangerous and uncertain situation in Kosovo. Italy placed Roma seeking public assistance into squalid and dangerous camps, reserving the public housing in the cities for the non-Roma. Belgium expelled a group of Slovak Roma by tricking them into coming to the police station under the pretext of completing documents to seek asylum. The United Kingdom passed a regulation authorizing customs officials to single out Roma and other minority groups for special scrutiny at the border. In light of the attitudes expressed by politicians, judges, police and the public in general towards the Roma, it is not so surprising that such appalling conduct is often shrugged off or ignored.

The Roma make up Europe's largest and most despised minority group. In virtually every country in Europe they struggle with poverty, discrimination, lower education levels and shortened life expectancies. They are often the victims of police brutality and public and political indifference, if not downright hostility. But the situation appears to be improving, albeit slowly. Creative and dedicated lawyers and human rights organisations have used the European Court of Human Rights to challenge the Member States of the Council of Europe in their treatment of the Roma and have forged new paths to justice in cases like *Assenov v. Bulgaria*, *Connors v. United Kingdom*, *Moldovan v. Romania*, *Nachova v. Bulgaria*, and others.

Armed with a mandate of defending human rights and protecting parliamentary democracy and the rule of law, the Council of Europe and European Court of Human Rights have been at the forefront in defending the rights of the Roma and in encouraging their social and political inclusion in European affairs. To encourage and assist lawyers in bringing cases involving Roma before the Court, the Council of Europe provides study sessions and training programs to familiarise them with the Court's procedural requirements and case law. This publication is offered in the hope of encouraging stronger and better defence of human rights in general and Roma rights in particular. Welcome to the struggle!

Gloria Jean Garland

## **Section I – Theoretical approach to the Convention for the Protection of Human Rights and Fundamental Freedoms**

### **Historical Background**

The Council of Europe was created in 1949 when ten States signed the Statute of the Council of Europe. The aim of the new International organisation was to achieve greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.<sup>1</sup> One of its aims was to maintain and further the respect of human rights and fundamental freedoms.<sup>2</sup> To this end, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was opened for signature in Rome in 1950 for the Council of Europe Member States to sign. The Convention came into force in September 1953 and represented the first step towards the collective enforcement of some of the rights set out in the Universal Declaration of Human Rights of 1948.

The obligation to recognise the Convention and the European Court of Human Right's competency is now a condition for admission to the Council of Europe.

### **The Convention and its Protocols**

The Convention is a treaty comprised of 59 Articles, which is divided into two sections. The first section of the Convention sets out the rights that it protects and the second section describes the functions and mechanisms of the Court.

In accordance with Article 1 of the Convention:

*"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*

Thus, all individuals who allege that their rights have been violated when they are in the territory of a contracting State are entitled to complain. The acts of Contracting States performed outside of their territory may amount to exercise by them of their jurisdiction within the meaning of Article 1. Whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under the Convention.<sup>3</sup> Additionally, a

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<sup>1</sup> Article 1(1) of the Statute of the Council of Europe.

<sup>2</sup> Article 1(2) of the Statute of the Council of Europe.

<sup>3</sup> See: *Öcalan v Turkey*, Application No. 46221/99, Judgment date, 12 May 2005, (2005) 41 E.H.R.R. 45.

Member State's obligation is extended outside its territory whenever the State, through its agents, exercises control and authority over an individual.<sup>4</sup>

Article 19 of the Convention provided for the creation of a permanent European Court of Human Rights ("the Court") which was to be set up to in order to ensure that the Contracting States observed their duties under the Convention and its Protocols.

To date, sixteen additional Protocols to the Convention have been opened for signature with the aim of developing the human rights protected by the Court. These can be divided into two main groups: those changing the machinery of the Convention (Protocols No. 11, 14 and 15); and those adding additional rights to those protected by the original Convention (Protocols No.1, 4, 6, 7, 12 and 13). Not all the Council of Europe Member States have ratified all the Protocols and it is important to underline that the Protocols are only binding on those Member States that have ratified them.

### **Relevant principles to be applied when interpreting the Convention**

**Subsidiarity.** The Convention is intended to be subsidiary to national systems safeguarding human rights, performing those tasks that cannot be performed effectively at national level.

The concept of subsidiarity reflects three basic features of the Convention system:

- 1) The list of rights and freedoms is not exhaustive. Contracting States are free to provide better protection under their own law or by any other international agreement.<sup>5</sup>
- 2) The Convention does not impose uniform rules across Contracting States.<sup>6</sup>
- 3) National authorities are in better position to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual.

**Democratic Society.** The concept of democratic society prevails throughout the Convention and is acknowledged as a fundamental feature of the European

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<sup>4</sup> See: *Issa and Others v. Turkey*, App. No. 31821/96, Judgment date 16 November 2004, (2005) 41 E.H.R.R. 27; and *Al-Skeini and others v. the United Kingdom*, Application No. 55721/07, Judgment date 7 July 2011, (2011) 53 E.H.R.R. 18.

<sup>5</sup> This principle is reflected in Article 53 of the Convention.

<sup>6</sup> See: Case "Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium" (known as the "Belgian linguistic case", App. No. 1474/62, Judgment date, 23 July 1998; Series A, No. 6 (1979-80) 1 E.H.R.R. 252, paragraph 10: "... The national authorities remain free to choose between the measures which they consider appropriate in those matters governed by the Convention. Review by the court concerns only the conformity of those measures with the requirements of the Convention".

public order.<sup>7</sup> This principle means that the rights that are protected by the Convention are to be considered, guaranteed and applied by State Parties in the light of the values of a democratic society. It is used in order to evaluate whether a State's interference with a right protected by the Convention is justified.<sup>8</sup> In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.<sup>9</sup>

**Legal Certainty (lawfulness).** The legal basis for any interference with Convention rights must be adequately accessible<sup>10</sup> and formulated with sufficient precision to enable a person to regulate their conduct.<sup>11</sup> In the context of discretionary powers that give rise to potential interferences with a Convention right, the discretion must, as a minimum, give an adequate indication of the scope of the intervention:<sup>12</sup>

**Proportionality.** This concept is used in order to establish a balance between the applicant's interests and those of the community.<sup>13</sup> When used in assessing the proportionality of a particular measure, the Court will consider whether there is an alternative means of protecting the relevant public interest without interference at all, or by means which are less intrusive. Proportionality requires a reasonable relationship between the means employed and the aim sought to be realised.<sup>14</sup>

**Margin of Appreciation.** This principle is used in order to describe the latitude left to national authorities once the appropriate level of review has been decided by the Court.<sup>15</sup> In practice, the margin of appreciation operates as a means of

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<sup>7</sup> See: *Oberschlick v. Austria* (No 1), App. No. 11662/85, Judgment date, 23 May 1991, (1991) 19 E.H.R.R. 389, paragraph 58.

<sup>8</sup> To be justified the interference must fulfil a pressing social need and must be proportionate to the legitimate aim relied upon. See: *United Communist Party of Turkey and others v. Turkey*, App. No. 19392/92, 30 January 1998, 26 E.H.R.R. 121.

<sup>9</sup> See: *Soering v. United Kingdom*, Series A, No 161, App. No. 14038/88, Judgment date 7 July 1999, (1989) 11 E.H.R.R. 439, paragraph 87.

<sup>10</sup> To enable citizens to ascertain the applicable legal rules.

<sup>11</sup> See: *Silber v. United Kingdom*, App. No. 5947/72, Judgment date 25 March 1983, Series A, No 161, (1983) 5 E.H.R.R. 347, paragraph 88: "... a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

<sup>12</sup> See: *Henrich v. France*, App. No. 13616/88, Judgment date 22 September 1994, Series A, No. 296-A, (1994) 18 E.H.R.R. 440, paragraph 42.

<sup>13</sup> See: *Sporrong and Lonnroth v. Sweden*, App. No. 7151/75, Judgment date 23 September 1982, Series A, No 52, (1983) 5 E.H.R.R. 35, paragraph 69.

<sup>14</sup> See: *James and Others v. United Kingdom*, App. No. 8795/76, 21 February 1986, Series A, No. 98, (1986) 8 E.H.R.R. 123, paragraph 50.

<sup>15</sup> Ibid, paragraph 46: "... Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern...and of the remedial action to be taken...Here, as the other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation".

leaving a State freedom to manoeuvre in assessing what its society needs and the best way to achieve those needs, and even the timing of policies.<sup>16</sup>

**The Convention as a living instrument.** The Convention is seen as a living instrument to be interpreted by the Court in the light of present day conditions, rather than by it trying to assess what was intended by its original drafters. We may speak about a dynamic, rather than an historical approach.<sup>17</sup> This cannot however extend so far as the creation of rights not intended to be included in the Convention.<sup>18</sup>

**Autonomous Concepts.** Specific terms have been found by the Court to constitute an “autonomous concept”. Justification for this principle lies in the fact that terms do not have the same meaning in the national legal systems of the Member States, so it is necessary for the Court to ensure uniformity of treatment.<sup>19</sup>

**Positive Obligations.** The Court has recognised that in order to secure truly effective protection, certain rights must be read as imposing obligations on the State to take action to ensure they are protected. In order to decide whether there is a positive obligation, the Court will try to take account of the fair balance to be struck between the general interest of the community and the interests of the individual.<sup>20</sup> Contravention of a positive obligation arises by way of an omission or a failure to act.<sup>21</sup>

**Fourth Instance.** The Court cannot act as a court of appeal when considering the decisions of national courts. In this context the assessment of domestic law is primarily for the national courts. It is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair.<sup>22</sup>

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<sup>16</sup> See: *Lindsay v. United Kingdom*, App. No.11089/84, Judgment date, 11 November 1986, 49 D.R. 181; (1987) 9 E.H.R.R. CD555.

<sup>17</sup> See: *Selmouni v. France*, App. No. 25803/94, 28 July 1990, (2000) 29 EHRR 403, paragraph 101.

<sup>18</sup> See: *Johnston v. Ireland*, App. No. 9697/82, 18 December 1986, Series A, No 112, (1987) 9 E.H.R.R. 203, paragraph 53.

<sup>19</sup> The Court is free to assess their application to particular situations in domestic systems.

<sup>20</sup> See: *McGinley and Egan v. United Kingdom*, App. No. 21825/93, Judgment date 9 June 1998, (1999) 27 E.H.R.R. 1, paragraph 125

<sup>21</sup> In *Osmann v. United Kingdom*, App. No. 23452/94, Judgment date 28 October 1998, (2000) 29 E.H.R.R. 245, paragraph 116 the Court was careful to emphasise that this obligation had to be: “interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”

<sup>22</sup> See: *Edwards v. United Kingdom*, App. No. 13071/87, Judgment date 25 November 1992, (1993) 15 E.H.R.R. 417, paragraph 34.

**Effectiveness.** As the Convention is a system for the protection of human rights, it is interpreted and applied in a manner which renders these rights practical and effective, not theoretical and illusory.<sup>23</sup> The Court considers not only whether the domestic legislation complies with the Convention article invoked, but also whether the application of the law in the circumstances of the actual case complied with the Convention.<sup>24</sup>

### The notion of jurisdiction

This notion has to be analysed from four different perspectives:

- **Ratione loci.** Contracting Parties are responsible for violations that occur within their national territory. However, they may make an ad hoc declaration extending Convention rights to some (or all) of their territories. In addition, a Contracting State will be liable even if the alleged violation takes place outside its territory but it is responsible for its commission.<sup>25</sup> The crucial test for jurisdiction is whether or not the State exercised *de facto* control over the events in question.<sup>26</sup> The exercise of extra-territorial jurisdiction depends on an effective control of the relevant territory and the inhabitants abroad, and an exercise of all or some public powers. This could be as a consequence of military occupation or through consent, invitation or acquiescence of the Government of that territory.<sup>27</sup>
- **Ratione temporis.** The Convention expressly provides that it has no retrospective effect. This is however a complex issue and the prevailing interpretation is that the declaration made by a Contracting State accepting the competence of the Court is retroactive, in the sense that it relates back to when the Contracting State ratified the Convention. There may nevertheless be individual exceptions resulting from an individual State's declaration which may restrict its temporal scope. However, any retroactive effect is limited by the fact that under Article 35 a complaint must be lodged with the Court within six months of the date on which the final decision was made by the State concerned.

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<sup>23</sup> See: *Airey v. Ireland*, App. No. 6289/73, Judgment date 9 October 1979, Series A, No 32, (1979-80) 2 E.H.R.R. 305, paragraph 24; *Soering v. United Kingdom*, App. No. 14038/88, Judgment date 7 July 1989, Series A, No. 161 (1989) 11 E.H.R.R. 439, paragraph 87.

<sup>24</sup> The principle of effectiveness will be applied by the Court when the respondent State makes excessively formal or technical arguments, which, if accepted would result in a reduction in the effectiveness of the rights guaranteed.

<sup>25</sup> For a more comprehensive analysis see: *Cyprus v. Turkey*, App. No. 6950/75, Judgment date 10 July 1982; (1982) 4 E.H.R.R. 482; and *Loizidou v. Turkey*, App. No. 15318/89, Judgment date 23 March 1996, (1995) 20 E.H.R.R. 99, paragraph 62.

<sup>26</sup> See: *Chrysostomos, Papachrysostomou v. Turkey*, App. Nos. 15299/89 and 15300/89; 86-A D.R. 4, paragraphs 96-97.

<sup>27</sup> See: *Banković and others v. Belgium and Others*, App. No. 52207/99, Admissibility decision, 12 December 2001, (2007) 44 E.H.R.R. SE5, paragraph 70-71.

- **Ratione personae.** A complaint can be directed only against a State that is a Party to the Convention. In this case the State is considered in its unity as responsible for an act contrary to the Convention rights.
- **Ratione materiae.** In accordance with Article 1 of the Convention, the Court cannot consider an application which concerns a right outside the scope of the Convention.

**Substantive Articles of the European Convention and Additional Protocols:**

**Convention**

- Article 2 Right to Life
- Article 3 Prohibition of Torture
- Article 4 Prohibition of Slavery and Forced Labour
- Article 5 Right to Liberty and Security
- Article 6 Right to a Fair Trial
- Article 7 No Punishment without Law
- Article 8 Right to Respect for Private and Family Life
- Article 9 Freedom of Thought, Conscience and Religion
- Article 10 Freedom of Expression
- Article 11 Freedom of Assembly and Association
- Article 12 Right to Marry
- Article 13 Right to an Effective Remedy
- Article 14 Prohibition of Discrimination

**Protocol No. 1**

- Article 1 Protection of Property
- Article 2 Right to Education
- Article 3 Right to Free Elections

**Protocol No. 4**

- Article 1 Prohibition of Imprisonment for Debt
- Article 2 Freedom of Movement
- Article 3 Prohibition of Expulsion of Nationals
- Article 4 Prohibition of Collective Expulsion of Aliens

**Protocol No. 6 Article 1 Abolition of the Death Penalty in Peacetime**

**Protocol No. 7**

- Article 1 Procedural Safeguards Relating to Expulsion of Aliens
- Article 2 Right of Appeal in Criminal Matters
- Article 3 Compensation for Wrongful Conviction
- Article 4 Right not to be Tried or Punished Twice
- Article 5 Equality between Spouses

**Protocol No. 12**

- Article 1 General Prohibition of Discrimination

**Protocol No. 13**

- Article 1 Abolition of the Death Penalty (in all circumstances)

**Protocol No. 14**

- Amending the control system of the Convention

## **Substantive rights protected by the Convention<sup>28</sup>**

The rights guaranteed by the Convention and its Protocols can be divided into two categories: civil and political rights; and social and economic rights. It should be noted that most of the safeguards concern civil and political rights and only a limited number of social and economic rights are protected.

### **Article 2 – Right to life**

- “1 *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
- 2 *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
  - a *in defence of any person from unlawful violence;*
  - b *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - c *in action lawfully taken for the purpose of quelling a riot or insurrection.”*

Article 2(1) protects the right of every person to their life. The right is subject to exceptions listed in Article 2(2) which include the cases of lawful executions, death as a result of "the use of force which is no more than absolutely necessary" in defending one's self or others, arrest of a suspect or fugitive and suppression of riots or insurrections.

At the time when the Convention first came into force, most Contracting States still used the death penalty as a form of punishment for the most serious of crimes. Throughout the 1970s, the Council of Europe took steps to eradicate the death penalty in its Members States by negotiating a legally binding treaty. This culminated in Protocol No. 6 to the Convention, which opened for signature on 28 April 1983. Article 1 of the Protocol provides that a State must abolish the death penalty from its law in order to become a party to the Protocol. However, Article 2 limits the scope of the Protocol by only obliging the signatory to abolish the death penalty in peacetime.<sup>29</sup>

Protocol No. 13 to the Convention, which opened for signature on 3 May 2002, provides for the abolition of the death penalty in all circumstances. Article 2 of Protocol No.13 provides that there can be no derogations.<sup>30</sup> Only Armenia, Azerbaijan, Poland and Russia have not ratified the 13<sup>th</sup> Protocol.

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<sup>28</sup> The full text of the Convention can be found in Appendix II

<sup>29</sup> Russia is the only Member State not to have ratified the Protocol although there has been a moratorium on the death penalty since 1999 and no executions have taken place since then.

<sup>30</sup> Only Armenia, Azerbaijan, Poland and Russia have not ratified the 13<sup>th</sup> Protocol.

### **Article 3 - Prohibition of Torture, inhuman or degrading treatment or punishment**

*"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

This Article requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.<sup>31</sup> In the case of arrest or detention, persons deprived of their liberty must be protected by the State from physical injury; in addition, they must receive proper medical treatment without being subject to discrimination. The conditions of any detention must be compatible with human dignity.<sup>32</sup>

### **Article 4 - Prohibition of slavery and forced labour**

- 1 No one shall be held in slavery or servitude.*
- 2 No one shall be required to perform forced or compulsory labour.*
- 3 For the purpose of this article the term "forced or compulsory labour" shall not include:*
  - a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
  - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
  - c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
  - d any work or service which forms part of normal civic obligations."*

Slavery or servitude as well as forced labour are prohibited. The Article provides some exceptions to the general prohibition namely: conscription; national service; prison labour; service exacted in cases of emergency or calamity; and any work or service which forms part of "normal civic obligations". Otherwise, the prohibition established by Article 4 is absolute.

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<sup>31</sup> See: *A. v. United Kingdom*, App. No. 25599/94, Judgment date 23 September 1998, paragraph 22.

<sup>32</sup> See: *Kalashnikov v. Russia* App. No. 47095/99, Judgment date 15 July 2002

With the aim of not establishing an independent definition for the term “*forced or compulsory labour*”, the Court has applied the definitions provided in the relevant conventions of the International Labour Organisation (ILO).<sup>33</sup>

The Court has held that Article 4 imposes a positive obligation on States to penalise and prosecute any act aimed at maintaining a person in a situation of slavery or servitude and to put in place legislative and administrative frameworks to punish trafficking. Additionally, there is, in certain circumstances, a positive obligation on States to protect victims of trafficking.<sup>34</sup>

### **Article 5 - Right to liberty and security**

- “1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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<sup>33</sup> See, for instance, *Van der Mussele v. Belgium*, App. No. 8919/80, Judgment date 23 November 1983, Series A, No. 70, (1984) 6 E.H.R.R. 163, paragraph 32 in which the Court began its review by citing art. 2 of the ILO convention No 9, which defines “*compulsory labour*” as “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*”.

<sup>34</sup> See: *Siliadin v France*, App. No. 73316/01, Judgment date 26 July 2005, (2006), 43 E.H.R.R. 16; and *Rantsev v Cyprus & Russia*, App. No. 25964/04, Judgment date 7 January 2010, (2010) 51 E.H.R.R. 1.

- 3 *Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
- 4 *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
- 5 *Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."*

Article 5 provides that everyone has the right to liberty and security of person. The right to liberty is subject to limitations in cases of lawful arrest or detention in certain circumstances, such as arrest on suspicion of a crime,<sup>35</sup> imprisonment in fulfilment of a sentence,<sup>36</sup> or to prevent the spreading of infectious diseases.<sup>37</sup>

Article 5(1)(a) provides that detention may be lawful "*after conviction by a competent court*". The insertion of the word "*after*" in Article 5(1)(a) does not simply mean that the detention must follow the "*conviction*" in point of time: "*detention*" must also result from, "*follow and depend upon*" or occur "*by virtue of*" the "*conviction*" and the causal link between the conviction and detention can be broken by the passage of time in certain circumstances.<sup>38</sup> Article 5(1)(b) provides that it may be lawful to detain a person "*for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law*." The words "*secure the fulfilment of any obligation prescribed by law*" in Article 5(1)(b) only concern cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy.<sup>39</sup>

Article 5(2) provides the right to be informed promptly in a language one understands of the reasons for the arrest and any charge brought against a person. Article 5(3) and (4) provide for the right of prompt access to judicial proceedings to determine the legality of one's arrest or detention and to trial within a reasonable time or to release pending trial and Article 5(5) provides for the right to compensation in the case of arrest or detention in violation of this Article.

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<sup>35</sup> Article 5(1)(c)

<sup>36</sup> Article 5(1)(a)

<sup>37</sup> Article 5(1)(e)

<sup>38</sup> See: *Weeks v. United Kingdom*, App. No. 9787/82, Judgment date 2 March 1987, 2 March 1987, (1988) 10 E.H.R.R. 293, paragraph 42; *Van Droogenbroeck v. Belgium*, App. No. 7906/77, Judgment date 24 June 1982, (1982) 4 E.H.R.R. 433, paragraph 35.

<sup>39</sup> See: *Engel and Others v. the Netherlands*, App. Nos. 5100/71-5102/71, 5354/72, 5370/72, Judgment date 8 June 1976, (1979-80) 1 E.H.R.R. 647 paragraph 69.

## Article 6 - Right to a Fair Trial

- "1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

This Article provides the right to a fair trial in both criminal and civil proceedings. This right includes the right to a public hearing before an independent and impartial tribunal within a reasonable time and the right to the presumption of innocence. Whether a trial is fair or not is to be assessed in the light of the particular circumstances of the case. The reasonableness of the length of proceedings will be assessed having regard to the complexity of the case and the conduct of the applicant and the relevant State authorities.<sup>40</sup>

Article 6(3) provides for particular procedural safeguards in criminal proceedings. Some form of legal aid is required where a defendant does not have sufficient means to pay for legal assistance. The Court has held that the following additional principles also apply: the right of a defendant to be present during

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<sup>40</sup> See: *Zappia v. Italy*, App. No. 24295/94, Judgment date 26 September 1996, paragraph 23; *Proszak v. Poland*, App. No. 25086/94, Judgment date 16 December 1997, paragraph 32.

proceedings;<sup>41</sup> the right to silence and freedom from self-incrimination;<sup>42</sup> equality of arms;<sup>43</sup> and the right to a reasoned judgment.<sup>44</sup>

In civil cases, Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for the effective access to a court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.<sup>45</sup>

### **Article 7 - No Punishment without Law**

- "1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
- 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

In accordance with the principle of non-retroactivity, no person may be punished for an act that was not a criminal offence at the time of its commission. Article 7 also prohibits a heavier penalty being imposed than was applicable at the time when the criminal act was committed. The word "law" in the expression "prescribed by law" covers not only statute but also unwritten law.<sup>46</sup>

### **Article 8 - Right to Respect for Private and Family Life**

- "1 Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being*

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<sup>41</sup> See: *Ekbatani v Sweden*, App No. 10563/83, Judgment date 26 May 1988, Series A, No. 134, (1991) 13 E.H.R.R. 504, paragraph 25

<sup>42</sup> See: *Weh v Austria*, App No. 38544/97, Judgment date 8 April 2004, (2005) 40 E.H.R.R. 37, paragraph 39

<sup>43</sup> See: *Delcourt v Belgium*, App. No. 2689/65, Judgment date 27 January 1970, (1979-80) 1 E.H.R.R. 355, paragraph 28

<sup>44</sup> See: *Karakasis v Greece*, App. No. 38194/97, Judgment date 17 October 2000, (2003) 36 E.H.R.R. 29, paragraph 27

<sup>45</sup> See: *Airey v Ireland*, App. No. 6289/73, Judgment date 9 October 1979 (1979-80), 2 E.H.R.R. 305, Series A, No. 32, paragraph 26

<sup>46</sup> See: *Sunday Times v. United Kingdom* (No.2), App. No. 6538/74, Judgment date 26 April 1979, Series A, No. 30, (1979-1980) 2 E.H.R.R. 245, paragraph 47.

*of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Article 8 provides for the right to respect for one's "*private and family life, his home and his correspondence*". Article 8 rights are not absolute rights. However, any restrictions to this right are only considered lawful if they are "*in accordance with law*" and "*necessary in a democratic society*". An interference with these rights cannot be regarded as "*necessary in a democratic society*" unless, amongst other things, it is proportionate to the legitimate aim pursued.<sup>47</sup>

In the case of *Johnston and others v. Ireland*, the Court held that:

*"The principles which emerge from the Court's case-law on Article 8 include the following:*

- (a) *By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family.*
- (b) *Article 8 applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family.*
- (c) *Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life."*<sup>48</sup>

It has also been held by the Court that:

*"...these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relation of individuals between themselves."*<sup>49</sup>

### **Article 9 - Freedom of Thought, Conscience and Religion**

- "1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

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<sup>47</sup> See: *Dudgeon v. United Kingdom*, App. No. 7525/76, Judgment date 22 October 1981, (1982) 4 E.H.R.R. 438, paragraph 53.

<sup>48</sup> See: *Johnston and others v. Ireland*, App No. 9697/82, Judgment date 18 December 1986, Series A, No 112, (1987) 9 E.H.R.R. 203 , paragraph 55.

<sup>49</sup> See: *X and Y v. the Netherlands*, App. No. 8978/80, Judgment date 26 March 1985, Series A, No.91, (1986) 8 E.H.R.R. 235 paragraph 23.

Article 9 provides for the right to freedom of thought, conscience and religion. Article 9 not only implies that individuals have the right to manifest their religion in public and within a circle of those who practice that faith but also that they have the right to practice their faith alone or in private. Article 9 lists a number of forms in which manifestation of religion or belief may take, namely: worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief.<sup>50</sup>

### **Article 10 - Freedom of Expression**

- "1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Article 10 provides for the right to freedom of expression. This right includes the freedom to hold opinions, and to receive and impart information and ideas. Restrictions to this right are only considered lawful if "*prescribed by law*" and "*necessary in a democratic society*".

The last sentence of Article 10(1) makes it clear that States are permitted to control by way of a licensing system the way in which broadcasting is organised in their territories, particularly in technical aspects. However, any licensing measures are subject to the requirements in Article 10(2).<sup>51</sup>

Article 10(2) is applicable not only to "*information and ideas*" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The Court has held that the demands of pluralism, tolerance and broadmindedness require this, as without it there is no democratic society. The adjective "*necessary*" within the meaning of Article 10(2), implies the existence of a "*pressing social need*." In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the

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<sup>50</sup> See: *Kalaç v. Turkey*, App. No. 20704/92, Judgment date 1 July 1997, (1999) 27 E.H.R.R. 552, paragraph 27.

<sup>51</sup> See: *Groppera Radio AG and Others v. Switzerland*, App. No. 10890/84, Judgment date 28 March 1990, paragraph 61.

context in which they were made. It must determine whether the interference in issue was “proportionate to the legitimate aims pursued”.<sup>52</sup>

### **Article 11 - Freedom of Assembly and Association**

- “1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 11 protects the right to freedom of assembly and association, both public and private, including the right to form trade unions.<sup>53</sup> Article 11(2) states that no restrictions shall be placed on the exercise of these rights of assembly and association other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others. In *Vona v Hungary*,<sup>54</sup> the Court found that the Hungarian authorities had acted proportionately when they dissolved the Hungarian Guard Association after it had held rallies and demonstrations throughout Hungary, including in villages with large Roma populations calling for the defence of “ethnic Hungarians” against so-called “Gypsy criminality”. The Court considered that the measure could be seen as pursuing the aims of public safety, prevention of disorder and the protection of rights of others. It found that the State was entitled to take preventative measures to protect democracy *vis-à-vis* such entities, if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. The Court held that one such value is the co-existence of members of society free from racial segregation, without which a democratic society is inconceivable.<sup>55</sup>

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<sup>52</sup> See: *Zana v Turkey*, App. No. 18954/91, Judgment date 25 November 1997, (1999) 27 E.H.R.R. 667, paragraph, 51; and *Şener v. Turkey*, App. No. 26680/95, Judgment date 18 July 2000, (2003) 37 E.H.R.R. 34, paragraph 39.

<sup>53</sup> See: *Young James and Webster v. United Kingdom*, Apps. No. 7601/76, 7806/77, Judgment date 13 August 1981, Series A, No. 44, (1982) 4 E.H.R.R. 38, paragraph 52.

<sup>54</sup> See: *Vona v. Hungary*, App. No. 35943/10, Judgment date 9 July 2013.

<sup>55</sup> *Ibid*, paragraph 57.

## Article 12 - Right to Marry

*"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."*

Article 12 refers to traditional marriage between persons of the opposite sex. Although the institution of marriage has undergone a major social change since the adoption of the Convention, the Convention itself does not impose an obligation on Member States to grant a same-sex couple access to marriage.<sup>56</sup> Article 12 does not provide for a right to divorce. According to the Court's opinion in the case *Johnston and others v. Ireland*:

*"...the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution. (54) The Court thus concludes that the applicants cannot derive a right to divorce from Article 12 (art. 12)."*<sup>57</sup>

## Article 13 – Right to an Effective Remedy

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

Article 13 states that each person who considers that one of their Convention rights has been violated should have a right to an effective remedy.<sup>58</sup> There is no need for the effective remedy to be a judicial one. As long as it is effective, any kind of remedy (judicial, administrative or legislative) will be sufficient to meet the requirements of Article 13.

## Article 14 - Prohibition of Discrimination

*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

Article 14 prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association

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<sup>56</sup> See: *Schalk and Kopf v Austria*, App. No. 30141/04, Judgment date 24 June 2010, (2011) 53 E.H.R.R. 20, in particular paragraphs 54, 55, 58 and 63.

<sup>57</sup> See: *Johnston and Others v. Ireland*, Series A, No 1, App. No. 9697/82, Judgment date 18 December 1986, (1987) 9 E.H.R.R. 203, paragraph 52; and *F v. Switzerland*, App. No. 11329/85, Judgment date 18 December 1987, Series A, No. 128, (1988) 10 E.H.R.R. 411, paragraph 38.

<sup>58</sup> Under Article 1 of the Convention, Contracting Parties should secure the rights and fundamental freedoms by measures one of which is providing effective domestic remedies under Article 13.

with a national minority, property, birth or other status. The wording of Article 14 makes it clear that the list of discriminatory grounds in it is simply illustrative and is not exhaustive.<sup>59</sup> The Convention is a living instrument and as times have changed, the Court has recognised that other categories such as disability<sup>60</sup> and sexual orientation<sup>61</sup> also come within the scope of Article 14.

Article 14 has no independent existence and will only be engaged where an applicant can point to a disadvantage, which relates to a right protected by one of the other substantive Articles of the Convention or its Protocols.<sup>62</sup>

Discrimination under Article 14 means treating persons in relatively similar situations differently, without providing an objective and reasonable justification for doing so.<sup>63</sup> Article 14 does not prohibit a State from treating different groups differently in order to correct "factual inequalities" between them and in certain circumstances a failure to do so may in itself give rise to a breach of the Article.<sup>64</sup> The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even though it is not specifically aimed at that group.<sup>65</sup>

## Protocol No. 1

### Article 1 – Protection of Property

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

This Article provides for the protection of private property. The Court has said that the notion "possessions" has an autonomous meaning which is not limited to

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<sup>59</sup> See: *Rasmussen v. Denmark*, App. No. 8777/79, Judgment date 28 November 1984, Series A, No.87, (1985) 7 E.H.R.R. 371, paragraph 34.

<sup>60</sup> See: *Glor v Switzerland*, App. No. 13444/04, Judgment date, 30 April 2014, paragraph 53

<sup>61</sup> See: *Salguero da Silva Mouta v Portugal*, App. No.33290/96, Judgment date, 21 December 1999, (2001) 31 E.H.R.R. 47, paragraph 28

<sup>62</sup> See: *Glor v Switzerland*, App. No. 13444/04, Judgment date, 30 April 2014, paragraph 45

<sup>63</sup> See: *DH v. The Czech Republic*, App. No. 57325/00, Judgment date 13 November 2007, (2008) 47 E.H.R.R. 3, paragraph 175.

<sup>64</sup> See: *Thlimmenos v Greece*, App. No. 34369/97, Judgment date 6 April 2000, (2001) 31 E.H.R.R. 15, paragraph 44

<sup>65</sup> See: *DH v. The Czech Republic*, App. No. 57325/00, Judgment date 13 November 2007, (2008) 47 E.H.R.R. 3, paragraph 175.

the ownership of physical goods.<sup>66</sup> Article 1 only protects existing possessions and does not guarantee the right to acquire possessions.<sup>67</sup>

The concept of deprivation does not include situations where the privileges flowing from the right of property are preserved.<sup>68</sup> For a deprivation to be compatible with Article 1 it must be in the “*public interest*” and this condition implies a relationship of proportionality between the aim pursued and the means employed to achieve that aim.<sup>69</sup>

## **Article 2 – Right to Education**

*“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*

This Article provides for the right to an education, and the right for parents to have their children educated in accordance with their religious or philosophical convictions. Article 2 guarantees the right of access to educational institutions existing at a given time and the right to obtain official recognition for studies which have been completed.<sup>70</sup> States have to respect the convictions of parents, be they religious or philosophical, throughout the entire education programme of their children.<sup>71</sup> In order to be considered as relevant, parents’ convictions have to attain a certain level of cogency, seriousness, cohesion and importance.<sup>72</sup> The Court has found in a number of cases that there has been a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 2 of Protocol 1 where Roma children have been treated differently in the provision of education.

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<sup>66</sup> See: *Gasus Dosier-und Födertechnik GmbH v. the Netherlands*, App. No. 15375/89, Judgment date 23 February 1995, Series A, No. 306-B, (1995) 20 E.H.R.R. 403, paragraph 53.

<sup>67</sup> See: *Marckx v. Belgium*, App. No. 6833/74, Judgment date 13 June 1979, Series A, No. 31, (1979) 2 E.H.R.R. 330, paragraph 50 and 62.

<sup>68</sup> See: *Sporrong and Lönnroth v. Sweden*, App. No. 7151/75; 7152/75, Judgment date 23 September 1982, Series A, No. 52, (1983) 5 E.H.R.R. 35, paragraph 62.

<sup>69</sup> See: *James and Others v. United Kingdom*, App. No. 8793/79, Judgment date 21 February 1986, Series A, No. 98, (1986) 8 E.H.R.R. 123, paragraph 50.

<sup>70</sup> See: *Belgian linguistic Case* (No. 2), App. No. 1474/63, Judgment date 23 July 1969, (No 2) (1979-80) 1 E.H.R.R. 252, p. 281, paragraph 4.

<sup>71</sup> See: *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. No. 5095/71, Judgment date 7 December 1976, Series A No. 23, (1979-80) 1 E.H.R.R. 711, paragraphs 51-52.

<sup>72</sup> See: *Campbell and Cosans v. United Kingdom*, App. No. 7511/76, Judgment date 25 February 1982, Series A., No. 48, (1982) 4 E.H.R.R. 293, paragraph 36.

<sup>73</sup> See: *DH v. The Czech Republic*, App. No. 57325/00, Judgment date 13 November 2007, (2008) 47 E.H.R.R. 3. See also the cases of *Sampanis and Others v. Greece*, App. No. 32526/05, Judgment date 5 June 2008; and *Oršuš and Others v. Croatia*, Judgment date 10 March 2010, (2011) 52 E.H.R.R. 7.

### **Article 3 – Right to Free Elections**

*"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

This Article provides for the right to regular, free and fair elections and is one of the few provisions to impose expressly a positive obligation on the State. Article 3 does not create any obligation to introduce a specific legislative system. The Contracting Parties have a wide margin of appreciation in the provision of the right to vote and to stand for election, but it is for the Court to determine in the last resort whether the State in question has complied with the requirements of the Protocol.<sup>74</sup>

### **Protocol No. 4**

**Article 1 – Prohibition of Imprisonment for Debt.** This Article prohibits the imprisonment of people due to an *"inability to fulfil a contractual obligation"*. The Article aims at prohibiting any deprivation of liberty for the sole reason that the individual does not have the material means to pay his or her debts. Imprisonment is not forbidden when in addition to the inability to fulfil a contractual obligation, a debtor acts with malicious or fraudulent intent; or deliberately refuses to fulfil an obligation; or the inability to meet a commitment is due to the debtor's negligence.<sup>75</sup>

**Article 2 – Freedom of Movement.** This Article allows people the right to move freely within the territory of a State and the right to leave one's own nation. Article 2 only protects those who are *"lawfully within the territory of a State"*. Therefore the provision does not assist aliens in securing permanent admission to the territory of a State. Consequently, this Article does not impact upon States' immigration policies.

**Article 3 – Prohibition of Expulsion of Nationals.** Article 3 prohibits States from expelling their nationals (either by individual or collective measures) or denying them entry into the territory of their nationality. The term "expulsion" in this Article does not include extradition.

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<sup>74</sup> See: *Gitonas and Others v. Greece*, App. No. 18747/91, Judgment date 1 July 1997, (1998) 26 E.H.R.R. 691, paragraph 39.

<sup>75</sup> Explanatory note to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto.

**Article 4 – Prohibition of Collective Expulsion of Aliens:** The collective expulsion of aliens is prohibited by Article 4. This provision also protects stateless persons. The Court has defined a collective expulsion as being:

*[...] any measures of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".<sup>76</sup>*

#### **Protocol No. 6: Abolition of the death penalty in peacetime**

Article 1 affirms the principle of the abolition of the death penalty. A State must, where appropriate, abolish the death penalty in order to become a Party to the Protocol. Article 2 qualifies the scope of the Protocol by limiting the obligation to abolish the death penalty to peacetime. Article 3 specifies that no derogation may be made under Article 15 of the Convention. Article 4 specifies that States may make a reservation in respect of the Protocol.

#### **Protocol No. 7**

**Article 1 – Procedural Safeguards Relating to Expulsion of Aliens.** Article 1(1) prohibits the expulsion of a lawfully resident alien unless the decision was reached in accordance with the law. It also provides the person who is the subject of the decision with the right to submit reasons why expulsion should not take place, to have the case reviewed and to be represented before the competent authority. The term "expulsion" in this Article does not include extradition.

The term "*lawfully*" refers to the domestic law of the State concerned. The term "*resident*" intends to exclude from the application of the Article any alien who has not yet passed through a State's immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose. This period also covers the period pending a decision on a request for a residence permit.

Article 1(1) also applies to aliens who have entered unlawfully and whose position has been subsequently regularised.

The right to have a case review does not require a two-stage procedure; only that a competent authority reviews the case.

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<sup>76</sup> See: *A and Others v. The Netherlands*, App. No.14209/88, Judgment date 16 December 1988, D.R. 59, p. 277. See also the Roma case of *Ćonka v. Belgium*, App. No. 51564/99, Judgment date 5 February 2002, (2002) 34 E.H.R.R. 54, paragraph 59.

Article 1(2) provides that an alien may be expelled before the exercise of his rights under Article 1(1) when such expulsion is necessary in the interests of public order or for reasons of "*national security*". In both cases, however, the person concerned should be entitled to exercise the rights specified in Article 1(1) after his expulsion.

**Article 2 – Rights of Appeal in Criminal Matters.** This Article provides a person who is convicted of a criminal offence by a tribunal with a right of appeal to a higher tribunal.<sup>77</sup> The Article leaves the procedures for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law. The Article does not apply where the proceedings instituted against the applicant do not constitute the determination of a criminal charge against him within the meaning of Article 6(1) of the Convention.<sup>78</sup>

Article 2(2) provides that "*this right may be subject to exceptions in regard to offences of a minor character*". In determining whether an offence is minor, it will be important to consider whether the offence is punishable with imprisonment.

**Article 3 – Compensation for Wrongful Conviction.** This Article does not apply in cases where the charge is dismissed or the accused person is acquitted either by the court of first instance or, on appeal, by a higher tribunal. The Article applies only if there has been a miscarriage of justice when the person's conviction has been reversed or he has been pardoned. Compensation is granted "*according to the law or the practice of the State concerned*". This means that either the law or practice should provide for the payment of compensation in all cases to which the Article applies. The State would be obliged to compensate persons only in clear cases of miscarriage of justice.

**Article 4 – Right not to be Tried or Punished Twice.** This Article provides that a person has the right not to be tried and punished twice for the same offence. It is clear from the way that this provision is drafted that it upholds the principle of "*ne bis in idem*" only in respect of cases where a person has been tried or punished twice for the same offence by the courts of a single State.<sup>79</sup> Using the term "*criminal proceedings*" the provision does not prevent that person from being made subject, for the same act, to action of a different character as well as to

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<sup>77</sup> This Protocol is not intended to limit the scope of the guarantee contained in Article 6 of the Convention. See: *Ekbatani v. Sweden*, App. No. 10563/83, Judgment date 26 May 1988, Series A No. 134, (1991) 13 E.H.R.R. 504, paragraph 26.

<sup>78</sup> See: *Borrelli v. Switzerland*, App. No. 17571/90, decision on admissibility date 2 September 1993, D.R. 75, p. 152, paragraph 3.

<sup>79</sup> See: *Baragiola v. Switzerland*, App. No. 17265/90, Decision on admissibility date, 21 October 1993, (1993) 75 D.R. 76, p. 127, paragraph 3.

criminal proceedings. Article 4 is applicable if the second set of proceedings are concluded after the coming into force of the Protocol.<sup>80</sup>

**Article 5 – Equality between Spouses.** This Article provides that States should put in place a system of laws by which spouses have equal rights and responsibilities concerning matters of private law but it does not apply to areas of law external to the relationship of marriage such as criminal law and specifically excludes the period preceding the marriage.

### **Protocol No. 12 – General Prohibition of Discrimination**

At this point in time only eighteen States have ratified this Protocol. 19 other States have signed Protocol No.12 but have yet to ratify it.

**Article 1 – General Prohibition of Discrimination.** Article 1(1) provides that: the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; and Article 1(2) makes it clear that no one shall be discriminated against by any public authority (such as administrative authorities, the courts and legislative bodies) on any such ground.<sup>81</sup>

Article 1 extends the scope of the protection against discrimination provided by Article 14 and it means that an applicant can complain that they have been discriminated against without having to depend upon a violation of another right in the Convention.

### **Protocol No. 13 – Abolition of the Death Penalty in All Circumstances**

Article 1 of Protocol No. 13 abolishes the death penalty in all circumstances. Article 2 prohibits derogations from Article 1.

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<sup>80</sup> See: *Gradinger v. Austria*, App. No. 15963/90, Judgment date 23 October 1995, paragraph 53.

<sup>81</sup> See: *Seđić and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06, Judgment date 22 December 2009 for a finding by the Grand Chamber that Article 1 of Protocol No. 12 had been violated where the Grand Chamber found that both Article 14 and Article 1 of Protocol No 12 had been breached in circumstances where constitutional provisions prevented anyone other than individuals from the three 'constituent peoples' (Bosniaks, Croats or Serbs) from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. In particular, this violated the rights of the Jewish and Roma applicants.

## Section II – Practice and procedure

### Composition and working of the Court

**Composition of the Court.**<sup>82</sup> The Court consists of a number of judges equal to that of the number of Contracting Parties.<sup>83</sup> There are currently 47 judges but once the European Union accedes to the Convention it will also provide a judge to the Court. Judges are elected for a single nine-year term.<sup>84</sup>

To consider cases brought before it, the Court sits in the following formations:

- (i) Single-judge formation;<sup>85</sup>
- (ii) Committees of three judges;
- (iii) Chambers of seven judges; and
- (iv) Grand Chamber of seventeen judges.<sup>86</sup>

**The Sections.** A “Section” is a Chamber set up by the Plenary Court for a fixed period in pursuance of Article 25(b) of the Convention. At any one time there are at least four Sections<sup>87</sup> and each judge is a member of a Section.<sup>88</sup> The composition of the Sections is geographically and gender balanced and reflects the different legal systems used in the Member States.<sup>89</sup>

A Chamber consists of seven judges drawn from one of the Sections; the term “Chamber” means any Chamber of seven judges constituted in pursuance of Article 26(1) of the Convention.<sup>90</sup> However, a Chamber can be reduced to five judges for a defined period of time, if the Committee of Ministers, by a unanimous decision, adopts a recommendation of the Plenary Court to reduce the number of judges..<sup>91</sup> Each Chamber includes the President of the Section and the judge elected in respect of any Contracting Party concerned; if not already a member of the Section, then such a judge will be chosen by the President of the Court from a list submitted in advance by that Party and will sit as an *ex officio* member of the Chamber.<sup>92</sup> Chamber decisions are taken by majority vote.

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<sup>82</sup> See Articles 20, 25, 26 of the Convention and Rules 24 to 30.

<sup>83</sup> See Article 20.

<sup>84</sup> See Article 23.

<sup>85</sup> See Rule 27A. Article 26(3) makes it clear that when sitting as a single-judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

<sup>86</sup> See Article 26(1).

<sup>87</sup> Rule 25(1)

<sup>88</sup> Rule 25(2)

<sup>89</sup> Rule 25(2).

<sup>90</sup> See: Rule 26

<sup>91</sup> See Article 26(2) of the Convention.

<sup>92</sup> Rule 26 (1)(a).

Committees consist of three judges, all from the same Section.<sup>93</sup> They are constituted for a period of twelve months by rotation among members of each Section, excepting the President of the Section.<sup>94</sup>

**The Grand Chamber.** The Grand Chamber has the jurisdiction to consider cases in one of two circumstances.<sup>95</sup> The first is under Article 30 where a Chamber relinquishes jurisdiction in circumstances where the case pending raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.<sup>96</sup> The second is under Article 43 where a party to a case requests that the case be referred to the Grand Chamber. Where a request is made under Article 43, a panel of five judges of the Grand Chamber will consider whether the case should be referred to the Grand Chamber. The panel will not include any judge who took part in the consideration of the admissibility or merits of the case in question or any judge elected in respect of, or who is a national of, a Contracting Party concerned.<sup>97</sup>

The Grand Chamber is composed of seventeen judges and at least three substitute judges who sit when another member is unavailable.<sup>98</sup> When sitting it includes: the President and Vice Presidents of the Court; the Presidents of the Sections; and the judge from the Contracting State that is party to the case (who sits as an *ex officio* member).<sup>99</sup> When a case is referred to the Grand Chamber by any of the parties in a case under Article 43 of the Convention, no judge from the Chamber which rendered the judgment sits in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.<sup>100</sup>

**The Plenary Court.** The Plenary Court is comprised of all the judges of the Court. It has both administrative and formal responsibilities. Its main tasks are: the election of the President and two Vice Presidents of the Court and the Presidents of the Sections; the election of the Registrar and the Deputy Registrars; the setting up of the Chambers; and the adoption and amendment of

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<sup>93</sup> Rule 27 (1).

<sup>94</sup> Rule 27(2)

<sup>95</sup> Article 31

<sup>96</sup> See: *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848, Judgment date 17 July 2014.

<sup>97</sup> Rules 24(5)(b) and (c).

<sup>98</sup> Rule 24 (1).

<sup>99</sup> Rule 24(2)(a) and (b). Rule 24(2)(c) provides that in cases referred to the Grand Chamber under Article 30 of the Convention, the Grand Chamber shall also include the members of the Chamber which relinquished jurisdiction.

<sup>100</sup> Rule 24(2)(d).

the Rules of the Court.<sup>101</sup> It can also make a request to the Committee of Ministers that it reduce the number of judges in Chambers from seven to five.<sup>102</sup> The President of the Court shall convene a plenary session of the Court if at least one-third of the members of the Court so request, and in any case once a year to consider administrative matters.<sup>103</sup>

**The working of the Court.** The Grand Chamber, the Chambers and the Committees sit full time. The Court deliberates in private and its deliberations remain secret. Only the judges take part in the deliberations. The Registrar or the designated substitute, as well as such other officials of the Registry and interpreters, whose assistance is deemed necessary, will be present.<sup>104</sup> The decisions and judgments of the Grand Chamber and the Chambers are adopted by a majority of the sitting judges. Abstentions are not allowed in final votes on the admissibility and merits of cases.<sup>105</sup>

**The Registry.** Article 24 of the Convention creates the Registry, which assists the Court in the performance of its functions and is headed by the Registrar elected by the Plenary Court. The principal function of the Registry is to process and prepare for adjudication applications lodged by individuals with the Court.

The Registry consists of Section Registries for each of the Sections set up by the Court and the departments necessary to provide the legal and administrative services required by the Court. Each of the Court's Sections has its own Registrar who assists the Section in the performance of its functions and may be assisted by a Deputy Section Registrar. The Rules of the Court provide that officials of the Registry are appointed by the Secretary-General of the Council of Europe with the agreement of the President of the Court or of the Registrar acting on the President's instructions.<sup>106</sup>

### **The Rules of the Court**

**Public character.** The Rules of the Court provide that all documents deposited with the Registry in connection with an application by any of the parties or persons involved in an application are accessible to the public, unless the President of the Chamber decides otherwise.<sup>107</sup> Public access to a document may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the

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<sup>101</sup> Article 25.

<sup>102</sup> See Article 26(2).

<sup>103</sup> Rule 20.

<sup>104</sup> Rule 22.

<sup>105</sup> Rule 23.

<sup>106</sup> Rule 18.

<sup>107</sup> Rule 33(1)

private of the parties or of any person concerned so require.<sup>108</sup> Notwithstanding the general rule, friendly-settlement negotiations are conducted in private.<sup>109</sup>

**Language.** English and French are the official languages of the Court.<sup>110</sup> However, where an individual application is made, communication with the Court may be in one of the official languages of the Contracting Parties, up until the point when the Contracting Party has been given notice of the application.<sup>111</sup> Thereafter, all communications (including oral submissions at hearings) shall be in one of the Court's official languages unless the President of the Chamber decides otherwise.<sup>112</sup> In order to ensure that the applicant understands, the President of Chamber may invite the Contracting Party to provide a translation of its written submissions in the official language of the applicant.<sup>113</sup> A witness, expert or other person may use his/her own language if he or she does not have sufficient knowledge of either of the Court's official languages.<sup>114</sup>

**Jurisdiction of the Court.** The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it, as provided in Articles 33, 34 and 47 of the Convention.<sup>115</sup> By ratifying the Convention, a State automatically accepts the jurisdiction of the Court to review inter-State and individual complaints.

**Individual applications (Article 34).** An applicant only has standing if they are a victim of an alleged violation of one of the rights protected by the Convention or its Protocols thereto. The Court is able to receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the Contracting Parties of one of the rights contained within the Convention.<sup>116</sup>

A complaint can also be introduced by: children (whether or not represented by their parents); other incapacitated persons; and legal persons such as companies,<sup>117</sup> churches,<sup>118</sup> political parties,<sup>119</sup> corporate bodies,<sup>120</sup> and trade

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<sup>108</sup> Rule 33(2)

<sup>109</sup> Rule 62(2) and Article 39(2).

<sup>110</sup> Rule 34(1)

<sup>111</sup> Rule 34(2)

<sup>112</sup> Rule 34(3)(a)

<sup>113</sup> Rule 34(5)

<sup>114</sup> Rule 34(6). In any such case the Registrar makes the necessary arrangements for interpreting and translation.

<sup>115</sup> Article 32(1).

<sup>116</sup> See: *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, App. Nos. 14234/88 & 14235/88, Judgment date 25 October 1992, Series A No.246 (1993) 15 E.H.R.R. 244.

<sup>117</sup> See: *Sunday Times v. United Kingdom* (No.2) App. No. 13166/87, Judgment date 26 November 1991, Series A, No. 217, (1992) 14 E.H.R.R. 229.

<sup>118</sup> See: *Canea Catholic Church v. Greece*, App. No. 25528/94, Judgment date 16 September 1997, (1999) 27 E.H.R.R. 521.

unions.<sup>121</sup> There is no requirement that the complainant be a citizen or resident of the respondent State, or of any Council of Europe Member State.<sup>122</sup> Nor do they necessarily have to be physically present in its territory, and if present there is no requirement that they be lawfully present in the Member State.<sup>123</sup>

The Court may determine any complaints that have arisen after a State has ratified the Convention itself. In a number of cases, however, the Court has reviewed cases where the complaint related to matters that occurred prior to ratification.<sup>124</sup>

**Group complaints.** The Convention does not permit an *actio popularis*<sup>125</sup> (general petition). In the case of a group of individuals, the application has to be signed by those persons competent to represent the group; where there are no such persons available, the complaint has to be signed by all the members. In the case of a group complaint, where possible, it would be advisable to make an individual complaint as well - so that if the Court rejects the group application (because it considers that the group is not a victim) then the Court will still be able to consider the individual complaint.

### Victim status

**Actual victims.** An actual victim is one who has already been personally affected by the alleged violation. No specific detriment has to be suffered in order to qualify as a "victim" for the purposes of the Convention.<sup>126</sup>

**Death of the complainant or victim.** The next-of-kin may introduce an application in his own name as an "indirect victim" in circumstances where the primary victim has died.<sup>127</sup> Where the applicant dies during the course of the

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<sup>119</sup> See: *Liberal Party v. United Kingdom*, App.No.8765/79, Judgment date 18 December 1980, (1982) 4 E.H.R.R. 106.

<sup>120</sup> See: *Autronic AG v. Switzerland*, App. No. 12726/87, 22 May 1990, (1990) 12 E.H.R.R. 485; and *Agrotexim v. Greece*, App. No. 14807/89, 24 October 1995, Series A, No. 330, (1996) 21 E.H.R.R. 250.

<sup>121</sup> See: *National Union of Belgian Police v Belgium*, App. No. 4464/70, Judgment date 27 October 1975, Series A, No. 9, (1979-80) 1 E.H.R.R. 578.

<sup>122</sup> See: *Ahmed v. Austria*, App. No. 25964/94, Judgment date 17 December 1996, (1997) 24 E.H.R.R. 278; *D v. United Kingdom*, App. No. 30240/96, Judgment date 2 May 1997, (1997) 24 E.H.R.R. 423.

<sup>123</sup> See: *D v. United Kingdom*, App. No. 30240/96, Judgment date 2 May 1997, (1997) 24 E.H.R.R. 423, paragraph 56.

<sup>124</sup> When the length of domestic legal proceedings has exceeded the "reasonable time" required under Article 6, and the proceedings had not been completed by the time that the State ratified the Convention.

<sup>125</sup> See: *Lindsay v. United Kingdom*, App. No. 31699/96, Admissibility decision 17 January 1997, (1997) 23 E.H.R.R. C.D. 199; *X v. Austria*, App. No. 7045/75, Admissibility decision, 10 December 1976; 7 D.R. 87.

<sup>126</sup> See: *Eckle v. Germany*, App. No. 8130/78, Judgment date 15 July 1982, Series A, No. 51, (1982) 5 E.H.R.R. 1, paragraph 66.

<sup>127</sup> See: *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment date 27 September 1995, Series A, No. 324, (1996) 21 E.H.R.R. 97; *Osman v. United Kingdom*, App. No. 23452/94, Judgment date 28 October

proceedings, a spouse or next of kin with a legitimate interest in the proceedings may continue to pursue the complaint.<sup>128</sup>

**Potential victims.** These are individuals at risk of being directly affected by a law or an administrative act.<sup>129</sup> A potential future violation may be sufficient in itself to render the applicant a "victim".<sup>130</sup> An applicant does not have to show that the measure in question has caused specific prejudice or damage.<sup>131</sup> However, these matters are clearly relevant when the Court considers the assessment of just satisfaction under article 41.<sup>132</sup>

**Indirect victims.** The Court will accept applications from those who have suffered as a result of a violation of the Convention rights of another.<sup>133</sup> This could occur, for example, where the applicant is a relative of someone who is deceased and where there is an allegation that the action or omission that caused the death constituted a breach of Article 2 of the Convention.<sup>134</sup>

**Unions and NGOs.** Unions and non-governmental organisations (NGOs) can only complain about acts directed towards them or that they were directly affected by a violation or potential violation. However, they can also provide representation to their own members or members of the public.<sup>135</sup> A registered association can submit a complaint on behalf of its members in appropriate circumstances,<sup>136</sup> provided that there is evidence of the association's authority to represent them. Exceptionally, the Court granted *locus standi* to the Centre for Legal Resources

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<sup>128</sup> 1998, (2000) 29 E.H.R.R. 245; *Yasa v. Turkey*, App. No. 22495/93, Judgment date 2 September 1998, (1999) 28 E.H.R.R. 408.

<sup>129</sup> See: *Scherer v. Switzerland*, App. No. 17116/09, Judgment date 25 March 1994, (1994) 18 E.H.R.R. 276, paragraph 31.

<sup>130</sup> See: *Ahmed v. Austria* App. No. 25964/94, Judgment date 17 December 1996, (1997) 24 E.H.R.R. 278; *Marckx v. Belgium* *Marckx v. Belgium*, App. No. 6833/74, Judgment date 13 June 1979, Series A, No. 31, (1979) 2 E.H.R.R. 330, paragraph 27; *Norris v. Ireland*, App. No. 10581/83, Judgment date 26 October 1988, Series A, No. 142, (1991) 13 E.H.R.R. 186, paragraph 31.

<sup>131</sup> See: *Campbell and Cosans v. United Kingdom*, App. No. 7511/76; 7743/76, Judgment date 25 February 1982, Series A, No. 48, (1982) 4 E.H.R.R. 293, paragraph 26; *Soering v. United Kingdom*, App. No. 14038/88, Judgment date 7 July 1989, Series A, No. 61, (1989) 11 E.H.R.R. 439, paragraph 94.

<sup>132</sup> See: *Eckle v. Germany*, App. No. 8130/78, Judgment date 15 July 1982, Series A, No. 51, (1982) 5 E.H.R.R. 1, paragraph 66.

<sup>133</sup> See: *Artico v. Italy*, App. No. 6694/74, Judgment date 13 May 1980, Series A, No. 37 (1981) 3 E.H.R.R. 1, paragraph 45-48; *Benham v. United Kingdom*, App. No. 19380/92, Judgment date 10 June 1996, (1996) 22 E.H.R.R. 293, paragraph 68; *Perks & others v. United Kingdom*, App. No. 25277/94, Judgment date 12 October 1999, (2000) 30 E.H.R.R. 33, paragraph 82.

<sup>134</sup> See: *Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. No. 9214/80; 9473/81; 9474/81; Judgment date 28 May 1985, Series A, No. 94, (1985) 7 E.H.R.R. 471; *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment date 27 September 1995, Series A, No. 324, (1996) 21 E.H.R.R. 97.

<sup>135</sup> See for example: *Fedorchenko and Lozenko v. Ukraine*, App. No. 387/03, Judgment date 20 September 2012.

<sup>136</sup> See: *Conka and the Human Rights League v. Belgium*, App. No. 51564, Admissibility decision, 13 March 2001.

<sup>137</sup> See: *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95, Judgment date 27 June 2000, (2000) 9 B.H.R.C. 27, paragraph 72; *Metropolitan Church of Bessarabia and Others v. Moldova*, App. No. 45701/99, Judgment date 13 December 2001, (2002) 35 E.H.R.R.13, paragraph 101.

(CLR) to act on behalf of, Valentin Câmpeanu (a severely mentally disabled, HIV positive Roma orphan who had died at the age of 18 in a Romanian neuropsychiatric hospital) due to the serious nature of the allegations notwithstanding the fact that it had not had power of attorney whilst he was alive.<sup>137</sup> The Court attached weight to the fact that the Romanian authorities had not objected to the CLR representing Mr Câmpeanu following his death before the domestic medial and judicial authorities. It also noted that he had no known next-of-kin and no competent person or guardian had been appointed to represent him.<sup>138</sup> It held that to find otherwise would amount to preventing such serious allegations of a violation of the Convention being examined at an international level, with the risk that the respondent State might escape accountability under the Convention.<sup>139</sup>

**Presentation of complaints.** Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention themselves or through a representative.<sup>140</sup> The Court will generally require either a signed letter of authority, or some other evidence of the representative's authority.<sup>141</sup> Children can be represented by their parents or by someone who has legal/parental responsibility for them.<sup>142</sup> A legal representative who was appointed through a guardian *ad litem* in domestic proceedings can represent a child before the Court, without formal consent from the child concerned, where the complaint is that the proceedings in which the legal representative participated on behalf of the children did not comply

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<sup>137</sup> Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, App. No. 47848/08, Judgment date 17 July 2014, paragraphs 96-114.

<sup>138</sup> Ibid, paragraphs 110-112.

<sup>139</sup> Ibid, paragraph 112. See also paragraph 11 of the Concurring Opinion of Judge Pinto Albuquerque who agreed that CLR should be granted *locus standi* but criticised the majority for not formulating a legal principle. He suggested that the Court should have established a concept of *de facto* representation, for cases involving extremely vulnerable victims who have no relatives, legal guardians or representatives. See also the submissions made by the Council of Europe Commission for Human Rights referred to at paragraphs 92-93 of the judgment. The Commissioner pointed out that access to justice for people with disabilities was highly problematic, especially in view of inadequate legal incapacitation procedures and restrictive rules on legal standing. NGOs played an important role by facilitating vulnerable people's access to justice. Allowing NGOs to lodge applications to the Court on behalf of people with disabilities would be in line with the case-law of the Inter-American Court of Human Rights, which granted *locus standi* to NGOs acting on behalf of alleged victims, even when the victims had not appointed these organisations as their representatives. The Commissioner suggested that in exceptional circumstances, NGOs should be able to lodge applications with the Court on behalf of identified victims who had been directly affected by the alleged violation. Such exceptional circumstances could concern extremely vulnerable victims, for example persons detained in psychiatric and social care institutions, with no family and no alternative means of representation, whose applications, made on their behalf by a person or organisation with which a sufficient connection was established, gave rise to important questions of general interest.

<sup>140</sup> Rule 36(1)

<sup>141</sup> See: Rule 47(3.1)(d) and paragraph 9 of the Court's Practice Direction on the Institution of Proceedings, issued by the President of the Court on 1 November 2003, as amended on 6 November 2013, pages 54-54 of the Rules.

<sup>142</sup> See: Hokkanen v. Finland, App. No. 19823/92, Judgment date, 23 September 1994, Series A, No. 299-A, (1995) 19 E.H.R.R. 139, paragraphs 49-50.

procedurally with the requirements of the Convention.<sup>143</sup> Where the victim is incapacitated, the Court will accept complaints by suitable representatives on his or her behalf but it will require confirmation of the representative's authority.

**Representation of applicants.**<sup>144</sup> Following the notification of the application to the respondent Contracting Party the applicant must be represented unless the President of the Chamber grants leave to the applicant to present his/her own case. The representative should be an advocate resident and authorised to practice in any of the Contracting States, or any other person approved by the President of the Chamber. The representative must have an adequate understanding of one of the Court's official languages; in case of insufficient knowledge, the President of the Chamber may give leave to the representative to use one of the official languages of the Contracting Parties.

**Written pleadings.**<sup>145</sup> No written observations or other documents may be filed after the time-limit set by the President of the Chamber or the Judge Rapporteur. If observations or documents are filed outside the time-limit or contrary to any practice direction then they will not be included in the case file, unless the President of the Chamber decides otherwise. A time-limit may be extended on receipt of a request from a party. When determining whether a time-limit has been met, the material date is the certified date of dispatch of the document or, if there is none, the actual date of receipt at the Registry.

**Interim measures.**<sup>146</sup> Under rule 39, the Chamber or, where appropriate, the President of the Section, or a duty appointed judge may, following a request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measures which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. Interim measures will be indicated where it appears that irreparable damage would result from the measure complained of.<sup>147</sup> Notice of the measures shall be given to the Committee of Ministers. The Chamber may request additional information concerning the implementation of the interim measures. An applicant may request interim measures, for example, where they are about to be deported from

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<sup>143</sup> See: *SP, DP and T v. United Kingdom*, App. No. 23715/94, Judgment date 1 January 1996, (1996) 22 E.H.R.R. C.D. 148.

<sup>144</sup> Rule 36

<sup>145</sup> See: Rule 38 and the Practice Direction on Written Pleadings issued by the President of the Court on 1 November 2003, as amended on 22 September 2008, pages 56-58 of the Rules.

<sup>146</sup> See: Rule 39 and the Practice Direction on Interim Measures issued by the President of the Court on 5 March 2003, as amended on 16 October 2009, pages 51-53 of the Rules.

<sup>147</sup> See: *Cruz Varas and others v. Sweden*, App. No. 15576/89, Judgment date 20 March 1991, (1991) 14 E.H.R.R. 1, paragraph 52.

a Contracting State and they say that the decision to deport contravenes one of their rights protected by the Convention.<sup>148</sup>

**Striking out and restoration to the list.** The Court may at any stage of the proceedings decide pursuant to Article 37 and Rule 43 to strike an application out of its list of cases in circumstances which lead to the conclusion that: the applicant does not intend to pursue the application; or that the matter has been resolved; or that for other reasons the examination of the application is no longer justified.<sup>149</sup> However, the Court will continue the examination of the application if respect for human rights as defined by the Convention and the Protocols thereto so requires.<sup>150</sup> The Court can also strike out a case by means of a judgment if the case has been declared inadmissible.<sup>151</sup> Once a decision to strike out an application has become final, it is forwarded to the Committee of Ministers by the President of the Chamber.<sup>152</sup> The Court may restore an application to its list of cases if it considers that the circumstances justify such a course of action.<sup>153</sup>

**Third Party intervention.**<sup>154</sup> In all cases before the Chamber or the Grand Chamber, a Contracting Party whose citizen or national is an applicant shall have the right to submit written comments and to take part in hearings.<sup>155</sup> If the Contracting Party wants to exercise this right, it shall advise the Registrar in writing not later than twelve weeks after the transmission or notification of the application, unless the President of the Chamber decides otherwise.<sup>156</sup>

The President of the Court may, “*in the interest of the proper administration of justice*”, invite any Contracting Party that is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.<sup>157</sup> In this case the request must be duly reasoned and submitted

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<sup>148</sup> See: *Mamatkulov and Abdurasulovic Askarov v. Turkey*, App. Nos. 46827/99, 46951/99, Judgment date 4 February 2005.

<sup>149</sup> See Article 37 of the Convention and the Roma cases of *Kalanyos and Others v. Romania*, App. No. 57884/00, Judgment date 26 April 2007, *Gergely v. Romania*, App. No. 57885/00, Judgment date 26 April 2007 and *Tănase and Others v. Romania*, App. No. 62954/00, Judgment date 26 August 2009, which were struck out following admissions by the State that it had breached Articles 3, 6, 8, 13 and 14 of the Convention and undertaken to adopt general measures to ensure that the Convention rights would be respected in the future.

<sup>150</sup> Article 37(1).

<sup>151</sup> Rule 43(3).

<sup>152</sup> Rule 43(3).

<sup>153</sup> Article 37(2) and Rule 43(5).

<sup>154</sup> See also Rule 44.

<sup>155</sup> Article 36(1).

<sup>156</sup> Rule 44(1)(b).

<sup>157</sup> See: Article 36(2) and *V v. United Kingdom*, App. No. 24888/94, Judgment date 16 December 1999, (2000) 30 E.H.R.R. 121, paragraph 4; *Teixeira de Castro v. Portugal*, App. No. 25829/94, Judgment date 9 June 1998, (1999) 28 E.H.R.R. 101, paragraph 5; *Incal v. Turkey*, App. No. 22678/93, Judgment date 9 June 1998, (2000) 29 E.H.R.R. 449, paragraph 5.

in one of the Court's official languages not later than twelve weeks after the notice of the application has been given to the respondent Contracting Party, unless the President of the Chamber sets another time limit.

The Council of Europe Commissioner for Human Rights also has the right under Article 36(3) of the Convention to make written submissions or take part in a hearing. .

**Legal aid.** Legal aid is a contribution towards expenses and fees. Under Rule 100, the President of the Chamber may, either at the request of an applicant having lodged an application under Article 34 or of his own motion, grant free legal aid to the applicant. This is available from the point where written observations on the admissibility of the application are received from the respondent State. Legal aid shall be granted only where the President of the Chamber is satisfied that: (a) it is necessary for the proper conduct of the case before the Chamber; and the applicant has insufficient means to meet all or part of the costs entailed.<sup>158</sup> In order to obtain legal aid the applicant must complete a form of declaration<sup>159</sup> that must be certified by the appropriate domestic authority or authorities.<sup>160</sup> The Registrar shall fix the rate of fees to be paid in accordance with the legal-aid scales in force and the level of expenses to be paid.<sup>161</sup>

#### Admissibility criteria<sup>162</sup>

**Exhaustion of domestic remedies.** Article 35 of the Convention provides that the Court is only able to deal with a complaint after all domestic remedies have been exhausted so as to provide the State with the opportunity to comply with the Convention's requirements. The only remedies that Article 35 requires to be exhausted are those that are available and sufficient and relate to the breaches alleged. A remedy will not be considered effective if it will "bear no fruit within sufficient time"<sup>163</sup> or where it is "purely theoretical". For example, the Court has held that a requirement to appeal within three days of a judgment meant that the remedy was not "sufficiently available."<sup>164 165</sup>

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<sup>158</sup> Rule 101,

<sup>159</sup> Under Rule 102(1) the applicant must state the income, capital assets and any financial commitments in respect of dependants, or any financial obligations.

<sup>160</sup> Rule 102(l)

<sup>161</sup> Rule 104.

<sup>162</sup> See Article 35.

<sup>163</sup> *Pine Valley Developments Ltd. and Others v. Ireland*, App. No. 12742/87, Judgment date 29 November 1991, (1992) 14 E.H.R.R. 319, paragraph 47

<sup>164</sup> *Brozicek v. Italy*, App. No. 10964/84, Judgment date 19 December 1989, Series A, No. 167, (1990) 12 E.H.R.R. 371, paragraph 31.

<sup>165</sup> *Katte Klitsche de la Grange v. Italy*, App. 12539/86, Judgment date 27 October 1994, Series A, No. 293-B, (1995) 19 E.H.R.R. 368, paragraph 37.

**Burden of proof.** The burden is on the Member State invoking the rule to prove that at the relevant time, there existed an available and sufficient remedy.<sup>166</sup> The State must explain with sufficient clarity the effective remedy that the applicant has failed to pursue<sup>167</sup> and demonstrate that the applicant had effective access to that remedy. Once the State has proved the availability of an unused domestic remedy, then the applicant has to demonstrate that the remedy is ineffective or that special reasons exist why that remedy was not pursued.<sup>168</sup> In practice the applicant must be able to demonstrate that he complied with national time limits<sup>169</sup> and procedural requirements.<sup>170</sup>

**Effective remedy.** To be effective, a remedy must be capable of remedying the violation<sup>171</sup> and be practically and directly “accessible” to the individual concerned.<sup>172</sup> Thus, discretionary remedies that cannot be sought by the applicant himself will not be considered “effective” or “accessible”.<sup>173</sup> An individual is not required to try more than one way of redress when there are several available,<sup>174</sup> the Court only expects the most obvious and sensible remedy to be pursued,<sup>175</sup> reflecting the practical realities of the individual’s position.

**Remedies must offer reasonable prospects of success.** The rule requires the use of remedies which clearly have a prospect of success. “No prospects of success” may constitute a sufficient basis for a finding that the remedy is ineffective.<sup>176</sup> Mere doubt about the prospects of success will not exempt the applicant from the requirement to pursue a particular remedy. If the domestic law is unclear or contradictory then the applicant may well be expected to pursue the remedy in order to enable the domestic courts to rule on the issues.<sup>177</sup>

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<sup>166</sup> See: *Deweerd v. Belgium*, App. No. 6903/75, Judgment date 27 February 1980, Series A, No. 35, (1979-1980) 2 E.H.R.R. 439, paragraph 26.

<sup>167</sup> See: *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. No. 13427/87, Judgment date, 9 December 1994, Series A, No. 301-B, (1995) 19 E.H.R.R. 29, paragraph 35.

<sup>168</sup> See: *Donnelly and Others v. United Kingdom*, App. Nos. 5577-5583/72, Admissibility decision, 15 December 1975, 4 D.R. 4; *Hilton v. United Kingdom*, App. No. 5613/72, Judgment date (1981) 3 E.H.R.R. 104; *Aksøy v. Turkey*, App. No. 21987/93, Judgment date 18 December 1996, (1997) 23 E.H.R.R. 553, paragraphs 51-57..

<sup>169</sup> See: *W. v. Germany*, App. No. 10785/84, Admissibility decision, 18 July 1986, (1986) 48 D.R. 102.

<sup>170</sup> See: *Cunningham v. United Kingdom*, App. No. 10636/83, Admissibility decision, 1 July 1985, 43 D.R. 171; *T. v. Switzerland*, App. No. 18079/91, Commission decision, 4 December 1991, 72 D.R. 263.

<sup>171</sup> See: *Vijayanathan and Pusparajah v. France*, App. No. 17550/90; 17825/91, Judgment date 27 August 1992, (1993) 15 E.H.R.R. 62; *Purcell and Others v. Ireland*, App. No. 15404/89, Admissibility decision, 16 April 1991, 70 D.R. 262.

<sup>172</sup> See: *Kuijk v. Greece*, App. No. 14986/89, Admissibility decision 3 July 1991, 70 D.R. 240.

<sup>173</sup> See: *Byloos v. Belgium*, App. No. 14545/89; Admissibility decision, 9 October 1990, 66 D.R. 238; *v. Denmark*, App. No. 8395/78, Admissibility decision 16 December 1981, 27 D.R. 50.

<sup>174</sup> See: *Airey v. Ireland*, Judgment date 9 October 1979, Series A, No. 32, (1979) 2 E.H.R.R. 305, paragraph 23; *Agree v. United Kingdom*, App. No. 7729/76, Admissibility decision, 17 December 1976, 7 D.R. 164.

<sup>175</sup> See: *Remli v. France*, App. No. 16839/90, Judgment date 26 April 1996, (1996) 22 E.H.R.R. 253; *Leander v. Sweden*, App. No. 9248/81, Judgment date 26 March 1987, Series A, No. 116, (1987) 9 E.H.R.R. 433.

<sup>176</sup> See: *H. v. United Kingdom*, App. No 10000/82, Admissibility decision, 3 July 1983, 33 D.R. 247.

<sup>177</sup> See: *Whiteside v. United Kingdom*, Admissibility decision 7 March 1994, App. No. 20357/92, 76 D.R. 80.

**Non judicial remedies.** Administrative remedies may be effective, provided they are realistically capable of affording redress.<sup>178</sup> Purely advisory powers are insufficient.<sup>179</sup> The Ombudsman procedure is not generally considered to be an effective remedy.<sup>180</sup> A Royal Pardon or an *ex gratia* payment cannot be considered as an effective remedy. In general, a remedy which depends on the discretionary power of a public authority cannot be considered to be effective.

**The six-month rule.** The Court can only deal with an application where the complaint has been made within six months from the date on which the final decision was taken by the authorities in the State in question.<sup>181</sup>

**The commencement of the six-month period.** The period commences on the day after the delivery of the final decision in the last effective or potentially effective domestic remedy available. The final decision is given when the judgment is rendered orally in public, or if not pronounced in public, the date on which the applicant or his lawyer were informed of it,<sup>182</sup> whichever is the earlier.<sup>183</sup> If the decision is relevant for the application, time runs from the date on which the full text is received.<sup>184</sup> Where the applicant was initially unaware of a violation of a Convention right, time runs from the date of knowledge.<sup>185</sup> Where there is a sequence of events, time starts to run from the end of the episode, unless it is practical to expect the application to be made earlier. If a prosecution involves multiple charges, time runs from the date on which the first conviction was affirmed,<sup>186</sup> rather than from the conclusion of the proceedings as a whole.<sup>187</sup> An application concerning a jurisdictional decision must be brought within six months of its date, and not the date of any subsequent decision.

**Continuing situation.** Where the act or omission that amounts to a violation is continuous or repeated<sup>188</sup> and there is no domestic remedy, the six-month period

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<sup>178</sup> See: *McFeeley v. United Kingdom*, App. No. 8317/78, Admissibility decision 15 May 1980, (1981) 3 E.H.R.R. 161.

<sup>179</sup> See: *Agee v. United Kingdom*, App. No. 7229/76, Admissibility decision 17 December 1976, 7 D.R. 164.

<sup>180</sup> See: *Montion v. France*, App. No. 11192/84, Admissibility decision 14 May 1987, 52 D.R. 227; *Leander v. Sweden*, App. No. 9248/81, Judgment date 26 March 1987, (1987) 9 E.H.R.R. 433.

<sup>181</sup> Article 35(1). Once Protocol No. 15 comes into force, it will reduce the time limit for making an application to the Court from six months to four months from the date on which a final decision was taken.

<sup>182</sup> See: *KCM v. Netherlands*, App. No. 21304/92, Admissibility decision 9 January 1995, 80 D.R. 87

<sup>183</sup> See: *Aarts v. Netherlands*, App. No. 4056/88, Admissibility decision 28 May 1991, 70 D.R. 208.

<sup>184</sup> See: *P v. Switzerland*, App. No. 9299/81, Admissibility decision, 3 May 1983, 36 D.R. 20.

<sup>185</sup> See: *Hilton v. United Kingdom*, App. No 12015/86, Admissibility decision, 6 July 1988, 57 D.R. 108.

<sup>186</sup> A similar rule is applied also in civil proceedings.

<sup>187</sup> See: *N v. Germany*, App. No. 9132/80, Admissibility decision, 16 December 1982, 31 D.R. 154.

<sup>188</sup> See: *De Becker v. Belgium*, App. No. 214/56, (1958-1959) 2 Y.B. of the E.C.H.R. 215 and paragraph 8 of the Court's Judgment: date 27 March 1963; *McDaid v. United Kingdom*, App. No. 25681/94, 85-A D.R. 134, Admissibility Decision, 9 April 1996; *Norris v. Ireland*, App. No. 10581/83, Judgment date 26 October 1988, (1991), Series A, No. 142, 13 E.H.R.R. 186; *Modinos v. Cyprus*, App. No. 15070/89, judgment date 22 April 1993, Series A, No. 259, (1993) 16 E.H.R.R. 485.

will run from the end of the state of affairs; and so long as the situation continues to exist, the six-month rule will not apply.<sup>189</sup>

**Pursuit of ineffective remedies.** Where the applicant has pursued a remedy that later proves to be ineffective, time runs from the moment that he became aware or should reasonably have become aware of this situation.

### **Additional inadmissibility grounds**

**Anonymity.** Anonymous applications are inadmissible.<sup>190</sup> However, an applicant can make a request for anonymity so that the applicant's identity is not disclosed to the public. The Court is able to authorise anonymity or grant it of its own motion.<sup>191</sup> A good example of where this has been granted is in the cases of forced sterilisation of Roma women where the applicants' names are not mentioned and they are referred to by initials.<sup>192</sup>

**Incompatibility with the provisions of the Convention.** Applications are declared incompatible if: the alleged violated right was not binding on the State concerned at the time of the event about which complaint is made; the application is based on events in a territory outside the Contracting State's jurisdiction;<sup>193</sup> the application related to the acts of a person not bound by the Convention, or over whom the Convention organs have no jurisdiction; or the application does not relate to a right or freedom protected by the Convention.<sup>194</sup>

**Substantially the same.** An application can be ruled inadmissible if it concerns a matter that has been examined already by the Court or in another procedure of international investigation or settlement.<sup>195</sup> However, the provision does not apply to cases involving different facts or circumstances even if the legal issues are substantially the same.

This provision will not apply where an applicant makes a second application in respect of the same alleged violation after the Court has passed judgment on a

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<sup>189</sup> See: *Dudgeon v. United Kingdom*, App. No. 7525/76, Judgment date 22 October 1981, Series A, No. 45,(1982) 4 E.H.R.R. 149.

<sup>190</sup> Article 35(2)(a)

<sup>191</sup> Rule 47(4). See also Rule 33 and the Court's Practice Direction on Requests for Anonymity, issued by the President of the Court in accordance with Rule 32 on 14 January 2010, page 64 of the Rules.

<sup>192</sup> See: *V.C. v Slovakia*, App. No. 18968/07, Judgment date 8 November 2011; *N.B. v Slovakia*, App. No. 29518/10, 12 June 2012; and *I.G., M.K. and R.H. v Slovakia*, App. No. 15966/04, 13 November 2012.

<sup>193</sup> See Article 56 of the Convention. However, this is subject to extra-territorial responsibility in certain cases.

<sup>194</sup> See: *BC v. Switzerland*, App. No. 19898/92, Admissibility decision date 30 August 1993, 75 D.R. 223. *Autio v. Finland*, App. No. 17086/90, Admissibility decision date 6 December 1991, 72 D.R. 245.

<sup>195</sup> Article 35(2)(b).

complaint but where there is new information or facts, not in existence or not known at the time when the first application was made.

**Manifestly ill founded.** Applications which do not disclose any possible ground upon which it could be established that the Convention has been violated, will be declared inadmissible on the basis that they are manifestly ill-founded.<sup>196</sup>

**Abuse of the right of petition.** Vexatious or repeated applications, those tainted by forgery or misrepresentation, or written in offensive or provocative language, or made in deliberate breach of the Court's ruling will be struck out as an abuse of the right of individual application.<sup>197</sup>

**Significant disadvantage.** The Court shall declare inadmissible any individual application if the applicant has not suffered a significant disadvantage unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits. No case may be rejected on this ground, which has not been duly considered by a domestic tribunal.<sup>198</sup>

#### **Institution of proceedings<sup>199</sup>**

**Application form and signature.** The application must be made in writing and signed by the applicant or his/her representative. The representative must provide a power of attorney, or other written authority to act. Rule 47(1) sets out the information that is required in the application. Among other things, it must include the name of the applicant, the name of the Contracting Party (or Parties), a succinct statement of facts and a succinct statement of the violations of the Convention.

Failure to comply with the requirements will result in the application not being examined by the Court, unless,

- (a) the applicant has provided an adequate explanation for the failure to comply;
- (b) the application concerns a request for interim measures;
- (c) the Court otherwise directs of its own motion or at the request of an applicant.<sup>200</sup>

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<sup>196</sup> Article 35(3)(a).

<sup>197</sup> Article 35(3)(a).

<sup>198</sup> See Article 35(3)(b) of the Convention. Note that in accordance with Article 20 of Protocol 14, this new admissibility criterion will not apply to applications declared admissible before the 1 June 2010 and that in the two years following that date the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court. For an example of the application of this provision see *Korolev v. Russia*, App. No. 25550/05, Judgment date 12 April 2007.

<sup>199</sup> When filling in the application it is advisable to follow the instructions contained within the Court's Practice Direction on the Institution of Proceedings, issued by the President of the Court on 1 November 2003, as amended on 6 November 2013.

<sup>200</sup> Rule 47(5.1).

**Date of introduction.** The date of the introduction of the application for the purposes of Article 35(1) shall be the date on which the application form satisfying the requirements of this Rule is sent to the Court. The date of dispatch shall be the date of the postmark. The Court may decide that a different date shall be considered to be the date of introduction where it finds it justified.<sup>201</sup>

**Special circumstances suspending the period.** Only very limited circumstances amounting to “force majeure” will be regarded as suspending the running of the six-month period. Illness and low morale have not been accepted as special circumstances.<sup>202</sup> Detention is not in itself sufficient, unless it can be proved that contact with the outside world was prohibited.<sup>203</sup> Nor is ignorance of the law sufficient.<sup>204</sup>

### Proceedings on admissibility

**Procedure before a single judge.** Article 27 of the Convention provides that a single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination. Such a decision will be final. However, if a single judge does not declare an application inadmissible or strike it out, that judge must forward it to a Committee or to a Chamber for further examination.

**Judge Rapporteur.** Where it seems justified that an application should be examined by a Chamber or Committee, a Judge Rapporteur is appointed by the President of the Section in order to prepare a report on the admissibility of the application<sup>205</sup> In his or her examination of an application the Judge Rapporteur: (a) may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant;<sup>206</sup> (b) shall, subject to the President of the Section directing that the case be considered by a Chamber, decide whether the application is to be considered by a single-judge formation, by a Committee or by a Chamber; (c) shall submit such reports, drafts and other documents as may assist the Committee or Chamber or its President in carrying out their functions.<sup>207</sup>

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<sup>201</sup> Rule 47(6)(a)-(b).

<sup>202</sup> See: *X v. Austria*, App. No. 6317/73, Admissibility decision 10 July 1975, 2 D.R. 87.

<sup>203</sup> See: *Kalenziz v. Greece*, App. No. 13208/87, Admissibility decision 8 January 1981, 68 D.R. 125.

<sup>204</sup> See: *Dello Preiti v. Italy*, App. No. 15488/89, Admissibility decision 27 February 1995, 80 D.R. 14.

<sup>205</sup> Rule 49(2).

<sup>206</sup> According to Rule 38, no written observations or other documents may be filed after the time-limit set by the President, unless the President decides otherwise.

<sup>207</sup> Rule 49(3).

**Procedure before a Committee.** Article 28(1) of the Convention provides that the Committee may, by a unanimous vote of all three judges: (a) declare an application inadmissible or strike out of the Court's list of cases an application where such a decision can be taken without further examination; or (b) declare the application admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well established case-law of the Court. Such decisions and judgments will be final. Article 28(3) provides that if the judge elected by the High Contracting Party concerned is not a member of the Committee then the Committee may at any stage of the proceedings invite that judge to take the place of one of the members of the Committee, having regard to all relevant factors including whether that Party has contested the application of the procedure under Article 28(1)(b).

**Examination before a Chamber.**<sup>208</sup> If no decision is taken under Article 27 or 28 of the Convention, or no judgment is rendered under Article 28 then the application will be forwarded to a Chamber for it to decide on admissibility and merits.<sup>209</sup> The case may be struck out or rejected as inadmissible in whole or in part on its first examination by the Chamber, and before any communication with the relevant Contracting State has taken place. Alternatively, the Chamber or its President may decide to: a) request the parties to present any factual information, documents and other material considered as relevant; b) communicate the application to the Contracting State, inviting it to submit written observations on the application and, upon receipt thereof, invite the applicant to submit observations in reply; c) invite the parties to submit further observations in writing.<sup>210</sup>

Before taking its decision on admissibility, the Chamber may decide to hold a hearing and the parties will usually be invited to address the issues arising in relation both to the admissibility and the merits of the application.<sup>211</sup> The deliberation of the Chamber takes place immediately after the hearing is closed.

**Communication to the High Contracting Parties.** When an application is communicated to the Contracting Party it will be given a time limit within which to submit its observations. Those observations will then be copied to the applicant who will then be given a time limit within which to reply.<sup>212</sup> Extensions may be granted to either party, but the request for an extension must be received

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<sup>208</sup> Rule 54.

<sup>209</sup> Article 29(1).

<sup>210</sup> Rule 54(2).

<sup>211</sup> Rule 54(5).

<sup>212</sup> According to Rule 38, no written observations or other documents may be filed after the time-limit set by the President, unless the President decides otherwise.

before the expiry of the time limit. When giving notice the Chamber may also decide to examine the admissibility and merits at the same time in accordance with Article 29(1) of the Convention.<sup>213</sup> In such cases the parties are invited to include in their observations any submissions concerning just satisfaction and any proposal for a friendly settlement.<sup>214</sup> If no friendly settlement or other solution is reached and the Chamber is satisfied that the case is admissible and ready for a determination on the merits it shall immediately adopt a judgment including the Chamber's decision on admissibility, save in cases where it decides to take such a decision separately.<sup>215</sup>

**Admissibility decision.**<sup>216</sup> A Chamber must give reasons for its decision on admissibility and this will generally contain a summary of the facts, complaints and a section on the law that gives rise to the decision.<sup>217</sup> The Chambers decision will be communicated by the Registrar to the applicant. It will also communicate its decision to the Contracting Party concerned and to any third party, including the Commissioner for Human Rights where they have previously been informed of the application.<sup>218</sup> Rule 57 provides that a decision made by a Chamber will be given either in English or French unless the Court considers that it should be given in both official languages.

#### **Proceedings after the admission of an application<sup>219</sup>**

**Procedure on the Merits.** Once a Chamber has decided to admit the application, it may invite the parties to submit further evidence and written observations,<sup>220</sup> including any claims for just satisfaction by the applicant. If no hearing has taken place at the admissibility stage, it may decide to hold a hearing on the merits of the case.<sup>221</sup> The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing.<sup>222</sup> A Contracting State whose national is an applicant in the case is entitled to intervene as of right.<sup>223</sup> In all cases before a

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<sup>213</sup> See Rule 54A(1).

<sup>214</sup> Rule 54A(1).

<sup>215</sup> Rule 54A(2).

<sup>216</sup> The Court's current practice is to examine both the admissibility and the merits of an application which is straightforward, for example, because the complaint mirrors a complaint considered in a definitive lead judgment.

<sup>217</sup> See Article 45(1) of the Convention and Rule 56.

<sup>218</sup> Rule 57 provides that a decision made by a Chamber will be given either in English or French unless the Court considers that it should be given in both official languages.

<sup>219</sup> Rule 59.

<sup>220</sup> Rule 59(1).

<sup>221</sup> Rule 59(3).

<sup>222</sup> See Article 36(2).

<sup>223</sup> See Article 36(1).

Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.<sup>224</sup>

**Friendly settlement.**<sup>225</sup> At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned in order to try to get them to negotiate a friendly settlement of the case.<sup>226</sup> If a friendly settlement is reached then, in accordance with Rule 43(3), the Court will strike the case out of its list by means of a decision which will be confined to a brief statement of the facts and the solution reached. Any communications or proposals made in the course of friendly settlement negotiations are confidential and cannot be referred to in any later contentious proceedings.<sup>227</sup>

**Examination of a case.** The Court has power to embark on an investigation where necessary after admissibility. Contracting States are obliged to furnish all necessary facilities for the investigations, in accordance with Article 38 of the Convention.<sup>228</sup>

**Public hearings.** Hearings are public unless the Chamber decides in exceptional circumstances otherwise.<sup>229</sup> Rule 63(2) sets out the grounds upon which the press and public may be excluded from all or part of a hearing.<sup>230</sup> Any request for private hearings must be justified.<sup>231</sup>

**Proceeding in the absence of a party.** In circumstances where a party, or any other person who is due to appear, fails to appear, the Chamber may, in accordance with a proper administration of justice, nonetheless proceed with the hearing.<sup>232</sup>

### **Proceedings before the Grand Chamber**

#### **Relinquishment of jurisdiction by a Chamber in favour of Grand Chamber.**

The Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber if the case raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where

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<sup>224</sup> See Article 36(3).

<sup>225</sup> See Article 39 of the Convention and Rule 62.

<sup>226</sup> See Article 39(1) which provides that any such settlement should be: "... *on the basis of respect for human rights as defined in the Convention and the protocols thereto*".

<sup>227</sup> See Article 39(2) of the Convention and Rule 62(2).

<sup>228</sup> See also Rule 44A which provides that the parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice.

<sup>229</sup> Article 40(1).

<sup>230</sup> The reasons include: the interests of morals, public order, national security or if the interest of juveniles or the protection of the private life of the parties so require a private hearing.

<sup>231</sup> Rule 63(3).

<sup>232</sup> Rule 65.

the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.<sup>233</sup> In these circumstances, the Grand Chamber will be also include the members of the Chamber which relinquished jurisdiction.<sup>234</sup> Reasons need not be given for the decision to relinquish. The Registrar shall notify the parties of the Chamber's intention to relinquish jurisdiction.<sup>235</sup> The parties shall have one month from the date of that notification within which to file at the Registry a duly reasoned objection.

**Referral of a case to the Grand Chamber:**<sup>236</sup> Exceptionally and within a period of three months from the date of the judgment of a Chamber, any party to a case may file a request in writing at the Registry for the case to be referred to the Grand Chamber.<sup>237</sup> The party making the request must specify the serious question affecting the interpretation or application of the Convention or the Protocols thereto, or the serious issue of general importance which it is suggested warrants consideration by the Grand Chamber.<sup>238</sup> A panel of five judges of the Grand Chamber<sup>239</sup> will examine the request solely on the basis of the existing case file. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

### Judgments

**Final judgment.** The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.<sup>240</sup>

The judgment of the Grand Chamber shall be final.<sup>241</sup>

In accordance with Article 45(1) of the Convention the Chamber and the Grand Chamber will give reasons for their judgments. Rule 74 lists the required contents of a judgment, which include the facts of the case; a summary of the submissions made by the parties; and the reasons for their judgment.

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<sup>233</sup> Article .30 and Rule 72(1).

<sup>234</sup> Rule 24(2)(c)

<sup>235</sup> Rule 72(2).

<sup>236</sup> Article 43 and Rule 73.

<sup>237</sup> Article 43(1).

<sup>238</sup> Rule 73(1).

<sup>239</sup> Constituted in accordance with Rule 24(5).

<sup>240</sup> Article 44(2).

<sup>241</sup> Article 44 44(1). of the Convention.

In a case where the decision is not unanimous, any judge is entitled to deliver a separate opinion.<sup>242</sup>

Upon signing the Convention, the Contracting Parties undertake to abide by the final judgments of the Court in cases to which they are parties.<sup>243</sup> Judgments are transmitted to the Committee of Ministers, which supervises the execution of judgments.<sup>244</sup> The Committee of Ministers has the power to take action against States that have not abided by the Court's judgments.<sup>245</sup>

The final judgment will be published by the Registry.<sup>246</sup> Most judgments can be found on the Court's website. The Registrar sends certified copies to the parties, the Secretary General of the Council of Europe, to any third party (including the Commissioner for Human Rights) and to any other person directly concerned.<sup>247</sup>

**Request for interpretation of a judgment.** Rule 79(1) provides that a party may request the interpretation of a judgment within a period of one year following the delivery of that judgment. The original Chamber<sup>248</sup> may decide of its motion to refuse the request on the ground that there is no reason to warrant its consideration. If the Chamber accepts the request, the Registrar will communicate it to the other party or parties and invite them to submit any written comments within a time-limit decided by the President of the Chamber. The Chamber shall then decide the request by means of a judgment.<sup>249</sup>

**Request for revision of a judgment.**<sup>250</sup> A party may request the revision of a judgment in the event of the discovery of a fact which might by its nature have a decisive influence and which, when the judgment was delivered, was unknown to the Court and could not reasonably have been known to that party. The request must be filed with the Registry. It must be made within a period of six months after the party acquired knowledge of the fact<sup>251</sup> and should be supported by all relevant documents.<sup>252</sup> The original Chamber may decide of its own motion to refuse the request.<sup>253</sup> If the Chamber accepts the request, the Registrar will communicate it to the other party or parties and invite them to

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<sup>242</sup> Article 45(2).

<sup>243</sup> Article 46(1).

<sup>244</sup> Article 46(2).

<sup>245</sup> Article 46(2)-(5)

<sup>246</sup> Article 44(3) and Rule 78.

<sup>247</sup> Rule 77(3).

<sup>248</sup> Rule 79(3).

<sup>249</sup> Rule 79(4).

<sup>250</sup> Rule 80.

<sup>251</sup> Rule 80(1)

<sup>252</sup> Rule 80(2).

<sup>253</sup> Rule 80(3).

submit any written comments within a time-limit decided by the President of the Chamber. The Chamber will then decide the request by means of a judgment.<sup>254</sup>

The Court may also, of its own motion or at the request of a party made within one month of the delivery of a decision or a judgment, rectify clerical errors, errors in calculation or obvious mistakes.<sup>255</sup>

**The pilot-judgment procedure.**<sup>256</sup> This procedure has been developed to deal with large groups of identical cases that derive from the same underlying problem, referred to as repetitive cases, in order to reduce the workload of the Court. When the Court receives a significant number of repetitive cases it may decide to select one or more of them for priority treatment. The Court will then strive to achieve a solution in the selected case(s), which will extend to the other repetitive cases. The resulting judgment will be a pilot judgment in which the Court will aim: to determine whether there has been a violation of the Convention in the particular case; to identify the dysfunction under national law that is at the root of the violation; to give clear indications to the respondent Contracting State as to how to eliminate this dysfunction; and to bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the Court awaiting the pilot judgment) or at least to bring about a settlement of all such cases pending before the Court.

### **Execution of judgment**

**Claims for just satisfaction.**<sup>257</sup> Article 13 of the Convention requires national courts to provide an effective remedy for violations of the Convention. Similarly, the Court will make an award of just satisfaction when the domestic law of the Contracting Party concerned allows only partial reparation for a violation.<sup>258</sup> In order to obtain a grant of just satisfaction an applicant must make a specific claim.<sup>259</sup> If the applicant fails to comply with the procedural requirements for making a claim for just satisfaction then the Chamber may reject the claim in whole or in part.<sup>260</sup> The applicant's claims for just satisfaction will be transmitted to the respondent Contracting State for comment.<sup>261</sup>

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<sup>254</sup> Rule 80(4).

<sup>255</sup> Rule 81.

<sup>256</sup> Rule 61

<sup>257</sup> Article 41, Rule 60 and Practice Direction on Just Satisfaction Claims.

<sup>258</sup> Pursuant to Article 41. of the Convention.

<sup>259</sup> In accordance with Rule 60, the claim has to be presented together with any relevant supporting documents, within the time-limit fixed by Rule 38, unless the President of the Chamber decides otherwise.

<sup>260</sup> Rule 60(3).

<sup>261</sup> Rule 60(4).

When deciding whether to make an award, the Court will have regard to what is equitable,<sup>262</sup> and whether the nature of the violation will render *restitutio in integrum* impossible.<sup>263</sup> The Court will award damages only in respect of losses which can be shown to have been caused by the violation in question.<sup>264</sup> In some circumstances the Court may decide that for some heads of alleged prejudice, a finding of a violation in itself constitutes adequate satisfaction, without there being a need for financial compensation. However, it may decide to award financial just satisfaction under three heads: pecuniary loss; non-pecuniary loss; and costs and expenses. To be awarded the latter, the applicant has to submit a detailed bill of the cost and expenses of bringing the case to the Court. When deciding how much to award, the Court can take into account the domestic fee scales but they are not binding on the Court.<sup>265</sup> If an award is made, the respondent State is usually expressly required to pay compensation and costs within a period of three months of the date of the judgment.

**The principle of *Restitutio in Integrum*.** The principle implies that the amount of compensation awarded should put the applicant in the position he/she would have been if the violation had not been committed. The principle will arise where the Court finds a breach imposes a legal obligation on the respondent State to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.<sup>266</sup> The Court will not award just satisfaction if fresh proceedings could bring about a situation as close to *restitutio in integrum* as possible.<sup>267</sup> In property cases the Court has sometimes stated that the return of the property would constitute *restitutio in integrum*.<sup>268</sup>

**Execution.** In accordance with Article 46 of the Convention, Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Respondent States must take measures in favour of applicants to put an end to violations and, so far as is possible, erase the consequences of the

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<sup>262</sup> See: *X v. United Kingdom*, App. No. 6998/75, Judgment date (Just Satisfaction) 18 October 1982, Series A, No.55, (1982) 5 E.H.R.R. 192, paragraph 18.

<sup>263</sup> See: *König v. Germany*, App. No. 6232/73, Judgment date (Just Satisfaction) 10 March 1980, Series A, No. 36, (1979-1980) 2 E.H.R.R. 469, paragraph 15.

<sup>264</sup> See: *Le Compte, Van Leuven and De Meyere v. Belgium*, App. No. 7299/75; 7496/76, Judgment date (Just Satisfaction) 24 October 2010, Series A, No. 54, (1983) 5 E.H.R.R. 183, paragraph 15.

<sup>265</sup> See: *Hood v. United Kingdom*, App. No. 27267/95, Judgment date 18 February 1999, (2000) 29 E.H.R.R. 365; *Eckle v. Germany*, App. No. 8130/78, Judgment date (Just Satisfaction), 21 June 1983, Series A, No. 45, (1991) 13 E.H.R.R. 556, paragraph 24.

<sup>266</sup> See: *Piersack v. Belgium* (Article 50), App. No. 8692/79, Judgment date (Just Satisfaction) 26 October 1982, Series A, No.85, (1985) 7 E.H.R.R. CD251, paragraph 12.

<sup>267</sup> See: *Windisch v. Austria*, App. No. 12489/86, Series A, No.85, (1991) 13 E.H.R.R. 281.

<sup>268</sup> See: *Papamichalopoulos v. Greece*, App. No. 14556/89, Judgment date (Just Satisfaction) 31 October 1995, Series A, No. 330-B, (1996) 21 E.H.R.R. 439, paragraphs 38-40; *Henrich v. France*, App. No. 13616/88, Judgment date 22 September 1994, Series A, No 296-A, (1994) 18 E.H.R.R. 440, paragraph 71.

violations. They must also take the measures needed to prevent new or similar violations.

States have considerable freedom in the choice of the individual and general measures they take to meet their obligations; however, this freedom is monitored by the Committee of Ministers.

Depending on the circumstances, the execution of the judgment may require the respondent State to take steps to remedy the violation of an applicant's rights. These steps include:

- **Individual measures.** The execution measures are meant to put an end to the violation and remedy, as far as possible, its negative consequences for the applicant. This implies that the State should pay any sum awarded by the Court as just satisfaction. However, in some circumstances, monetary compensation will not be able to erase the consequence of the violation. The Committee of Ministers can propose that a Member State takes other individual measures to remedy the situation. These measures could include the re-opening and re-examination of national proceedings. These measures may be an effective way of redressing the consequences of a violation of the Convention caused by an unfair national trial.<sup>269</sup> In the case of expulsion from a country, the measure may oblige the State to reconsider its decisions to ensure that the applicant can return to the country in question or remain there if the deportation has not yet taken place.<sup>270</sup>
- **General measures.** These measures are used when the circumstances of the case clearly show that the violation is the result of domestic legislation, or where it is the lack of legislation which has led to the violation. The State concerned has to amend the existing legislation or introduce new, appropriate legislation in order to comply with the Court's judgment. The State automatically adjusts its legal stance and its interpretation of national law to meet the demands of the Convention, as reflected in the Court's judgments; and makes the Court's judgments directly enforceable by virtue of its domestic law.<sup>271</sup>

**Monitoring the execution of judgments.** The Committee of Ministers is comprised of the Ministers for Foreign Affairs of all the Member States of the Council of Europe, or their Permanent Representatives in Strasbourg. The Committee of Ministers is responsible for supervising the execution of the Court's judgments under Article 46(2) of the Convention and is assisted by the

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<sup>269</sup> See: *Barberà, Messegué and Jabardo v. Spain*, Judgment date 6 December 1988, Series A, No. 146, (1989) 11 E.H.R.R. 360, paragraphs 92-93.

<sup>270</sup> See: *D. v. United Kingdom*, Resolution DH (98) 010.

<sup>271</sup> In case of systemic violation see also *Broniowski v. Poland* [GC], App. No. 31443/96, Judgment date 22 June 2004. The case is an example of the pilot-judgment procedure.

Council of Europe Department for the Execution of Judgments of the Court. The judgments of the Court are transmitted to the Committee of Ministers,<sup>272</sup> which then examines: whether any just satisfaction awarded by the Court has been paid; and, if required, whether individual measures have been taken.<sup>273</sup>

If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment then it may refer the matter to the Court for a ruling on the question of interpretation.

If a two-thirds majority of the representatives entitled to sit on the Committee of Ministers considers that a Contracting Party has refused to abide by a final judgment in a case to which it is a party then it may, after serving formal notice on that Party, refer to the Court the question whether that Party has failed to fulfil its obligation to abide by the judgment of the Court.<sup>274</sup> If the Court finds a violation of that obligation then it shall refer the case back to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation then it shall refer the case back to the Committee, which shall close its examination of the case.<sup>275</sup>

The Committee of Ministers is also entitled to consider any communication from the injured party with regard to the payment of just satisfaction or the taking of individual measures.<sup>276</sup> NGOs and National Institutions for the Promotion and Protection of Human Rights can also submit communications in writing.

After establishing that the State concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its functions under Article 46(2) of the Convention have been exercised. In some cases, interim resolutions may be appropriate.

Since Protocol 14 came into effect, the Committee of Ministers has also been tasked with supervising the execution of friendly settlements.

**Recommendation No. R (2000) 2.**<sup>277</sup> This Recommendation was adopted by the Committee of Ministers as a result of execution problems caused in certain cases by the lack of appropriate national legislation on the re-opening of proceedings.

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<sup>272</sup> See also the document: “*Rule adopted by the Committee of Ministers for the application of Article 46, paragraph 2 of the Convention*”.

<sup>273</sup> Rule 6 of the Rules of the Committee of Ministers for the supervision and execution of judgments and of the terms of the friendly settlements, adopted 10 May 2006.

<sup>274</sup> Article 46(4).

<sup>275</sup> Article 46(5).

<sup>276</sup> Rule 9 of the Rules of the Committee of Ministers for the supervision and execution of judgments and of the terms of the friendly settlements, adopted 10 May 2006.

<sup>277</sup> Adopted by the Committee of Ministers on 19 January 2000.

The Committee of Ministers uses this Recommendation to invite the Contracting Parties to ensure the existence at national level of adequate possibilities to achieve, as far as possible, *restitutio in integrum*.<sup>278</sup>

### **Reform of the Court and Future Developments**

There have been a number of reforms to the operation of the Court in the past and there will be further reforms in the future. These reforms are contained within Protocols No. 11, 14, 15 and 16.

#### **(i) Protocol No. 11**

Protocol No. 11 came into force on 1 November 1998 with the aim of reforming the Court. Reform of the control machinery established by the Convention was required so that it could cope with the growing number of complaints that were being made to the Court. It abolished the dual system whereby the European Court of Human Rights and the European Commission of Human Rights considered complaints. This system was replaced with a single permanent European Court of Human Rights. The creation of a single Court was intended to prevent the overlapping of a certain amount of work and also to avoid certain delays, which were inherent in the previous system. The new Court has jurisdiction in all matters concerning the interpretation and application of the Convention including inter-State cases as well as individual applications. In addition, the Court is able to give advisory opinions when so requested by the Committee of Ministers.

#### **(ii) Protocol No. 14**

Protocol No. 14 entered into force on 1 June 2010. The principle aim of the Protocol was to reduce the time spent by the Court on applications that are clearly inadmissible and those which raise issues which are already the subject of well-established case-law of the Court (repetitive applications) so as to enable the Court to concentrate on those cases which require an in-depth examination. The changes that are made by the Protocol relate more to the functioning than to the structure of the system<sup>279</sup> and the Protocol amends the Convention in a number of significant ways. It allowed for the Council of Europe Commissioner for Human Rights to submit written comments and take part in hearings in all cases

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<sup>278</sup> The problems associated with the implementation of judgments related to Roma cases are highlighted in the Journal of the European Roma Rights Centre, Number 1, 2010 which is available at <http://errc.org/en-research-and-advocacy-roma.php>.

<sup>279</sup> See Articles 4 and 6 of the Protocol.

before a Chamber or the Grand Chamber.<sup>280</sup> It also amended the Convention to permit the European Union to accede to the Convention.<sup>281</sup>

**(iii) Protocol No. 15**

Protocol No. 15 opened for signature on 24 June 2013 and will only come into effect once all Member States have ratified it. Article 1 will add a recital to the Convention affirming the principle of subsidiarity and emphasising the Court's position that Contracting States enjoy a margin of appreciation in respect of the interpretation of human rights. Once the Protocol comes into force, it will reduce the time limit for making an application to the Court from six months to four months from the date on which a final decision was taken.

**(iv) Protocol No. 16**

Protocol No. 16 opened for signature on 2 October 2013 and only requires ten Member States' ratification for it to become effective in those Member States. Article 1 of the Protocol enables the highest courts and tribunals of Contracting States to request that the Court gives an advisory opinion on a question relating to the interpretation and the application of the rights and freedoms defined in the Convention and its Protocols. Article 5 provides that the advisory opinions shall not be binding.

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<sup>280</sup> Article 13 of the Protocol amended Article 36 of the Convention.

<sup>281</sup> See Article 59 of the Convention. Negotiations between the EU Commission and the Council of Europe's Steering Committee for Human Rights with regard to the EU's accession officially commenced on 7 July 2010. At the time of writing, the European Union has still not acceded to the Convention. A Draft Agreement on Accession of the European Union to the European Convention on Human Rights was published on 5 April 2013.

## Section III – Key Articles of the Convention in Roma Cases and the Relevant Jurisprudence

Gloria Jean Garland and Luke Clements

This section offers an overview of those Articles of the European Convention on Human Rights that arise most frequently in cases involving Roma.<sup>282</sup> They are: Article 2 (right to life), Article 3 (freedom from torture), Article 5 (right to liberty), Article 6 (fair trial), Article 8 (respect for private and family life), Article 14 (freedom from discrimination), and Article 4 of Protocol 4 (prohibition of mass expulsions). Of course, other articles, such as Article 10 (freedom of speech) and Article 11 (freedom of association), may apply in individual cases as well, but for the sake of brevity, they are not discussed further here. The Court's case-law is an important tool in combating prejudice and mistreatment of Roma, and in protecting their rights. Citations of cases involving Roma applicants are included, where applicable. In some instances, examples of situations that are common to Roma are offered to illustrate the principles, even though they may not yet represent actual cases before the Court.

### Article 2 – Right to Life

Article 2(1) provides that everyone's right to life shall be protected by law, and that no one shall be deprived of his life.<sup>283</sup>

Article 2 is engaged if the conduct, by its very nature, puts the victim's life at risk, even when the victim of the conduct survives. In those circumstances, the Court will have regard to the degree and type of force used, as well as the intention or aim behind the use of that force, when determining whether the facts should be examined under Article 2 or rather under Article 3 of the Convention.<sup>284</sup>

For example, in *Soare and others v Romania*,<sup>285</sup> a police officer shot a 19-year-old Romani man in the head when he was trying arrest him. Although the victim

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<sup>282</sup> The term 'Roma' should be read as including Roma, Sinti, Kale, and other related groups in Europe, as well as ethnic minorities that identify themselves as Romani Gypsies and Irish Travellers.

<sup>283</sup> The original 1950 Convention provided an exception to the right to life where the death penalty was imposed following a criminal conviction. The death penalty, in times of peace, was abolished by Protocol No.6 to the Convention. Protocol No. 13 abolishes the death penalty in all circumstances. All member States except Russia have ratified Protocol 6 and only four member States have yet to ratify Protocol 13.

<sup>284</sup> On several occasions the Court has stated that "*If the force was potentially deadly and the conduct of the officers concerned was such as to put the applicant's life at risk, then Article 2 is applicable*". See: *Vasil Sashov Petrov v. Bulgaria*, App. No. 63106/00, Judgment date 10 June 2010, paragraph 39; *Karagiannopoulos v. Greece*, App. No. 27850/03, Judgment date 21 June 2007, paragraphs 38-39; *Makaratzis v. Greece* [GC], App. No. 50385/99, Judgment date 20 December 2004 (2005) 41 E.H.R.R. 49, paragraphs 49-55; *Tzekov v. Bulgaria*, App. No. 45500/99, Judgment date 23 February 2006, paragraph 40; and *Goncharuk v. Russia*, App. No. 58643/00, Judgment date 4 October 2007, (2010) 50 E.H.R.R. 24, paragraph 74.

<sup>285</sup> See: *Soare and others v Romania*, App. No. 24329/02, Judgment date 22 February 2011.

survived, he was left semi-paralysed and the Court found that there had been a violation of Article 2 because the legal framework had not been sufficient to afford the required level of protection “by law” of the right to life.

When viewed in conjunction with the State’s duty under Article 1 to “secure to everyone within its jurisdiction the rights and freedoms” protected by the Convention, Article 2 involves both *negative obligations* (the State and its agents must refrain from killing people) and *positive obligations* (the State must take appropriate steps to safeguard lives; implement legislation making murder a crime; and investigate and prosecute people who kill).

**The obligation to safeguard life.** Securing the right to life requires the State in some instances to take active steps to protect against possible risks to life. If the authorities know or ought to know of a real and immediate risk to an individual from criminal acts of another, there is a positive obligation to take measures to protect the intended victim.<sup>286</sup> Thus, in a Roma context, if skinheads at a rally announce their intention to attack a Roma family, there may be a positive obligation on the part of the police to prevent the attack.<sup>287</sup> The positive obligations under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake. In *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, it was held that the positive obligation applied to the healthcare sector as regards the acts or omissions of health professionals. This duty applies particularly where the patients’ capacity to look after themselves is limited.<sup>288</sup>

Similarly, Article 2 can also be used to claim protection against potentially fatal environmental pollution and to compel the State to provide information about the circumstances. In *Öneryildiz v. Turkey (No.1)*, a methane explosion at a municipal rubbish tip killed residents living nearby. The Court found a violation of Article 2, holding that the positive obligation to safeguard life applied to any activities, public or private, where the right to life may be at stake, including the public’s right to information about the potential dangers.<sup>289</sup> Many Romani settlements are located in environmentally polluted areas, which may trigger a positive obligation to inform them of the dangers and to relocate them to safer areas.

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<sup>286</sup> See: *Osman v. United Kingdom*, App. No. 23452/94, 28 October 1998, (2000) 29 E.H.R.R. 245.

<sup>287</sup> This sentence is based on an actual incident occurring in Slovakia in 2001. The matter did not go before the European Court because the assailants were prosecuted and the Slovak Romani family subsequently sought and obtained political asylum in Belgium.

<sup>288</sup> *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania*, App. No. 47848/08, Judgment date 17 July 2014, paragraph 130.

<sup>289</sup> See: *Öneryildiz v. Turkey (No.1)*, App. No. 48939/99, Judgment date 30 November 2004 (2004) 39 E.H.R.R. 12, paragraph 90.

If a foreign national faces a risk to his life (or ill-treatment) if he is returned to his home country, it could amount to a violation of Article 2 (or Article 3) for the State to send him back (regardless of the reason for the risk).<sup>290</sup>

**Procedural requirement to conduct an independent investigation.** The burden of proving a violation of Article 2 normally rests with the applicant. However, the Court recognises that the available evidence needed to prove the violation is often in the hands of State authorities or can only be gathered through the investigative powers of the State and imposes a procedural requirement on the State under Article 2 to investigate any deaths where there is credible evidence that the State is responsible. The investigation must be independent and capable of leading to the identification and punishment of those responsible.<sup>291</sup> The Court also requires that the investigation is thorough, impartial and careful.<sup>292</sup>

The requirement to investigate was extended by the Grand Chamber in *Nachova v. Bulgaria* (discussed in more detail under Article 14) to take into account possible racial motivations in appropriate cases. In *Nachova*, the Grand Chamber noted that:

*"Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction"*<sup>293</sup>

and stated that -

*"[w]here such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives."*<sup>294</sup>

In the case of *Seidova and Others v. Bulgaria*<sup>295</sup> the applicants' close relative had been shot dead when he was caught with 15 other men of Roma origin stealing

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<sup>290</sup> The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol only affords protection to those who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

<sup>291</sup> See: *Carabulea v. Romania*, App. No. 45661/99, Judgment date 13 July 2010, paragraph 130; *Kaya v. Turkey*, App. No. 22535/93, Judgment date 28 March 2000, (2000) 28 E.H.R.R. 1, paragraph 124; *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment date 27 September 1995, Series A, No. 324, (1996) 21 E.H.R.R. 97.

<sup>292</sup> See: *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment date 27 September 1995, Series A, No. 324, (1996) 21 E.H.R.R. 97, paragraphs 161–63; *Kaya v. Turkey*, App. No. 22535/93, Judgment date 28 March 2000, (2000) 28 E.H.R.R. 1, paragraph 105; *Çakıcı v. Turkey* [GC], App. No. 23657/94, Judgment date 8 July 1999, (2001) 31 E.H.R.R. 5, paragraph 86; *Carabulea v. Romania*, App. No. 45661/99, Judgment date 13 July 2010, paragraph 127.

<sup>293</sup> See: *Nachova v. Bulgaria* (GC), App. Nos. 43577/98 and 43579/98, Judgment date 6 July 2005, (2006) 42 E.H.R.R. 43, paragraph 145.

<sup>294</sup> Ibid, paragraph 164.

<sup>295</sup> See: *Seidova and Others v. Bulgaria*, App. No. 310/04, Judgment date 18 November 2010.

onions by wardens patrolling an onion field. Criminal proceedings were brought against the warden who was suspected of firing the shots that killed the relative. However, those proceedings were later discontinued on the ground that the warden had acted in self-defence. The applicants complained that they had not been able to participate effectively in the investigation of their relative's death and had been denied the opportunity to inspect the investigation file. The Court noted that the right of the applicants to participate in the investigation of the death of their relative was an inherent aspect of Article 2 and it held that the State's failure to provide the applicants with the opportunity to participate in that investigation had breached Article 2.

**Standard of proof.** The Court will apply the *beyond reasonable doubt* standard of proof in Article 2 cases. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.<sup>296</sup>

**Burden of proof and the exception in custody cases.** The general rule is that an applicant in an Article 2 case (usually a surviving family member) has the burden of proving State responsibility for the death. An exception to that rule is made when a death occurs while someone is in police custody; in such a case the burden shifts to the State to prove that it is not responsible for the death.<sup>297</sup> In *Velikova v. Bulgaria*, a case involving the death of a Romani man while in police custody, the Court held:

*"The Court considers that where an individual is taken into police custody in good health but is later found dead, it is incumbent on the State to provide a plausible explanation of the events leading to his death, failing which the authorities must be held responsible under Article 2 of the Convention. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control while in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."*<sup>298</sup>

In *Kleyn and Aleksandrovich v. Russia*<sup>299</sup> the Court found that the family of a Roma woman who had fallen out of a second floor window whilst in police custody had not proven beyond reasonable doubt that she had been intentionally killed

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<sup>296</sup> See: *Salman v. Turkey*, App. No. 21986/93, Judgment date 27 June 2000, (2002) 34 E.H.R.R. 17,, paragraph 100.

<sup>297</sup> Ibid.

<sup>298</sup> *Velikova v. Bulgaria*, App. No. 41488/98, Judgment date 18 May 2000, paragraph 70. See also: *Carabulea v. Romania*, App. No. 45661/99, Judgment date 13 July 2010 where the Court found that: "*the authorities have not only failed to provide timely medical care to Mr Carabulea, but they have also failed to provide any plausible or satisfactory explanation for his death, a then healthy 27-year-old man who was in police custody*" (paragraph 126).

<sup>299</sup> See: *Kleyn and Aleksandrovich v. Russia* App. No. 40657/04, Judgment date 3 May 2012.

and held that there had been no violation of the substantive limb of Article 2.<sup>300</sup> However, the Court did find that there had been a violation of the procedural limb of Article 2 because there had been no effective investigation into the victim's death by the State.

**Exceptions to the right to life.** Article 2(2) provides that the deprivation of life will not constitute a violation in prescribed circumstances. Thus there will be no violation if a police officer or other State agent kills someone while defending any person from unlawful violence, to effect a lawful arrest or to prevent the escape of a person lawfully detained, or to quell a riot or insurrection. These exceptions are narrowly tailored, however, and the use of force must be absolutely necessary and proportionate in view of the circumstances.

In *Soare*<sup>301</sup> the applicant had been chasing his former brother-in-law when he was apprehended by a police officer. It was alleged that the police officer assaulted the applicant and then drew his gun and shot the applicant in the head. The officer claimed that he had been acting in self-defence because the applicant had been armed and a prosecution was dropped against him. The Court indicated that the use of lethal force by police officers is justified in certain circumstances. However, this did not grant them a *carte blanche* and policing operations had to be authorised and sufficiently regulated by domestic law. The Court found that Romania did not have a legal framework which was sufficient to afford the right level of protection by law to the right to life and held that there had been a violation of Article 2 as a consequence.

### **Article 3 – Freedom from Torture or Inhuman or Degrading Treatment or Punishment**

Along with Article 2, Article 3 is considered to be of paramount importance among the rights guaranteed by the Convention. A State can never 'derogate' from its responsibilities under Article 3, even in the most difficult of circumstances such as the fight against terrorism or crime.

The difference between torture, inhuman or degrading treatment is one of degree. Torture is defined as deliberate inhuman treatment causing very serious and cruel suffering.<sup>302</sup> Inhuman treatment involves infliction of intense physical or mental suffering. Degrading treatment or punishment is ill-treatment designed to arouse feelings of fear, anguish and inferiority, capable of

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<sup>300</sup> Ibid, paragraphs 49-51.

<sup>301</sup> See: *Soare and Others v. Romania*, App. No. 24329/02, Judgment date 22 February 2011.

<sup>302</sup> These definitions are taken from *Ireland v. United Kingdom*, App. No. 5310/71, Judgment date 18 January 1978, Series A, No. 25, (1979-80) 2 E.H.R.R. 25.

humiliating and debasing a person and breaking physical or moral resistance. There must be a minimum level of severity before ill-treatment will constitute a violation of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>303</sup> Thus, the Court may find a violation of Article 3 with respect to prisoners who are elderly or disabled, where the same treatment may not rise to the level of an Article 3 violation in the case of a prisoner who is young and healthy. Implicit in this approach is an obligation to provide adequate medical treatment to prisoners.

In *Borbála Kiss v. Hungary* the applicant had stepped into an argument between a police officer and someone else. The officer called the applicant names, threatened to arrest her, grabbed her arm and peppered sprayed her eyes. The applicant fell over, and then six or seven male officers dragged her on the ground and then banged her against the police car. While being dragged, her breasts became exposed, since her pullover had been torn. She suffered bruises on her neck and her eyes were burning badly. The Court found that the humiliating conduct of the police operation and the injuries suffered by the applicant were sufficiently serious to amount to degrading treatment within the scope of Article 3.<sup>304</sup>

**Standard of proof.** As in Article 2 cases, the Court will apply the *beyond reasonable doubt* standard of proof in Article 3 cases.<sup>305</sup>

**Burden of proof and the exception in custody cases.** Generally, the applicant in an Article 3 case will have the burden of proving the complaint. However, as with Article 2, if the applicant was in police custody at the time of the alleged ill-treatment, the burden of proof shifts to the State to demonstrate that an injury was caused by something other than ill-treatment.<sup>306</sup>

Thus, in *Cobzaru v. Romania*<sup>307</sup> the Court concluded that there had been a violation of Article 3 in circumstances where a Romani man had alleged that he had been beaten by police officers when in custody and the State had failed to establish that his injuries were sustained otherwise.<sup>308</sup>

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<sup>303</sup> Ibid, paragraph 162 and *Borbála Kiss v. Hungary*, App. No. 59214/11, Judgment date 26 June 2012, paragraph 32.

<sup>304</sup> See: *Borbála Kiss v. Hungary*, App. No. 59214/11, Judgment date 26 June 2012, paragraphs 6, 34 and 35.

<sup>305</sup> Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. See: *Ireland v. United Kingdom*, App. No. 5310/71, Judgment date 18 January 1978, Series A, No. 25, (1979-80) 2 E.H.R.R. 25, paragraph 161

<sup>306</sup> See: *Assenov v. Bulgaria*, App. No. 24760/94, Judgment date 28 October 1998, (1999) E.H.R.L.R. 225, paragraph 92.

<sup>307</sup> See: *Cobzaru v. Romania*, App. No. 48254/99, Judgment date 26 July 2007, (2008) 47 E.H.R.R. 10.

<sup>308</sup> Note well that the Court also concluded that there had been a violation of Articles 13 and 14.

**Discrimination as “degrading treatment”.** Discrimination in itself can constitute degrading treatment where it is gross. The *East African Asians* case, for instance, concerned UK passport holders of Asian descent living in Uganda, Kenya and Tanzania who attempted to settle in the United Kingdom following efforts to “purge” those African nations of their non-African citizens. The 1968 Commonwealth Immigrants Act specifically subjected commonwealth citizens of Asian origin to immigration control. The European Commission for Human Rights held that:

*“differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when different treatment on some other ground would raise no such question.”*<sup>309</sup>

This finding was reiterated in the case of *Moldovan v. Romania*,<sup>310</sup> where Romani victims of mob violence whose homes were burned to the ground were forced to live for years in hen houses, stables and windowless cellars. The Court held that the applicants’ living conditions and the racial discrimination to which they were publicly subjected constituted an interference with their human dignity which, in the special circumstances of that case, amounted to “degrading treatment.”<sup>311</sup>

**Procedural requirement to investigate.** Where there is credible evidence that the State has subjected a person to degrading treatment in violation of Article 3, there is a positive obligation on the State to hold a full independent and public investigation into the matter. In *Assenov v. Bulgaria*<sup>312</sup> the Court held that the investigation should be capable of leading to the identification and punishment of those responsible and stated that:

*“If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.”*<sup>313</sup>

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<sup>309</sup> 3 EHRR 76 (1973).

<sup>310</sup> See: *Moldovan and Others v. Romania* (No.2) App. No. 41138/98, Judgment date 12 July 2005, (2007) 44 E.H.R.R. 16.

<sup>311</sup> Ibid, paragraph 113.

<sup>312</sup> See: *Assenov v. Bulgaria*, App. No. 24760/94, Judgment date 28 October 1998, (1999) E.H.R.L.R. 225, (1999) 28 E.H.R.R. 652, paragraph 92.

<sup>313</sup> Ibid.

The Court has reiterated this point in a number of Article 3 cases involving Roma applicants.<sup>314</sup>

It should be noted that the positive obligation to investigate is not restricted to circumstances where it is alleged that an individual suffered degrading treatment at the hands of agents of the State. In *Šećić v. Croatia*<sup>315</sup> the Court concluded that the State's failure to investigate properly an allegation that a Romani man had been attacked by a group of unidentified skinheads breached Article 3 of the Convention.<sup>316</sup>

State authorities cannot hide behind traditional Roma customs as a reason not to investigate alleged crimes. The Court found that there had been a violation of the procedural limb of Article 3 in *M and Others v. Italy and Bulgaria*,<sup>317</sup> where the police failed to investigate properly allegations that a Bulgarian Roma minor had been forced to marry against her wishes and those of her parents. Her parents alleged that they had been offered work by a Roma man of Serbian origin in Italy. After they arrived, they were told that the man's nephew would marry their daughter. They alleged that they were beaten and threatened with death and had to flee to Bulgaria leaving their daughter behind. The daughter married the nephew but she was also beaten, threatened with death and repeatedly raped by him. The Italian authorities dropped a criminal investigation against the alleged assailant after less than 24 hours and started proceedings against the alleged victim for perjury and libel. The authorities concluded that the marriage was a traditional Roma marriage, to which the parents had consented. The Court found that even if the marriage had been made in accordance with Roma traditions, it was still alleged that the first applicant was beaten and forced to have sexual intercourse. The Italian authorities had an obligation to look into the matter and to establish all the relevant facts by means of an appropriate investigation. The conclusion that the case fell within the context of a Roma

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<sup>314</sup> See: *Bekos and Koutropoulos v. Greece*, App. No. 15250/02, Judgment date 13 December 2005, (2006) 43 E.H.R.R. 2, paragraph 46; *Jasar v. The Former Yugoslav Republic of Macedonia*, App. No. 69908/01, Judgment date 15 February 2007, paragraph 48; *Petropoulou-Tsakiris v. Greece*, App. No. 44803/04, Judgment date 6 December 2007, (2009) 48 E.H.R.R. 47, paragraph 39; *Stoica v. Romania*, App. No. 42722/02, Judgment date 4 March 2008, (2011) 52 E.H.R.R. 29, paragraphs 63 & 126; *Dzeladinov v. The Former Yugoslav Republic of Macedonia*, App. No. 13252/02, Judgment date 10 April 2008, paragraph 68; *Sulejmanov v. The Former Yugoslav Republic of Macedonia*, App. No. 69875/01, Judgment date 24 April 2008, paragraph 46; *Stefanou v. Greece*, App. No. 2954/07, Judgment date 22 April 2010, paragraph 41; *Cobzaru v. Romania*, App. No. 48254/99 Judgment date 26 July 2007, (2008) 47 E.H.R.R. 10, paragraph 64.

<sup>315</sup> See: *Šećić v. Croatia*, App. No. 40116/02, Judgment date 31 May 2007, (2009) 49 E.H.R.R. 18, paragraphs 52-54. The Court also concluded that there had been a violation of Article 14 - in circumstances where the police had been aware that the attack was most probably induced by ethnic hatred but had done little during a period of seven years following the attack to investigate the crime.

<sup>316</sup> See also the case of *Angelova and Iliev v. Bulgaria*, App. No. 55523/00, Judgment date 27 July 2007, (2008) 47 E.H.R.R. 7, for a similar decision in the context of Article 2 and the unlawful killing of a Romani man which the State had failed properly to investigate.

<sup>317</sup> See: *M and Others v. Italy and Bulgaria*, App. No. 40020/03, Judgment date 31 July 2012.

marriage did not suffice to remove any doubt that the alleged victim had been trafficked.

**The obligation to safeguard.** Like Article 2, Article 3 carries with it an obligation to protect individuals from torture or inhuman or degrading treatment from both public and private actors, including preventing expulsion to a country where an individual risks torture or inhuman or degrading treatment.<sup>318</sup>

*Beganović v. Croatia*<sup>319</sup> was a case in which a Roma complained about the State's failure to prosecute effectively the individuals who had attacked him. The Court accepted that the applicant had suffered ill-treatment of sufficient severity to engage Article 3 of the Convention and then considered the extent of the State's positive obligation:

*'70. The Court observes, however, that even in the absence of any direct responsibility for the acts of a private individual under Article 3 of the Convention, State responsibility may nevertheless be engaged through the obligation imposed by Article 1 of the Convention. In this connection the Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals ...'*

*71. Furthermore, Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see ... Nachova ...) and this requirement also extends to ill treatment administered by third parties (see Šećić ...) On the other hand, it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that, if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must in the view of the Court be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3 ....'*

The Court then reminded itself that the requirements of Articles 2 and 3 may go beyond the stage of an investigation (for example, where it has led to the institution of proceedings in national courts) and that the proceedings as a whole must satisfy the positive obligations under those Articles, having regard to the deterrent effect of the judicial system and the significance of the role it is

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<sup>318</sup> See, e.g. *Soering v. United Kingdom*, App. No. 14038, 7 July 1989, Series A, No. 161 (1989) 1 E.H.R.R. 439.

<sup>319</sup> See: *Beganović v. Croatia*, App. No. 46423/06, Judgment date 25 September 2009.

required to play in preventing violations of the right to life and the prohibition of ill-treatment.<sup>320</sup>

The Court noted that the Croatian authorities had only prosecuted one of the applicant's attackers and that those proceedings had failed because they were time barred, before concluding that the State had failed to comply with its positive obligation and that there had been a violation of Article 3.<sup>321</sup>

**Forced sterilisation of Roma women.** There have been a number of recent judgments of the Court regarding the forced sterilisation of Roma women in Slovakia.<sup>322</sup> In *V.C. v. Slovakia*, the applicant alleged that after several hours of labour, doctors asked her whether she wanted more children. When the applicant confirmed that she did she was informed that it would be fatal if she decided to have more children and she was asked to sign a form consenting to her sterilisation. The applicant later claimed that she did not understand what sterilisation meant. The words "*patient is of Roma origin*" appeared on the records of her delivery; she shared a room with three other patients of Roma origin; and was not allowed to share the bathroom with non-Roma women. The Court found that V.C. must have experienced fear, anguish and feelings of inferiority as a result of her sterilisation, as well as the way in which she had been requested to agree to it.<sup>323</sup> She had suffered physically and psychologically over a long period, which included symptoms of false pregnancies which necessitated psychiatric intervention. Although there was no proof that the medical staff concerned had intended to ill-treat her, they had acted with gross disregard to her right to autonomy and choice as a patient and the Court found that this amounted to a violation of Article 3.

In the case of *I.G. M.K. and R.H. v Slovakia*, the Court found that there had been a breach of the procedural obligation to investigate. It stated that:

*129...the Court reiterates that Articles 1 and 3 of the Convention impose procedural obligations on the Contracting Parties to conduct an effective official investigation, which*

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<sup>320</sup> See: *Ali and Ayşe Duran v. Turkey*, App. No. 42942/02, Judgment date 8 April 2008, paragraphs 61-62.

<sup>321</sup> See also: *Koky and others v Slovakia*, App. No 13624/03, Judgment date 12 June 2012 in which the Court considered a similar issue. In that case, following an argument in a bar where a non-Roma woman refused to serve Roma men, a group of non-Roma men, some of whom were armed with baseball bats and iron bars, went to a Roma settlement in a village where the applicants lived. They allegedly shouted racist slogans, forcibly entered into three houses, broke windows and caused other damage. The Court found that there had been an insufficient investigation into the incidents when the police decided not to proceed with an investigation due to lack of evidence.

<sup>322</sup> *V.C. v. Slovakia*, App. No. 18968/07, Judgment date 8 November 2011; *N.B. v Slovakia*, App. No. 29518/10, 12 June 2012; and *I.G., M.K., and R.H. v. Slovakia*, App. No. 15966/04, 13 November 2012. See also: *R.K. v Czech Republic*, App. No. 7883/08, Decision date 27 November 2012, where the case was struck out of the Court's list after Czech Republic agreed a friendly settlement whereby it paid €10,000 to a victim of forced sterilisation.

<sup>323</sup> *Ibid*, paragraph 18.

*must be thorough and expeditious. However, the failure of any given investigation to produce conclusions does not of itself mean that it was ineffective: an obligation to investigate is not an obligation of result but of means. Furthermore, in the specific sphere of medical negligence the obligation to carry out an effective investigation may, for instance, also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability on the part of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained.*

The Court found that the way in which the investigation had been carried out lacked the required promptness and expedition resulting in a violation of the procedural limb of Article 3. The civil complaint lodged by the second applicant, M.K. had taken six years and five months to resolve and the criminal proceedings lasted five years and three months.<sup>324</sup>

The case of M.K. is a good illustration of how the Court awards just satisfaction under Article 41. The applicant had been awarded 1,593 euros in compensation by the Slovakian courts. The Court found that this did not amount to just satisfaction of the violations of Articles 3 and 8 and the Court awarded her 27,000 euros in non-pecuniary damages.<sup>325</sup>

### **Article 5 – Liberty and Security of Person**

Article 5 lists six situations in which a State can deprive an individual of liberty. If an arrest or detention or other deprivation of liberty does not fall within one of the six situations then it will constitute a violation of Article 5.

The six specific instances laid down in Article 5(1) are as follows:

- (a) after a person has been convicted of a crime by a court;
- (b) arrest or detention following non-compliance with a court order or to secure a legal obligation (for example, to compel attendance of a witness at trial, injunctions, paternity tests, or detentions to establish an individual's identity – but detention should be used only if less drastic options will not work);
- (c) reasonable suspicion of having committed a crime or to prevent flight after commission of a crime (the "reasonable" suspicion is an objective one, and States have a margin of appreciation);
- (d) detaining a minor for educational supervision or legal action;
- (e) to prevent the spreading of infectious diseases, or the detention of persons of unsound mind, alcoholics or drug addicts (for their own

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<sup>324</sup> Ibid, paragraph 132 and contrast the position in *V.C. v. Slovakia*, App. No. 18968/07, Judgment date 8 November 2011.

<sup>325</sup> *M.K. v. Slovakia*, App. No. 15966/04, 13 November 2012, paragraphs 55-60.

protection and that of others – the mental disorder must be reliably established and the State has the burden of justifying the detention);

- (f) detention in order to deport or extradite someone.

The State cannot create additional categories and must act within the ambit of the six situations referred to above. Generally, the reasons given by the State for detaining someone will be subject to scrupulous supervision, given the high importance of the right to liberty in democratic societies.<sup>326</sup>

**Procedural guarantees following arrest or detention.** Once a person has been lawfully detained or arrested, several procedural guarantees then come into play, requiring continued justification of the detention. Article 5(2) requires that any person who is arrested be informed promptly of the reasons for arrest, in a language he or she understands. Under Article 5(3), a person arrested on reasonable suspicion of committing an offence must be brought promptly before a judge or other judicial officer and has a right to bail except where there are compelling reasons for it to be refused. A “reasonable suspicion” may be adequate to justify an initial arrest, but more is needed to continue the detention. In the *Assenov v. Bulgaria* case, for instance, two years of pre-trial detention for a minor violated Article 5(3), even though the national authorities were “not unreasonable in fearing that the applicant might offend if released.”<sup>327</sup>

Article 5(4) provides for the right to habeas corpus – an ongoing right to have the legality of detention reviewed (primarily with respect to pre-trial detention, rather than after conviction). Finally, Article 5(5) guarantees the right of compensation to anyone who has been unlawfully arrested or detained.

With respect to Roma cases, Article 5 issues can arise in the context of raids conducted in Roma camps or neighbourhoods where police detain numerous individuals, often on rather dubious allegations that thefts or other crimes having been committed by a person of Roma descent. Roma are sometimes arrested without adequate cause and kept in detention or denied bail for longer than can be justified.

In the case of *Seferovic v. Italy*<sup>328</sup> the lawfulness of the detention of a Roma woman from Bosnia and Herzegovina pending her deportation from Italy was challenged on the grounds that Articles 5(1)(f) and 5(5) had been violated. The applicant’s detention and subsequent deportation had been ordered only a few

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<sup>326</sup> See: *De Wilde, Ooms and Versyp v. Belgium* (No.1), App. Nos. 2832/66; 2835/66; 2899/67, Judgment date 18<sup>th</sup> June 1971, Series A, No. 12 (1979-80) 1 E.H.R.R. 373.

<sup>327</sup> See: *Assenov and Others v. Bulgaria*, App. No. 24760/94 (1999) 28 E.H.R.R. 652, paragraph 156-158.

<sup>328</sup> See: *Seferovic v Italy*, App. No. 12921/04, Judgment date 8 February 2011.

weeks after she had given birth to a child (who subsequently died a few days later); in contravention of Italian law, which prohibits the deportation of women within six months of giving birth.

The central issue before the Court was the lawfulness of the applicant's detention, which was a result of the deportation order made against her. The Court found that the applicant could not have been the subject of a deportation order under Italian law because she had just given birth to a child; the fact that the baby had died did not alter her right to not be subject to a deportation order. The Court concluded that there had been a violation of Article 5(1)(f) because the Italian authorities, who had been aware of the birth of the child, did not have the authority to place the applicant in detention.

### **Article 6 – Right to a Fair Trial**

Article 6(1) guarantees a fair and public hearing to determine "*civil rights and obligations*" or criminal charges within a reasonable time and by an independent and impartial tribunal. The Court has not clearly defined what is included in "*civil rights and obligations*" but the Article clearly applies to rights of a private law character (such as contract obligations, employment rights, personal injury claims and so on) and excludes public law rights unless there are financial or economic implications. The Court has in general given a broad interpretation to the scope of Article 6, covering pre-trial and post-trial procedures as well as the trial itself.

**What is "fair"?** What is "*fair*" depends upon the particular circumstances of the case, but also includes the right to get to court in the first place. Procedural guarantees are meaningless without a right of access to the courts.<sup>329</sup> Excessively high court fees or other barriers can violate Article 6.<sup>330</sup> In Roma cases, lawyers must be particularly alert to the kinds of cultural and practical barriers their clients can face when trying to resolve their grievances. In addition, a court must give each party the opportunity to present his or her case without being at a disadvantage. This concept, known as "*equality of arms*," recognizes that the State's police power and ability to compel witnesses and gather evidence must be balanced by requiring that the evidence be disclosed to the accused and that it be gathered in a fair manner (for example, without coercion or illegal tactics). The principle of fairness also requires that a court gives the reasons for its judgments. Two Roma cases provide good examples of situations in which fairness in civil proceedings has led to Article 6 claims. In *K.H. v Slovakia* the Court held that a

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<sup>329</sup> See: *Golder v. United Kingdom*, App. No. 4451/70, 21 February 1975, Series A, No. 18 (1979-80) 1 E.H.R.R. 524, paragraphs 91-93.

<sup>330</sup> See: *Kreuz v. Poland*, App. No. 28249/95, Judgment date 19 June 2001. See also the decision of the Commission (1999) 25 E.H.R.R. CD 80.

refusal to provide photocopies of medical records to Roma women who wanted to bring a civil claim for sterilisation without their consent amounted to a violation of Article 6(1). In a claim for damages the burden had been on the applicants to prove that they had been sterilised and without the evidence their claim for damages would have failed.<sup>331</sup> In *Stokes v UK*,<sup>332</sup> the applicant, an Irish Traveller, claimed that her rights protected by Articles 6 and 8 of the Convention had been violated in circumstances where she had not been provided with full reasons for the decision taken to evict her from a local authority run site. The parties reached a friendly settlement and the UK agreed to pay the applicant the sum of 2000 euros.

**What is a “reasonable time”?** The Court has reiterated that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case. Regard should be had to the criteria laid down in the Court's case-law; in particular, the complexity of the case, the applicants' conduct and that of the competent authorities, and the importance of what was at stake for the applicant in the litigation.<sup>333</sup>

Therefore, what is a “reasonable” time will depend on the particular circumstances of a case. In criminal cases, a reasonable time is likely to be shorter if the defendant's liberty is restricted pending trial. Cases involving children or applicants suffering from illnesses such as HIV/AIDS should be resolved more quickly than cases involving adults or healthy applicants. In *Moldovan v. Romania*,<sup>334</sup> the mob violence case described earlier, the Court found a violation of Article 6(1) because the resolution of the applicants' civil claims took over 12 years. The civil claims could not be addressed under Romanian law until the criminal proceedings were resolved, and those proceedings had likewise lasted for several years.

**Particular obligations in criminal cases.** Article 6(2) and (3) lists particular obligations with respect to criminal trials. There is a presumption of innocence and the burden of proof is on the State. The defendant must be informed promptly in a language he or she understands of the nature of the charges and must be given time and facilities for preparing a defence and must have the right to compel witnesses to attend. Interpretation must be provided if needed, for witnesses as well as the defendant.

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<sup>331</sup> *K.H. and others v. Slovakia*, App. No. 32881, Judgment date 28 April 2009, (2009) 49 E.H.R.R. 34, paragraphs 59-69.

<sup>332</sup> See: *Stokes v. United Kingdom*, App. No. 65819/10.

<sup>333</sup> See: *Oršić and Others v. Croatia* App. No. 15766/03, Judgment date 10 March 2010, (2011) 52 E.H.R.R. 7 paragraph 108; *Sijemann v. Germany*, App. No. 20024/92, Judgment date 16 September 1996, paragraph 48; *Gast and Popp v. Germany*, App. No. 29357/95, Judgment date 25 February 2000, paragraph 70.

<sup>334</sup> See: *Moldovan and Others v. Romania* (No.2) App. No. 41138/98, Judgment date 12 July 2005, (2007) 44 E.H.R.R. 16.

If a defendant cannot afford a lawyer the State must provide one “*when the interests of justice so require*”. Accordingly, if a defendant is at risk of a serious penalty (for instance, a prison sentence) then the Court will require that legal aid is potentially available.

### **Article 8 – Right to respect for private and family life, home and correspondence**

Article 8(1) provides that “*Everyone has the right to respect for his private and family life, his home and his correspondence*”.

**What is protected?** Article 8 protects four rights – the right to respect for one’s (1) private life (2) family life, (3) home, and () correspondence. The rights protected by Article 8 fall into a category of rights that are qualified rather than absolute. Unlike the rights protected by Article 3, they may be subject to a certain level of interference by State authorities. According to Article 8(2) and the case law of the Court, any interference with Article 8 rights: must be in accordance with the law; must be necessary in a democratic society; and must pursue a legitimate aim. The legitimate aims are listed in Article 8(2):

- i. in the interests of national security;
- ii. in the interests of public safety;
- iii. in the interests of the economic wellbeing of the country;
- iv. for the prevention of disorder or crime;
- v. for the protection of health or morals; or
- vi. for the protection of the rights and freedoms of others.

The proportionality of a measure depends on its effectiveness, whether there are less restrictive means of achieving the same goal, and the level of interference involved. If a person is completely deprived of a right, even the most legitimate of aims may not be sufficient. When applying this balancing test, the Court generally gives a “margin of appreciation” to the State – a discretion accorded to States to determine the best balance between qualified rights and the public interest in any interference.

Thus, the right to respect for private and family life is not absolute, and a State can obtain a warrant on good cause to tap someone’s telephone, collect medical information to combat a potential epidemic, or install surveillance cameras in public places as a security measure.

The Court has been most radical in interpreting the meaning of “*private life*”. The concept of “*private life*” has been interpreted as including a “person’s physical and

psychological integrity” for which respect is due in order to “ensure the development, without outside interference, of the personality of each individual in his relations with other human beings”.<sup>335</sup> The Court has found that applicants’ rights to a private life have been interfered with where: the State has banned consensual sexual activity between two men;<sup>336</sup> there is restriction on access to files,<sup>337</sup> or information about one’s illness;<sup>338</sup> information concerning one’s health and reproductive status;<sup>339</sup> the applicant has been affected by environmental pollution;<sup>340</sup> or where applicants sought access to information about environmental pollution.<sup>341</sup>

By guaranteeing *respect* for private and family life, and not just a right to privacy, the Convention protects a wide range of overlapping and interrelated rights. For instance, in *Chapman v. United Kingdom*,<sup>342</sup> the Court considered a complaint made by a Romani woman who wished to live in a caravan on her plot of land, in violation of national and local planning regulations and who had been subjected to enforcement action to remove her from the land. The Court accepted that the applicant’s occupation of her caravan was an integral part of her ethnic identity as a Gypsy,

*“reflecting the long tradition of the minority of following a travelling lifestyle ... even though, under the pressure of development and diverse policies or from their own volition, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children.”*<sup>343</sup>

The Court held that Article 8 protected the right of Romani Gypsies to enjoy a traditional lifestyle. Significantly, the Court also stated that the vulnerable position of Romani Gypsies as a minority required special consideration of their needs and different lifestyle and that there was a positive obligation on Member States to facilitate the Romani Gypsy way of life. Nevertheless, the Court dismissed the complaint. The Court had afforded the State a wide margin of

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<sup>335</sup> See: *Botta v Italy*, App. No. 21439/93, Judgment date 24 February 1998, (1996) 26 E.H.R.R. 241, paragraph 32.

<sup>336</sup> See: *Norris v Ireland*, App. No. 10581, Judgment date 26 October 1988, (1991) 13 E.H.R.R. 186.

<sup>337</sup> See: *Gaskin v U.K.*, App. No. 10454/83, Judgment date 7 July 1989 Series A, No. 160, (1990) 12 EHRR 36.

<sup>338</sup> See: *McGinley & Egan v UK*, App. No. 21825/93, 9 June 1998, (1999) 27 E.H.R.R. 1; and *LCB v UK*, App. No. 23414/94, 9 June 1998 (1999) 27 E.H.R.R. 212.

<sup>339</sup> See: *K. H. and others v. Slovakia*, App. No. 32881/04, Judgment date 28 April 2009, (2009) E.H.R.R. 34, paragraph 44.

<sup>340</sup> See: *Hatton v UK*, App. No. 36022/97, Judgment date 8 July 2003, (2003) 37 E.H.R.R. 28 and *Di Sarno v Italy*, App. No. 30765/08, Judgment date 10 January 2012.

<sup>341</sup> See: *Guerra and others v. Italy*, App. No. 14967/89, Judgment date 19 February 1998, (1998) 26 E.H.R.R. 357, paragraph 60.

<sup>342</sup> See: *Chapman v. United Kingdom*, App. No. 27238/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 18.

<sup>343</sup> Ibid. paragraph 73

appreciation. It found that the measures taken by the respondent State were in accordance with the law and pursued a legitimate aim of preserving the environment of the land in question which had been classed as greenbelt land by the UK authorities and concluded that enforcement action was proportionate in that case.<sup>344</sup>

In *Connors v. United Kingdom* the applicant, an Irish Traveller, had been summarily evicted from a local authority run Traveller site. The Court reminded itself of the positive obligation to facilitate the Gypsy way of life and found that the eviction had not been attended by the requisite procedural safeguards in circumstances where the applicant had not had the chance to defend eviction proceedings or the opportunity to argue in court that the eviction would be disproportionate.<sup>345</sup> Likewise, in *Buckland v United Kingdom*<sup>346</sup> the Court found that the Article 8 rights of a Romani Gypsy had been violated in circumstances where she had not been given the opportunity to challenge the proportionality of a decision to seek possession of her rented pitch on an authorised site before an independent tribunal.

In *Yordanova v Bulgaria*<sup>347</sup> the Court held that the margin of appreciation will be very wide in respect of economic and social rights but will be narrower where an individual's effective enjoyment of intimate or key rights is at stake. The authorities served an eviction notice on Roma residents of an area in Sofia who had been illegally occupying the land since the 1960s. Nothing had ever been done about their presence prior to the notice being served in 2005 and no plans were made to rehouse the residents who were to be evicted. The Court held that although the state did not have an obligation to provide housing, it was noteworthy that the authorities did not consider the risk of the applicants becoming homeless before issuing. It also held that:

*"130...an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases."*

The Court took into account the length of time the applicants had been on the land and the fact that some of the complaints made against them by other

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<sup>344</sup> See also: *Smith v. United Kingdom* App. No. 25154/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 30, at paragraph 138; *Coster v. United Kingdom*, App. No. 24876/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 20 at paragraph 141; *Lev v. United Kingdom*, App. No. 25289/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 29 at paragraph 129; and *Beard v. United Kingdom*, App. No. 24882/94, Judgment date 18 January 2001 (2001) 33 E.H.R.R. 19, at paragraph 132 and the earlier case of *Buckley v. United Kingdom*, App. No. 20348/92, Judgment date 25 September 1996, (1997) 23 E.H.R.R 101.

<sup>345</sup> See: *Connors v. United Kingdom*, App. No. 66746/01, Judgment date 27 May 2004, (2005) 40 E.H.R.R. 9, paragraph 84; *Chapman v. United Kingdom*, App. No. 27238/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 18, paragraph 96; and *Winterstein v. France*, App. No. 27013/07, Judgment date 17 October 2013.

<sup>346</sup> App No. 40060/08, 18 September 2012, (2013) 56 E.H.R.R. 16.

<sup>347</sup> App No 25446/06, 24 April 2012.

residents in the area had contained racial prejudice before concluding that there would have been a violation of Article 8 had the eviction order been executed.

In *Winterstein and Others v France*<sup>348</sup> the Court held that there had been a violation of Article 8 where the French courts ordered the eviction of a number of Travellers who had been on a site for between five and thirty years, in pain of a daily fine of €200 if they remained on the land. Although the order had never been enforced, a large number of people left the site through fear and only four families had been rehoused by the State. The Court noted that the domestic tribunals had not taken into account the length of time that the families had been settled on the site and that for many years there had been a *de facto* tolerance of their presence. The Court concluded that the principle of proportionality meant that these sorts of cases, where a whole community had been settled for a long period of time, should be treated in a totally different manner to the situation where an individual is evicted from a property which he has been occupying illegally.<sup>349</sup> It reiterated that where someone faces losing their home, they should have the proportionality of that measure assessed by a tribunal/court, which the French courts had failed to do.

Although Article 8 does not recognise the right to be provided with a home, in the specific circumstances of the case and in view of the lengthy presence of the applicants, their families and the community that they had forged, the principle of proportionality required that particular attention should be paid to the fact that the consequence of their expulsion would leave them at risk of homelessness. The Court highlighted numerous international and Council of Europe instruments that stressed the need, in cases of forced expulsion of Roma and Travellers, to provide the persons concerned with alternative accommodation.<sup>350</sup>

In the case of *Moldovan v. Romania* the Court concluded that the right to respect for private and family life was violated by the State's failure to rebuild Romani family homes adequately after a mob of villagers, with police complicity, had burned them to the ground.<sup>351</sup>

Article 8 has also been used to prevent the expulsion of Roma from Member States. In *Hamidovic v Italy*,<sup>352</sup> the applicant, who was originally from Bosnia Herzegovina, had been living in Italy for twenty years before the Italian State

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<sup>348</sup> *Winterstein v. France*, App. No. 27013/07, Judgment date 17 October 2013.

<sup>349</sup> Ibid, paragraph 150.

<sup>350</sup> Ibid, paragraphs 164-165.

<sup>351</sup> See: *Moldovan and Others v. Romania* (No.2), App. No. 41138/98, 64320/01, Judgment date 12 July 2005, (2007) 44 E.H.R.R. 16, paragraph 109.

<sup>352</sup> See: *Hamidovic v. Italy*, App. No. 31956/05, Judgment date 4 December 2012.

took the decision to expel her. The Court found that in the time that the applicant had lived in Italy, she had developed personal, social and economic relationships, which formed part of her private life. Her children had all been brought up in Italy and the Court rejected the Italian government's argument that they could return with her to Bosnia Herzegovina as unrealistic because the children had no attachment with that country. It noted that the crimes the applicant had committed had been mainly for begging and were not so "grave" as to justify the expulsion. The decision to expel her amounted to a disproportionate interference with her right to respect for a private and family life.

In the cases of the forced sterilisation of Roma women that are referred to in the section on Article 3 above, the Court found that there had been a violation of Article 8 in that there had been an interference with the applicants' right to a private and family life. In V.C. the Court found that there had been a violation on the basis that the forced sterilisation had affected the applicant's relationship with the Roma community and her then husband. The Court noted that:

(146) "...the documents before it indicate that the issue of sterilisations and its improper use affected vulnerable individuals belonging to various ethnic groups. However, the Council of Europe Commissioner for Human Rights was convinced that the Roma population of eastern Slovakia had been at particular risk. This was due, inter alia, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits. In the Commissioner's view, the Slovakian Government had an objective responsibility in the matter because of systemic shortcomings in the procedures permitted and, in particular, for failing to put in place adequate legislation and exercise appropriate supervision of sterilisation practices (see paragraph 78 above)..."

(154) ...[T]he absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman resulted in a failure by the respondent State to comply with its positive obligation to secure to her a sufficient measure of protection enabling her to effectively enjoy her right to respect for her private and family life."

## **Article 14 – Freedom from Discrimination**

Article 14 guarantees freedom from discrimination with respect to the "rights and freedoms" guaranteed by the Convention. The right has no independent existence and in order for the discrimination to be actionable the applicant must allege that

it occurred within the context of a violation of another substantive right, such as the right to respect for family life or freedom from torture.

The potential categories of discrimination are open-ended. Article 14 prohibits discrimination “*on any ground*”. It gives the examples of “*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status*.” However, the Convention is a living instrument and the Court interprets the Convention in the context of the time when it makes a judgment. As such, the Court has held that the Convention now prohibits discrimination on the grounds of disability<sup>353</sup> or sexual orientation<sup>354</sup>, both of which had not been envisaged at the time when the Convention was originally drafted.

Like other articles, Article 14 protects the rights of individuals, not groups. Thus, Roma or Ashkaliya or women or other individuals can bring an action relating to the violation of their Convention rights only where they are individually affected, rather than on behalf of a group. Each applicant must be able to demonstrate that he or she is personally the victim of a violation.

**No substantive violation required.** If the claimed discrimination falls within the ambit of another Convention right, then the Court can consider Article 14 allegations. The Court does not need to find a separate violation of the substantive right in order for it to conclude that there has been a breach of Article 14. For example, in *Abdulaziz, Cabales, and Balkandali v. United Kingdom*<sup>355</sup> the female applicants complained that it was easier for a men settled in the United Kingdom than for woman so settled to obtain permission for their non-national spouse to enter, or remain, in the United Kingdom. They alleged violations of Article 8 and Article 14 in conjunction with Article 8. The Court found that Article 8 was applicable but that, taken alone, it had not been violated because the applicants had no right under the Convention to a choice of country of residence and could have made their homes in Turkey, Pakistan, or elsewhere. Nonetheless, the Court found that the claim fell within the ambit of Article 8 and that Article 14 taken together with Article 8 had been violated by reason of discrimination against the applicants on the grounds of sex because there had been discriminatory treatment of husbands and wives in similar situations.

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<sup>353</sup> See: *Glor v Switzerland*, App. No. 13444/04, Judgment date, 30 April 2014, paragraph 53.

<sup>354</sup> See: *Salguero da Silva Mouta v Portugal*, App. No.33290/96, Judgment date, 21 December 1999, (2001) 31 E.H.R.R. 47, paragraph 28.

<sup>355</sup> See: *Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. Nos. 9214/80; 9473/81; 9474/81, Judgment date 28 May 1985, (1985) 7 E.H.R.R. 471.

**Similar treatment in similar situations.** In essence, Article 14 guarantees that persons in similar situations should be treated in a similar manner with respect to Convention rights, unless there is objective and reasonable justification for the difference in treatment.

In *Hoffmann v. Austria*<sup>356</sup> a mother, who was a Jehovah's witness, was treated differently in a child custody matter because of her religion. It was found that there had been a violation of Article 8 in conjunction with Article 14. In the *Belgian linguistic case*, French-speaking children living in Flemish-speaking communes were treated differently than Flemish-speaking children living in French-speaking communes.<sup>357</sup> In *Abdulaziz* the Court rejected the United Kingdom's argument that its different treatment of husbands compared to wives with respect to immigration matters was justified by the State's high levels of unemployment.

More recently, in *Muñoz Díaz v. Spain*,<sup>358</sup> the Court held that there had been a violation of Article 14 taken together with Article 1 of Protocol 1 (the right to enjoyment of private possessions) in circumstances where the State had refused to recognise a Roma woman's marriage (which had been solemnised in accordance with Roma customs and cultural traditions) and as a consequence had refused to award her a survivor's pension to which she would otherwise have been entitled had she been married in accordance with Spanish law.

In *Sejdić and Finci v. Bosnia and Herzegovina*<sup>359</sup> the Grand Chamber found that both Article 14 and Article 3 of Protocol No 1 (right to free elections) had been violated in circumstances where constitutional provisions prevented anyone other than individuals from the three 'constituent peoples' (Bosniaks, Croats or Serbs) from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. In particular, the constitutional provisions discriminated against the Jewish and Roma applicants.

In *Paraskeva Todorova v. Bulgaria*,<sup>360</sup> the Court held that the sentence of three years imprisonment imposed upon a Roma woman breached Article 14 in conjunction with Article 6.. The domestic sentencing court had commented on the applicant's ethnic origin, among the personal details used to identify her, and then refused

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<sup>356</sup> See: *Hoffmann v. Austria*, App. No. 12875/87, Judgment date 23 June 1993, Series A, No. 255-C (1994) 17 E.H.R.R. 293.

<sup>357</sup> See: Case "relating to certain aspects of the laws on the use of languages in education in Belgium (Merits)" known as the *Belgian linguistic case No.2*, App. No. 1474/64, Judgment date 23 July 1968, Series A, No. 6 (1979-80) 1 E.H.R.R. 252

<sup>358</sup> See: *Muñoz Díaz v. Spain* App. No. 49151/07, Judgment date 8 March 2010, (2010) 50 E.H.R.R. 49.

<sup>359</sup> See: *Sejdić and Finci v. Bosnia and Herzegovina*, App Nos 27996/06 and 34836/06, Judgment date 22 December 2009.

<sup>360</sup> See: *Paraskeva Todorova v. Bulgaria*, App. No. 37193/07, Judgment date 25 March 2010.

to suspend the sentence on the grounds that there was “*an impression of impunity, especially among members of minority groups, who consider that a suspended sentence is not a sentence at all.*”<sup>361</sup> The Court found that the applicant had been treated differently and that the reasons given by the sentencing court contained no objective justification for the difference in treatment.

**Different treatment in different situations.** Article 14 also guarantees the right of persons in different situations to be treated differently. In *Thlimmenos v. Greece*<sup>362</sup> the Court held that a Jehovah’s witness who was sent to jail for four years for refusing to wear a military uniform must be treated differently than “ordinary” criminals with respect to laws preventing those with a criminal record from becoming public accountants. While there was a legitimate reason for keeping convicted criminals from becoming public accountants, the same rationale did not apply to conscientious objectors, and their different circumstances compelled different treatment.<sup>363</sup> This reasoning is important in Roma cases – the Court in *Chapman v. United Kingdom*<sup>364</sup> specifically recognised the different lifestyle of Romani Gypsies and the State’s positive obligation to facilitate that lifestyle, which could in some cases require different treatment for Roma because of their different situation.

**The State’s “margin of appreciation” in discrimination cases.** Freedom from discrimination under Article 14 is a qualitative rather than an absolute right, and the States can have a considerable margin of appreciation. The different treatment must have an objective and reasonable justification – there must be a legitimate aim and the measure must be proportionate and directed towards meeting that aim. Whether that margin of appreciation is wide or narrow depends upon:

- The nature of the right involved (States are given more leeway in social and economic fields whereas the margin with respect to fundamental rights is very narrow).
- The level of interference (is the underlying right completely eliminated?)  
In *Aziz v. Cyprus*,<sup>365</sup> the Court found a violation on behalf of a Turkish Cypriot living in the Greek part of Cyprus who could not register to vote because the Cypriot constitution required Turks to be on the Turkish voting rolls and Greeks to be on the Greek voting rolls, thus completely depriving him of his right to vote.

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<sup>361</sup> Ibid, paragraph 10.

<sup>362</sup> See: *Thlimmenos v. Greece*, App. No. 34369/97, Judgment date 6 April 2000, (2001) 31 E.H.R.R. 15.

<sup>363</sup> Ibid, paragraph 47.

<sup>364</sup> See: *Chapman v. United Kingdom*, App. No. 27238/94, Judgment date 18 January 2001, (2001) 33 E.H.R.R. 18.

<sup>365</sup> See: *Aziz v. Cyprus*, App. No. 69949/01, Judgment date 22 June 2004, (2005) 41 E.H.R.R. 11.

- The public interest involved in the category of discrimination (the strong public interest in combating gender and racial distinctions requires a higher level of justification for discrimination on those grounds).

**Segregation in schools.** In the seminal *Belgian linguistic case*, the Court found that Belgian legislation did not comply with Article 14 in conjunction with Article 2(1) of Protocol 1 because it prevented French-speaking children living in certain Flemish-speaking communes on the periphery of Brussels from having access to French language schools solely on the basis of where their parents were resident.<sup>366</sup>

There have been a number of judgments from the Court in relation to the discrimination that many Roma children face in accessing education in countries across Europe. In the landmark case of *D.H. v. The Czech Republic*<sup>367</sup> the Court held that the Roma applicants had been the victims of indirect discrimination. The Grand Chamber stated that there had been a violation of Article 14 read in conjunction with Article 2 of Protocol 1 (the right to education) in circumstances where the applicants had been indirectly discriminated against when selected for and assigned to special schools for children with learning difficulties.

Statistical evidence was provided to the Court which showed that in 1999, 50.3% of Roma children went to special schools in the town of Ostrava in comparison with the 1.8% of non-Roma children. It also showed that Roma children made up 56 per cent of all children who had been assigned places in a special school. This was a significantly high proportion given that Roma children only represented 2.26 per cent of pupils of primary school age in the town.<sup>368</sup>

The Grand Chamber concluded that: at the very least, selection tests for the schools were biased and did not take into account the particular characteristics of Roma children;<sup>369</sup> the parents were not in a position to give informed consent to the children being placed in these schools;<sup>370</sup> and that, in any case

*“no waiver of the right not to be subjected to racial discrimination can be accepted.”<sup>371</sup>*

In reaching its conclusion that there had been a violation of the Convention the Grand Chamber recognised that the choice of the best means to address learning

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<sup>366</sup> See: Case “relating to certain aspects of the laws on the use of languages in education in Belgium (Merits)” App. No. 1474/64, Judgment date 23 July 1968, Series A, No. 6 (1979-80) 1 E.H.R.R. 252.

<sup>367</sup> See: *D.H. and Others v. The Czech Republic*, App. No. 57325/00, Judgment date 13 November 2007, (2008) 47 E.H.R.R. 3.

<sup>368</sup> Ibid, paragraph 18.

<sup>369</sup> Ibid, paragraphs 200-201.

<sup>370</sup> Ibid, paragraph 202.

<sup>371</sup> Ibid, paragraph 204.

difficulties of children lacking proficiency of the language of instruction is not an easy one and that it entails a difficult balancing exercise between the competing interests. Nevertheless, the Grand Chamber commented upon the margin of appreciation in the following terms:

*"206. ... whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation ...".*

In *Sampanis and Others v. Greece*,<sup>372</sup> a number of Roma applicants complained of discrimination where a local school had firstly failed to enrol their children at all for a year, and then, once places were provided, taught Roma children in separate 'preparatory classes', without any objective or reasonable justification.

It was accepted by the State that the children had missed the school year 2004-2005 but it was suggested that there had been no breach of the Convention because the applicants had not formally applied for their children to be enrolled but had simply approached the school to enquire about enrolment. The Court rejected that argument. It found that the applicants had explicitly expressed their wish to enrol their children and concluded that the school should have facilitated the enrolment of the applicants' children, given the vulnerability of the Roma community and the requirement to pay particular attention to their needs.

The applicants' children were enrolled at the school the following academic year but at the beginning of that school year non-Roma parents protested about their admission and blockaded the school, demanding that the Roma children be transferred to another building. The applicants subsequently signed a statement drafted by teachers from the school to the effect that they wished their children to be transferred to another building and shortly thereafter their children began receiving "preparatory classes" in an annexe and the blockade was lifted.

The Court was able to infer from the facts of the case that the decision to place the Roma children in the annexe was influenced by the protests and the blockade mounted by the parents of non-Roma children and it considered that the evidence adduced by the applicants created a strong presumption of discrimination. In the circumstances the Court examined whether the State had shown that the difference in treatment was as a result of objective factors, unrelated to the ethnic origins of the persons concerned. The State argued that the applicants' children had been placed in "preparatory classes" so that they could attain the level of education that would enable them to be transferred to

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<sup>372</sup> See: *Sampanis and Others v. Greece*, App No 32526/05, Judgment date 5 June 2008.

“ordinary classes”. However, the Court noted that: the school had not adopted any clear criterion or suitable test of capabilities or learning difficulties that could be used to choose which children to place in “preparatory classes”; and that the State had not provided any examples of Roma children that had been transferred to “ordinary classes” (despite the fact that the applicants’ children had been attending lessons in the “preparatory classes” for 2 years), nor explained how the children were to be objectively assessed in order to determine their capability to join “ordinary classes”.

Though the Court recognised that the applicants had signed a statement indicating that they wished their children to be transferred to the annexe it reiterated the point that had been made in *D.H. v. The Czech Republic*, namely that waiver of the right not to be discriminated was unacceptable and would be incompatible with the Convention.

In conclusion the Court decided that the State had discriminated against the applicants’ children and that there had been a violation of Article 14 taken together with Article 2 of Protocol 1 of the Convention.

The question of discrimination of Roma children in Greek schools was revisited by the Court in late 2012 in the case of *Sampani v Greece*.<sup>373</sup> The applicants were either children aged between five and 15 or their parents or guardians. Some of the applicants in this case were the same as the applicants in the 2008 *Sampanis v Greece* case.

After the judgment in *Sampanis*, a new school, known as the 12<sup>th</sup> school, opened in Autumn 2008 in the district to replace the annexe where the Roma children had been taught their lessons. Before the school opened, the non-Roma parents reaffirmed their opposition to the integration of Roma children into ordinary classes. Additionally, during the summer of 2008, the new school’s premises were damaged and equipment stolen and the headteacher had to warn the Ministry of Education that the school was not fit to meet the basic needs of the children and posed a threat to the safety of the teachers and children. Both the Ombudsman and the Ministry of Education took steps to encourage the local Prefect and Mayor to take steps to integrate the Roma children into the school system. It was proposed that the new school be merged with another school but the Prefect refused. The Mayor complained in September 2008 that the Roma children had “dare[d] to demand to share the classrooms as the other students.”

In the event, the only pupils that attended the new school were children of Roma origin and the headteacher complained that the books provided to the school did not meet the needs of children for whom Greek was their second language.

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<sup>373</sup> *Sampani v Greece*, App No. 59608/09, Judgment date 11 December 2012

In 2009, the applicants wrote to the Ministry of Education requesting that the children be allowed into another school in the district and that a curriculum be devised to meet their needs. However, they received no reply.

The Court recognised that there were certain difficulties faced by national authorities in some European countries in trying to integrate Roma children into their education system, some of which came from the hostility of non-Roma parents. It also recognised that it is not always easy to choose the best way to resolve the difficulties of teaching children who do not have an adequate knowledge of the language in which they are taught. The Court reiterated that if the difference in treatment is based on race, colour or ethnic origin, the concept of objective and reasonable justification should be interpreted in as strict a way as possible. Notwithstanding the margin of appreciation afforded to States in the domain of education, the Court found that the measures taken to educate the Roma children were not accompanied by sufficient guarantees and safeguards to protect the needs of this disadvantaged group. The Court found that there had been a violation of Article 14 taken in conjunction with Article 2(1) of Protocol 1.

In terms of Article 46(2) (binding force and execution of judgment) the Court recommended that the Greek State enrol those students of school age in other schools and that those who were too old to remain in school should be given the opportunity to enrol on adult education courses.

In *Oršuš and Others v. Croatia*<sup>374</sup> the Grand Chamber indicated that the temporary placement of children from ethnic minorities in separate classes on the basis of linguistic difficulties did not necessarily entail a breach of Article 14 and there may be circumstances under which it would be permissible. For example, it would be compatible with the Convention where the purpose of segregation was to improve the separated children's command of the Croatian language to an adequate level after which they would be transferred to mixed classes. However, where such measures disproportionately or exclusively affected members of a specific ethnic group, such a system would have to be accompanied by adequate safeguards to protect those children.<sup>375</sup>

In *Oršuš* Roma children attending mainstream primary schools had been placed automatically in separate classes, supposedly on account of their lack of proficiency in the Croatian language. The Grand Chamber noted that the test designed to separate the children did not assess their command of the Croatian language. Furthermore, no programme had been established in order to address the special needs of Roma children lacking in language skills that included a timeframe for addressing those needs and transferring the children back into

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<sup>374</sup> See: *Oršuš and Others v. Croatia*, App. No. 15766/03, Judgment date 10 March 2010, (2011) 52 E.H.R.R. 7.

<sup>375</sup> Ibid, paragraph 147.

mainstream classes.

The Grand Chamber held that the State had exceeded the margin of appreciation. There had been:

*"...no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained."*<sup>376</sup>

It followed that placing the applicants' children in Roma-only classes had no objective and reasonable justification. Accordingly, there had been a violation of the applicants' rights protected by Article 14 taken together with Article 2 of Protocol No 1.<sup>377</sup>.

The State was also criticised for not taking positive measures to address issues such as poor school attendance and a primary school drop-out rate of 84% among Roma pupils.<sup>378</sup>

In *Horváth and Kiss v Hungary*<sup>379</sup> the applicants were two young men of Roma origin who had been assessed as having mild mental disabilities and placed in a school for the mentally disabled. The applicants argued that this was a misplacement and amounted to indirect discrimination. The Court agreed and found a violation of Article 14 taken in conjunction with Article 2(1) of Protocol 1. It took into account the applicants' special needs as members of a disadvantaged group. Many of those students who had been diagnosed with mild disabilities could have been placed in mainstream schools. Many had been misdiagnosed as a result of socio-economic disadvantage or cultural difference. There had been a long history of misplacement of Roma children in special schools in Hungary and the authorities had failed to take into account their special needs as a disadvantaged group. The Court held that:

*"...[I]n light of the recognised bias in past placement procedures...the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests."*<sup>380</sup>

Furthermore, the Court held that the State has a positive obligation to undo a history of racial segregation in special schools.<sup>381</sup>

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<sup>376</sup> Ibid, 184.

<sup>377</sup> It should be noted that the Grand Chamber also found that there had also been a violation of Article 6 of the Convention due to the length of proceedings before the domestic courts'.

<sup>378</sup> The statistic contained in the judgment were the rate for Medimurje County (paras 176-177).

<sup>379</sup> *Horváth and Kiss v Hungary*, App. No. 11146/11, Judgment date, 29 January 2013, (2013) 57 E.H.R.R. 31.

<sup>380</sup> Ibid, paragraph 116.

In *Lavida and Others v Greece*,<sup>382</sup> the Court held that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No.1 where the applicants' children were placed in a school that was attended solely by Roma children. The Court observed that the school had not been set up for this purpose and that the authorities had recognised the problem and the need to correct it. Even in the absence of any discriminatory intention on the State's part, a position which consisted in continuing to educate the Roma children in a State school attended exclusively by children belonging to the Roma community and deciding against effective anti-segregation measures could not be considered as objectively justified by a legitimate aim.

**Article 14 in the context of Article 8, Roma rights and implicit discrimination.** In the case of *Aksu v. Turkey*<sup>383</sup> the Grand Chamber held that there was no violation of Article 14 taken in conjunction with Article 8 in respect of the applicant's allegation that two State funded publications contained remarks and expressions that reflected anti-Roma sentiment. The first publication was an academic book in which the applicant claimed that certain passages portrayed Roma as criminals. The second publication was a dictionary intended for school pupils in which the applicant alleged certain entries were discriminatory and insulting.

The Turkish State contended that the book was merely an academic study and when the offending passages were read in the context of the book in its entirety, no discriminatory intent was evident. Further, they claimed that the dictionary entries were metaphorical and that they were clearly defined as such in the dictionary.

The Court noted that:

*"in the present case the applicant, who is of Roma origin, argued that a book and two dictionaries that had received government funding included remarks and expressions that reflected anti-Roma sentiment. He considered that these statements constituted an attack on his Roma identity. However, the Court observes that the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect. The case is therefore not comparable to other applications previously lodged by members of the Roma community (see, regarding education, *ibid.*, §§ 175-210; regarding housing, *Chapman v. the United Kingdom* [GC], no. 27238/95, §*

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<sup>381</sup> Ibid, paragraph 127.

<sup>382</sup> See: *Lavida and Others v Greece*, App. No. 7973/10, Judgment date 30 May 2013.

<sup>383</sup> See *Aksu v. Turkey*, App. Nos. 4149/04, 41029/04, Judgment date 15 March 2012, (2013) 56 E.H.R.R. 4.

73, ECHR 2001-; and, regarding elections, *Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, § 45, ECHR 2009*”.<sup>384</sup>

However, the important joint dissenting opinion of Judge Gyulumyan should be noted:

“(1) It seems to me that if the facts complained of are examined under Article 14 of the Convention the conclusion must be that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

(2) Contrary to what is stated in paragraph 45 of the judgment, I am not persuaded “that the case does not concern a difference in treatment, and in particular ethnic discrimination”. The majority reached this conclusion only on the basis that “the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect”. In that respect I agree with the partly dissenting opinion of Judge Giovanni Bonello in *Anguelova v. Bulgaria* (no. 38361/97, ECHR 2002-IV), in which he stated:

“Alternatively [the Court] should, in my view, hold that when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic, the burden to prove that the event was not ethnically induced shifts to the Government.”

The Court did not take into consideration the environment in which the three publications were issued and was satisfied by the assessments made by the Turkish courts. These courts usually take a very different approach when dealing with cases concerning the denigration of Turkishness (Article 301 of the Turkish Criminal Code).”

With regard to the contents of the book and the dictionary, Judge Gyulumyan commented that:

“(5) These and several other expressions in the three books clearly disclose violations of Roma dignity, intolerance and a lack of respect for a culture that is different from the majority of society. Furthermore, the statements perpetuate stereotypes of and prejudices against the Roma and incite discrimination against a minority which is undoubtedly among the most vulnerable in Europe today, if not the most vulnerable. It has to be noted that the books were published with support from the Turkish authorities.”

...

Judge Gyulumyan concluded that:

“(10)...The continued stereotyping of the Roma must come to an end. It would be highly unfortunate for this Court to be seen to condone incitement to discrimination of the kind contained in the books in question.”

**Not necessary to examine Article 14 separately.** The Court will not always go on to consider whether there has been a violation of Article 14 where it has found that another substantive right has been violated. By way of example, the Court decided in *V.C. v Slovakia* and *N.B. v Slovakia* that it was unnecessary to consider

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<sup>384</sup> Ibid, paragraph 45.

whether the facts of the case also gave rise to a breach under Article 14. It found that the State had failed to comply with its positive obligations under Article 8 of the Convention to secure to the applicants a sufficient measure of protection enabling them, as a member of the vulnerable Roma community, to effectively enjoy their rights. Therefore there was no need to consider separately Article 14.

**The standard and burden of proof in discrimination cases.** In Article 14 cases the Court will apply the *beyond reasonable doubt* standard of proof. The burden of proof rests with the applicant. This has at time led to some unsatisfactory outcomes.

In *Anguelova v. Bulgaria*<sup>385</sup> the applicant's son, a Romani man, died while in police custody. The Court found the applicant's claim that he was tortured because of his ethnicity raised a "serious argument" and noted that the State had not provided any other plausible explanation. Nonetheless, the Court could not conclude *beyond reasonable doubt* that the death and lack of a meaningful investigation into it were motivated by racial prejudice. That conclusion led Judge Bonello in a strong dissenting opinion to note that:

*"Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it."*<sup>386</sup>

The Court's traditional approach was challenged in *Nachova v. Bulgaria*,<sup>387</sup> where the applicants and interveners argued that the *beyond reasonable doubt* standard of proof was simply too difficult to meet and pointed to a growing trend by other courts, such as the Court of Justice of the European Union, to shift the burden of proof in discrimination cases once a *prima facie* case of discrimination had been made out.

In *Nachova* the Grand Chamber noted that the *beyond reasonable doubt* standard had been adopted by the Court, but indicated that it had never been the purpose of the Court to borrow the approach of national legal systems that apply that standard and that it had no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court stated that it could base its conclusions on inferences that flow from the facts, and reiterated the point made in earlier cases that:

*"proof may follow from the coexistence of sufficiently strong, clear and concordant*

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<sup>385</sup> See: *Anguelova v. Bulgaria*, App. No. 38361/97, Judgment date 13 June 2002, (2004) 38 E.H.R.R. 31.

<sup>386</sup> Ibid, dissenting opinion, paragraph 3.

<sup>387</sup> See: *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 & 43579/98, Judgment date 6 July 2005, (2006) 42 E.H.R.R. 43.

*inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the convention right at stake.”<sup>388</sup>*

In the case of *Mižigárová v. Slokavia*,<sup>389</sup> the applicant sought to rely on a number of reports compiled by both UN bodies and international NGOs as evidence of widespread police brutality against persons of Roma origin.<sup>390</sup> The Court found that the reports provided an insufficient evidential basis upon which a determination could be made as to whether the treatment inflicted on the applicants had been motivated by racism.<sup>391</sup>

However, Judge David Thor Bjorgvinsson delivered a partly dissenting judgment, in which he stated that there was:

*“... enough objective evidence to suggest the existence of a hostile racist motive. Furthermore, the persistent criticism from international bodies manifested in these reports should have alerted the authorities to the possible existence of such a motive. Thus, the authorities were, in my view, under the obligation to conduct an investigation as to whether racist motives played a part in Mr. L'ubomir Sarissky's death. Since no such investigation was carried out I conclude that there has been a violation of the procedural head of Article 14 in conjunction with Article 2 of the Convention.”<sup>392</sup>*

In Article 14 cases it is clear that once an applicant has proved that there has been a difference in treatment then the burden of proof shifts on to the respondent State to show that it was justified.

That point was recently made by the Grand Chamber in *DH v. The Czech Republic*:<sup>393</sup>

*“Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory.”<sup>394</sup>*

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<sup>388</sup> See: *Salman v. Turkey*, App. No. 21986/93, Judgment date 27 June 2000, (2002) 34 E.H.R.R. 17; and *Nachova v. Bulgaria*, App. Nos. 43577/98 - 43579/98, Judgment date 6 July 2005, paragraph 147.

<sup>389</sup> See: *Mižigárová v. Slovakia*, App. No. 74832/01, 14 December 2010.

<sup>390</sup> Ibid, paragraphs 57-63. See also the cases of *Dimitrova and Others v. Bulgaria*, App. No. 44862/04, Judgment date 27 January 2011; *Seidova v. Bulgaria*, App. No. 310/04, Judgment date 18 November 2010 for recent examples of the application of Article 14 in relation to Article 2. For a further example of dissenting judgments relating to the application of Article 14 in Roma cases see *Soare and Others v. Romania*, App. No. 24329/02, Judgment date 22 February 2011.

<sup>391</sup> *Mižigárová v. Slovakia*, App. No. 74832/01, 14 December 2010, paragraph 117.

<sup>392</sup> Ibid, partly dissenting opinion.

<sup>393</sup> See: *DH v The Czech Republic*, App. No. 57325/00, Judgment date 13 November 2007.

<sup>394</sup> Ibid, paragraph 189.

In order to create this rebuttable presumption, the Grand Chamber indicated that:

*“...statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.”<sup>395</sup>*

**The procedural obligation to investigate possible racist motives.** In *Nachova* the Grand Chamber endorsed the original Chamber’s analysis of the Contracting States’ procedural obligation to investigate possible racist motives for acts of violence:

*“... States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life.*

*... That obligation must be discharged without discrimination, as required by Article 14 of the Convention ... [W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the State’s positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim’s racial or ethnic origin ...*

*... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, *Thlimmenos v Greece* ...). In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killings.*

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<sup>395</sup> Ibid. paragraph 188.

*Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute ... The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of ... racially induced violence.*"<sup>396</sup>

The Grand Chamber added that:

*... the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure enjoyment of the right to life without discrimination."*<sup>397</sup>

Adopting those principles the Grand Chamber found that the State had failed in its duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a part in the events that led to the killing of two Romani men who had been shot dead by a military police officer.<sup>398</sup>

In the case of *Fedorchenko and Lozenko v. Ukraine*<sup>399</sup> the applicants' house was set on fire by attackers, killing two family members. The Court took note of the fact that on the same evening two other houses, in which people of Romani origin lived, were also set on fire, purportedly on the basis that the occupants were involved with drug dealing/trafficking. The Court found that given the widespread discrimination and violence against Roma in Ukraine, it could not be excluded that the arson attacks had been fuelled by ethnic hatred. In the circumstances, it was unacceptable that the investigators had not taken any serious action to try to identify or prosecute the perpetrators. Accordingly, the Court held that there had been a violation of Article 14 in conjunction with the procedural aspect of Article 2.<sup>400</sup>

#### **Article 4 of Protocol 4 – Prohibition on Collective Expulsion of Aliens**

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<sup>396</sup> *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 & 43579/98, Judgment date 6 July 2005, (2006) 42 E.H.R.R. 43, paragraph 161.

<sup>397</sup> *Ibid*, paragraph 162.

<sup>398</sup> In *Stoica v. Romania*, App. No. 42722/02, Judgment date 4 March 2008, (2011) 52 E.H.R.R. 29, the Court not only found the State to have committed a substantive and procedural breach of Article 3 but also, having adopted the principles spelt out by the Grand Chamber in *Nachova*, a violation of Article 14. See also: *Mižigárová v. Slovakia*, App. No. 74832/01, 14 December 2010, paragraphs 119-120.

<sup>399</sup> See: *Fedorchenko and Lozenko v. Ukraine*, App. No. 387/03, Judgment date 20 September 2012.

<sup>400</sup> See: paragraphs 68-71.

Article 4 of Protocol 4 prohibits mass expulsions of aliens. In the decision in *Andrić v. Sweden*<sup>401</sup> the Court held that there is no collective expulsion when an alien's immigration status is individually and objectively examined in a way that permits him or her to put forward a case against expulsion. Thus, collective expulsion

*"is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group."*<sup>402</sup>

In *Čonka v. Belgium*, the applicants were a part of a group of Slovak Roma who were seeking asylum in Belgium. They reported to the police station on 1 October 1999, in response to a notice stating that their attendance was required in order to complete their asylum applications. Instead, upon arrival at the police station, they were given an order to leave the country and were held in a detention centre until they were deported en masse from Brussels four days later. The Court rejected the State's claim that the applicants' asylum claims had been denied based upon an examination of their personal circumstances (which is required by the Refugee Convention). Given the large number of persons in the group, all of whom were expelled, the Court considered:

*"... that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective . . . [Therefore] . . . there has been a violation of Article 4 of Protocol No. 4."*<sup>403</sup>

It is implicit in the language used by the Court that where an applicant or group of applicants can demonstrate that they have an arguable claim that a collective expulsion has occurred, the State then bears the burden of demonstrating that the expulsion was not collective. The Court found that the State was unable to *"eliminate all doubt that the expulsions might have been collective"* and therefore the State was found to have violated the Convention.

### **Protocol 12 – General Prohibition of Discrimination**

Protocol 12 to the Convention entered into force in 2005. Article 1 extends the protection contained in Article 14 so that *"The enjoyment of any right set forth by law shall be secured without discrimination on any ground"*. Protocol 12 creates a freestanding right; unlike Article 14 it is not dependent upon establishing an interference with another Convention right. While the underlying goal of

<sup>401</sup> See: *Andrić v. Sweden* App. No. 45917/99, [Section 1], Admissibility decision 23 February 1999, (1999) 28 E.H.R.R. CD 218.

<sup>402</sup> See: *Čonka v. Belgium*, App. No. 51564/99, Judgment date 5 February 2002, (2002) 34 E.H.R.R. 54, paragraph 59.

<sup>403</sup> Ibid. paragraph 61.

Protocol 12 – a general ban on discrimination – is potentially radical, it is difficult to predict in advance how effective a tool it will become. Only 18 States have thus far ratified the Protocol. Many of the larger Member States and the countries with the largest Roma populations have not yet ratified it and Article 14 remains the only viable tool for many of Europe's Roma to challenge discrimination under the Convention.

The Court has only considered Protocol No. 12 once in relation to discrimination against Roma; in the case of *Sejdić and Finci v Bosnia and Herzegovina*.<sup>404</sup> The Grand Chamber found that both Article 14 and Article 1 of Protocol No.12 had been violated in circumstances where the Bosnian Constitution prevented anyone other than individuals from the three 'constituent peoples' (Bosniaks, Croats or Serbs) from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. It found that the constitutional provisions discriminated against the Roma and Jewish applicants and amounted to a violation of Article 1 of Protocol No. 12.

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<sup>404</sup> See: *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos 27996/06 and 34836/06, Judgment date 22 December 2009, for a finding by the Grand Chamber that both Article 14 and Article 1 of Protocol 12 of the Convention had been breached in circumstances where constitutional provisions prevented a Roma and a Jew from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

## Section IV – Practical Exercises

*Gloria Jean Garland and Luke Clements*

### **Introduction:**

A training workshop is most effective when it incorporates an element of hands-on application of the topics covered. For lawyers interested in litigating human rights cases, one such exercise is to put together a set of hypothetical facts, generally based on a combination of actual events, and have the participants argue both sides of the case before a panel of judges (which can be composed of both actual judges and/or experienced human rights lawyers). The hypothetical case should involve different articles of the European Convention and, ideally, some procedural issues as well.

This process is known as a “moot court exercise,” and the same approach is used in many law schools and in international competitions. Some participants in previous training workshops have reported that the moot court exercise was the most valuable part of the training. Below is an example of the kind of hypothetical case based on actual events that can be used in a moot court exercise – it has been called “*Five Roma Families v. Plodalot*”.

There are as many different approaches to a moot court training exercise as there are trainers. What follows is one suggested approach that has proven effective in previous training sessions.

The participants are divided into two teams, selected randomly. One team will represent the government and the other will represent the applicants. The teams can be chosen either by the trainers or the participants themselves.

The participants will read through the hypothetical case carefully, underlining relevant dates and making notes of significant events. Then, as a group, the participants will review the facts and be given a chance to ask any questions about them. As a group, the participants, with direction from the trainers, will also identify the issues presented by the hypothetical case.

The participants then split up into the two teams and discuss with their trainers in more detail the arguments they would like to raise on behalf of their respective clients (i.e. the State or the applicants). The issues to be argued should then be divided up among the team members (either by them volunteering to take a particular issue or, if that doesn't work, by them being assigned to cover an issue). Participants are strongly encouraged to try to present a portion of their team's arguments, but anyone who is truly uncomfortable speaking in public can elect instead to assist a team mate in the preparation of his or her argument. Depending on the number of issues and the number of participants, a

decision can then be made how best to split up the arguments between participants and whether the arguments on each issue can be advanced by individuals or by groups of two or three participants. One team member should be selected to present an introduction to the case, summarising the important facts, and another member should be selected to conclude the arguments, briefly highlighting the most important points. There will be time for rebuttal of the other team's arguments in the moot court exercise – the rebuttal may be left to the individuals responsible for the particular issues covered by the rebuttals, or the team may prefer to have one person respond to all rebuttal arguments. The judges may also have questions for the teams and so the members of the team should be prepared to answer them.

Once the arguments are presented, the judges will retire and then return with their verdict. The verdict is often a mixed result – the applicants will win on some issues and the government will win on others. The point of the exercise is to have the experience of formulating creative arguments – every participant is a winner, despite the judges' decision.

### **Feedback / Frequently Asked Questions**

#### *Why not use an actual case instead of a hypothetical one?*

There is no problem with using an actual case, except it's better to avoid using a case that has already been decided. The hypothetical cases are usually based on actual facts, but those facts may have arisen in more than one case. The cases are designed to present a variety of issues in order to give participants a chance to review what they have learned in several different areas.

#### *How similar is a moot court exercise to an actual hearing?*

The trainers should try to follow, as far as possible, the actual procedure a lawyer would face in presenting his or her case to the European Court of Human Rights, including the order of presentation and suggested time limits. However, account should also be taken of the fact that many of the participants in a training workshop will not have the same level of experience as those lawyers that have appeared before the Court.

#### *The time limits to prepare the arguments are way too short! Why aren't the hypothetical cases sent out in advance?*

Where possible, the trainers do try to send the hypothetical case to participants in advance. However, experience shows that when this has been done in the past, many of the participants did not prepare in advance.

*Why do the countries have such silly names? Why not use a real country?*

The participants come from many different countries. The idea is to focus on the Convention itself, and at a broad level, without being distracted by the actual legal situations of particular countries. In addition, using a hypothetical country avoids the prospect that participants from a particular country will think their home country is being identified as a human rights abuser.

***Five Roma Families v. Plodalot***

Plodalot became a Member of the Council of Europe on 1 January 2002. Roma make up 8% of its population.

Five Roma families in the city of Plod complain to the European Court of Human Rights. The facts underlying their complaint are as follows:

1. Almost all of Plod's Roma community (including the five Roma families) live in municipal housing in one area known as Hell. The housing here is very much worse than any other municipal housing. The buildings are very damp, the water has a chemical taste and the sewerage system does not work.
2. The health of Roma children in the area is poor and many have serious unexplained illnesses. 10 years ago an international report found that Roma children living in the Hell district had a markedly higher risk of a number of diseases than children from the general population. For example, the risk of certain forms of leukaemia was 10 times higher and the infant mortality rate was 12 times higher. The report called upon the government of Plodalot to relocate the community, since it alleged that Hell had been constructed on a former secret government chemical dump.
3. As a result of the report the government of Plodalot commissioned its own report from Plodabit University. This report was completed in June 2000. The Roma complainants believe that this report also found that the prevalence of certain childhood diseases amongst Hell's inhabitants was statistically significant. The Plodalot government has, however, refused to disclose the report.
4. Although the Roma community has frequently complained to the municipality about poor housing, Roma are still being placed in Hell, whereas non-Roma are offered housing elsewhere in better areas.

5. Not only are the houses poor, but the only school in the area (which is attended by virtually all the Roma) is also considered unsuitable by the five Roma families. They allege that the school is designated for children with a mental handicap and that its educational standards are much worse than those of other schools in the city. Only 5% of the school's population is non-Roma.
6. The five Roma families commenced proceedings in the Plod Municipal Court. There is no legal aid in Plodalot for civil claims and the families were unable to pay for a lawyer. However, they did obtain some help from a community worker, and they made a complaint to the Court concerning the refusal of the government to disclose the Plodabit University report.
7. Plodalot Court Rules only allow reports prepared by approved experts to be used as evidence in proceedings. The Plodabit University report was prepared by an approved expert but the international report was not. The families sought disclosure of the Plodabit University report because they could not afford to pay one of the court approved experts to prepare another report: it is estimated that the cost of this would be in the region of 100,000 plodlets (a sum equivalent to about 1,500 Euros: the average Plodalot annual wage).
8. The domestic proceedings were commenced on 1 March 2001 and were eventually dismissed by the Plod Regional Court on 10 September 2005.
9. Although it was possible to appeal to the Plodalot Supreme Court, the families were advised by the community worker that such an appeal would stand no chance of success. In addition it should be noted that no one has ever taken a case to the Plodalot Supreme Court without being represented by a lawyer and in any event the families were unable to afford the court fee for lodging an appeal - which was 50,000 plodlets per applicant.
10. There is a procedure by which applicants can apply to have the Court fee reduced, but this process generally takes a long time (on average 18 months) and an applicant cannot appeal before this process has been completed (unless they pay the full fee).
11. The only other domestic remedy pursued by the five Roma families was an administrative appeal to the Plod Education Department concerning the children's schooling. They requested that their children be transferred to a non-Roma school outside the district. This appeal was rejected on 1

October 2005 because the children's school reports indicated that the children lacked the necessary intellectual ability to cope in any school apart from one for children with a mental handicap.

12. There is no further right of appeal against such an administrative decision, although there is the theoretical possibility of taking a case to the Constitutional Court.
13. The five Roma families decided to complain directly to the European Court of Human Rights concerning these various matters and lodged their complaint in Strasbourg on 1 February 2006.

**Possible outline answer:**

The issues and complaints raised in this case include -

1. General admissibility issues raised by the State;
2. A complaint alleging a substantive violation of Article 2 concerning the failure to protect the right to life of the residents of Hell – particularly the children;
3. A complaint alleging a substantive violation of Article 3 concerning the alleged degrading treatment endured by the children of Hell;
4. A complaint alleging a substantive violation of Article 3 concerning the alleged degrading treatment endured by the parents of Hell arising out the mental anguish they have endured fearing that their children may contract leukaemia;
5. A complaint alleging a violation of the State's positive obligation under Article 3, to investigate the harm caused to the families by the former chemical dump (alone and in combination with Article 14);
6. A violation of Article 6 in relation to:
  - the lack of access to the University report and the procedural rule prohibiting reliance upon the international report)
  - the absence of legal aid to pay for a lawyer for the appeal; and
  - the very high court fees
  - the delay;
7. The appalling environmental conditions (and the lack of environmental information) endured in Hell amounted to a breach of the applicants' right to respect for their private and family life under Article 8;
8. The five families only experienced these appalling environmental conditions because they were Roma and therefore this constitutes a breach of Article 8 in combination with Article 14;
9. The poor housing constituting degrading treatment on the basis of an *East African Asians*<sup>405</sup> argument;
10. The applicants were without an effective domestic remedy contrary to Article 13;
11. The failure to provide education of an adequate standard constituted a violation of Article 2 of Protocol 1 alone and in combination with Article 14.

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<sup>405</sup> See: *Patel v. United Kingdom* (the *East African Asians* case), Judgment date 14 December 1973, (1981) 3 E.H.R.R.76.

## 1. General admissibility issues.

### *The six-month rule*

Although the government raised no objection concerning the six-month period, the European Court of Human Rights will nevertheless have to satisfy itself under this ground. All the complaints do however appear to have been made within the six-month time limit.

### *Ratione temporis*

The Court can only examine complaints which allege that the state has violated its obligations under the Convention. States can only be held responsible for violations which occur after they have accepted those obligations; that is, after their ratification of the Convention. However, the Court will take account of the situation at the date of ratification. Thus in *Loukanov v. Bulgaria*<sup>406</sup> the Court considered the fact that the grounds for the applicant's detention remained the same before and after the effective date of the Court's competence. The decision to refuse to release the applicant from detention was made after ratification and therefore the decision of the supreme court, which had been made prior to ratification, could be examined.

In the present case, the violation appears to be a continuing one and the Court is likely therefore to reject the State's arguments on this ground.

### *Exhaustion of domestic remedies*

A number of issues concerning this question were raised by the government, and most of these would be considered by the Court when assessing the merits, because they are inextricably linked. However the Court would consider as a preliminary question the government's contention that the applicants took the wrong proceedings, or at least failed to take available action - for instance:

- with regard to the alleged poor state of the housing - by making an ordinary rent/housing contract dispute claim;
- with regard to the alleged environmental harm - by making a claim under the environmental protection legislation;
- with regard to the alleged discrimination - by using the constitutional safeguards in this respect.

The Court will reiterate that where there is a choice of remedies open to the applicant, it expects the most obvious and sensible to be pursued. It accepts that the rule of exhaustion of domestic remedies can only be applied to reflect the practical realities of the individual's position. Where an applicant has exhausted

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<sup>406</sup> App. No. 21915/93, Judgment date 20 March 1997, (1997) 24 E.H.R.R.121.

a remedy which is apparently effective and sufficient then he or she will not be required to exhaust others which are available, but probably ineffective. On the other hand, the applicant cannot ignore a remedy that is generally held to be available and effective. In the present circumstances the Court will probably reject this aspect of the State's argument.

## **2. The alleged substantive violation of Article 2 concerning the failure to protect the right to life of the residents of Hell – particularly the children.**

The Court will accept that it may in theory be possible for a person's rights under Article 2 to be violated – even where no death has occurred - but these cases will be rare and will require compelling evidence of a very real and immediate risk to the applicant (see for instance *Osman v. United Kingdom*,<sup>407</sup> *Yasa v. Turkey*<sup>408</sup> and *Makaratzis v. Greece*<sup>409</sup>). In *Osman v. United Kingdom*<sup>410</sup> the Court stated that Article 2(1) requires States to:

*"not only refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".*

Significantly, the Commission's decision in *Osman v. United Kingdom* includes the following passage:

*"91. While effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred provide an indispensable safeguard and the protective effect of deterrence, the Commission is of the opinion that for Article 2 to be given practical force it must be interpreted also as requiring preventive steps to be taken to protect life from known and avoidable dangers. However, the extent of this obligation will vary inevitably having regard to the source and degree of danger and the means available to combat it. Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, inter alia, to the use of State resources, which it will be for Contracting States to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention. Thus, where an applicant alleged a risk to her life from the threat of terrorist attack in Northern Ireland, her husband and brother having been killed, the Commission considered that it was not its task to consider in detail the appropriateness or efficiency of the measures taken to counter terrorism and that the*

<sup>407</sup> See: *Osman v. United Kingdom*, App. No. 23452/94, Judgment date 28 October 1998, (2000) 29 E.H.R.R. 245, (2000) 29 E.H.R.R. 245.

<sup>408</sup> See: *Yasa v. Turkey*, App. No. 22495/93, Judgment date 2 September 1998, (1999) 28 E.H.R.R. 408.

<sup>409</sup> App. No. 50385/99, Judgment date 20 December 2004.

<sup>410</sup> *Osman v. United Kingdom*, App. No. 23452/94, 28 October 1998, (2000) 29 E.H.R.R. 245, page 305.

*United Kingdom could not be required by the Convention to take measures going beyond those already being taken to protect the lives of the inhabitants in Northern Ireland. It referred to the fact that the army strength had been increased to 10,500 and that several hundred members of the security forces had lost their lives in combating terrorism.*

*92. The extent of the obligation to take preventive steps may however increase in relation to the immediacy of the risk to life. Where there is a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of the right to protection of life by law. In order to establish such a failure, it will not be sufficient to point to mistakes, oversights or that more effective steps might have been taken."*

In the present case, however there is no compelling evidence of immediate risk of harm and so the Court will find no violation of Article 2.

### **3. The alleged substantive violation of Article 3 concerning the alleged degrading treatment endured by the children of Hell.**

The applicants allege that their children's elevated risk of leukaemia amounts to degrading treatment contrary to Article 3 of the Convention. They do not allege that the State deliberately inflicted this treatment on their children – but that the State is indirectly responsible for the harm to which they are exposed.

The Court will examine all the material placed before it and remind itself that the standard of proof to be applied in Article 3 cases is 'beyond reasonable doubt'<sup>411</sup>. The only evidence before the Court consists of the international report which is now of some considerable age. Nevertheless the Court will note that in considering whether this evidential burden has been discharged, it has frequently resorted to the use of presumptions, inferences, and shifts in the burden of proof in its efforts to secure adequate protection against human rights violations (see, for instance, *Ribitsch v. Austria*<sup>412</sup> and *Salabiaku v. France*<sup>413</sup>).

The Court may express its concern that the State has not furnished it with a copy of the Plodabit University report and conclude that the evidential burden has been discharged. However, in this case none of the children have actually contracted leukaemia and accordingly they are unable to claim victim status for

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<sup>411</sup> See: *Ireland v. UK*, App. No. 5310/71, Judgment date 18 January 1978, Series A, No. 25, (1979-80) 2 E.H.R.R. 25

<sup>412</sup> See: *Ribitsch v Austria*, App. No. 18896/91, Judgment date 4 December 1995, Series A, No. 336, (1996) 21 E.H.R.R. 573; see also *Tomasi v. France*, App. No. 12850/87, Judgment date 27 August 1992, Series A, No. 241-A, (1993) 15 E.H.R.R. 1

<sup>413</sup> See: *Salabiaku v. France*, App. No. 10589/83, Judgment date 7 October 1998, Series A, No. 141-A, (1988) 13 E.H.R.R. 379.

the purposes of Article 3. As a consequence the Court will find no violation in this respect.

**4. The alleged substantive violation of Article 3 concerning the mental anguish and distress that the parents have endured fearing that their children may contract leukaemia.**

The Court will note that in principle the anguish experienced by a grieving parent may be sufficient to amount to a violation of Article 3.<sup>414</sup> However, the Court will reiterate that the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3<sup>415</sup> and it is for the applicants to produce evidence to establish that this threshold has been crossed. Although it is self evident that parents will suffer severe anguish fearing that their children may become ill, this in itself is unlikely to be sufficient to discharge the evidential burden. In the absence of medical reports as evidence and a causal link establishing (beyond reasonable doubt) the State's responsibility for the environmental problems, the Court is likely to consider this part of the claim too speculative and find no violation.

**5. The alleged violation of Article 3 concerning the state's positive obligation to investigate the harm caused to the families by the former chemical dump (alone and in combination with Article 14).**

The Court will refer to its increasingly sophisticated jurisprudence concerning the positive obligations on States to investigate - once provided with credible evidence - whether someone has been seriously ill-treated by its agents. Thus, for instance in *Assenov v. Bulgaria*<sup>416</sup> it stated:

*"102. The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible."*

Additionally in *Edwards v. United Kingdom*<sup>417</sup> the Court stated:

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<sup>414</sup> See, for example, *Kurt v. Turkey*, App. No. 24276/94, Judgment date 25 May 1998, (1999) 27 E.H.R.R. 373.

<sup>415</sup> See: *Ireland v. UK*, App. No. 5310/71, Judgment date 18 January 1978, Series A, No. 25, (1979-80) 2 E.H.R.R. 25.

<sup>416</sup> See: *Assenov v. Bulgaria*, App. No. 24760/94, Judgment date 28 October 1998, (1999) 28 E.H.R.R. 652.

<sup>417</sup> See: *Edwards v. United Kingdom*, App. No. 46477/99, Judgment date 14 March 2002 (2002) 35 E.H.R.R. 19.

"69. ...whatever mode [of investigation] is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."

However, all cases so far decided have concerned situations where there has been a death or significant physical injuries and credible evidence that the State is responsible. In the present case, although there is credible evidence of State responsibility for the environmental harm, none of the members of the five Roma families have suffered death or injuries sufficient for the Article 3 threshold to be crossed.

Nevertheless, there is an added dimension to this complaint, namely that there appears to be a credible argument that the Roma have been singled out on racial grounds. In *Nachova v. Bulgaria*<sup>418</sup> the Court's Grand Chamber held that Article 14 contained a procedural obligation of a similar nature to that identified in respect of Articles 2 and 3. In the Grand Chamber's view, where there is cogent evidence that an arguable violation of a Convention right had taken place because of a person's race, then there is a duty on the State to undertake an exhaustive investigation to decide whether this is the case. The judgment has since been applied in similar cases.<sup>419</sup> Given the combination of factors it is possible (but probably unlikely) that the Court would find the State had failed to comply with its procedural obligations under Articles 3 and 14 in this respect.

## **6. The alleged violation of Article 6(1) concerning the delay, lack of legal aid and the court fees.**

The applicants argue that they did not have a fair hearing because of the absence of legal aid, the high fees that had to be paid for an appeal to be lodged and the fact that the proceedings took an unreasonably long time.

On the contrary, the State argues that the applicants were able to represent themselves, were able to apply to have the court fees reduced and that the delay was not excessive. It also alleges that the applicants' failure to pursue an appeal to the Plodalot Supreme Court renders their complaint inadmissible due to their failure to exhaust all domestic remedies. The Court will consider this question at the same time as it considers the merits of the Article 6 argument.

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<sup>418</sup> App. Nos. 43577/98 & 43579/98, Judgment date 6 July 2005, (2006) 42 E.H.R.R. 43.

<sup>419</sup> See, e.g. *Bekos and Koutropoulos v. Greece*, App No. 15250/02, Judgment date 13 December 2005 (2006) 43 E.H.R.R. 2.

### ***Legal aid***

The first argument concerns the absence of legal aid. In this respect the case is very similar to *Airey v. Ireland*.<sup>420</sup> In Airey the Court accepted that in complex proceedings concerning vital rights under Article 8 legal aid might be required in civil proceedings. It held that:

*"24. ...For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position ... can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer ....*

*The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access and, hence, that it also does not constitute a domestic remedy*

...

*It would be erroneous to generalise the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6(1); there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.*

*In addition, whilst Article 6(1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme ... constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1).*

*The conclusion ... does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".*

*To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes ... However ... Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.*

...

*27. The applicant was unable to find a solicitor willing to act on her behalf in judicial separation proceedings. The Commission inferred that the reason why the solicitors she*

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<sup>420</sup> App. No. 6289/73, Judgment date 9 October 1979, Series A, No 32, (1979-80) 2 E.H.R.R. 305.

*consulted were not prepared to act was that she would have been unable to meet the costs involved. The Government question this opinion but the Court finds it plausible and has been presented with no evidence which could invalidate it.*

*28. Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There has accordingly been a breach of Article 6(1)."*

The Airey case was unusual but it is possible that since the facts are so similar, the Court may find that in the present case the inability to obtain legal aid rendered the civil proceedings unfair and the remedy inaccessible.

#### ***Court fees***

The second point raised by the applicants is that the proceedings were unfair because they could not afford to pay the appeal fee. The State countered this point by relying upon the fact that there was a procedure by which one could apply to reduce the fees. The Court will be concerned about the delay and also the high fees and will remind itself of the decision in *Kreuz v. Poland* (2001)<sup>421</sup> where, after weighing up all the arguments, it concluded:

*"66. Assessing the facts of the case as a whole and having regard to the prominent place held by the right to a court in a democratic society, the Court considers that the judicial authorities have failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts.*

*The fee required from the applicant for proceeding with his action was excessive. It resulted in his desisting from his claim and in his case never being heard by a court. That, in the Court's opinion, impaired the very essence of his right of access.*

*67. For the above reasons, the Court concludes that the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court. It accordingly finds that there has been a breach of Article 6(1) of the Convention."*

The Court will note that present case is different from the Kreuz case in that there is a process for having the fees reduced. Nevertheless, that procedure takes 18 months and the Court may conclude that the applicants should not have been expected to wait that length of time for such an application to be determined.

#### ***Delay***

The applicants complain that the proceedings concerning the disclosure of the expert's report took an unreasonably long time. The proceedings were commenced on 1 March 2001 and were dismissed by the Plod Regional Court on 10 September 2005, some 4½ years later. The State draws the Court's attention to

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<sup>421</sup> App. No. 28249/95, Judgment date 19 June 2001.

the fact that the time relevant to the application is that which followed Plodalot's ratification of the Convention on 1 January 2002, i.e. in this case a period of 3½ years. However, the Court will take account of the situation at the date of ratification – see *Loukanov v. Bulgaria*.<sup>422</sup>

The Court will state that in determining whether proceedings take an unreasonably long period of time, regard must be had to the nature of the proceedings and their importance to the applicants. In this case the question concerned whether or not evidence should be disclosed – a relatively simple issue of law. Given the strict rules of evidence in Plodalot, the disclosure of the Plodabit University report was a matter of fundamental importance to the applicants and the issue at stake was the severe risk of fatal illness to their children.

Given these many arguments concerning the unsatisfactory nature of the domestic court proceedings, the Court is likely to find a violation of Article 6(1).

## **7. The alleged violation of the State's positive obligations under Article 8 to take action to ameliorate the environmental conditions endured in Hell and to provide information about the risk of harm.**

In relation to the dangerous environment, the Court will repeat its point that there has been no medical evidence provided that in any way suggests that the applicants themselves have been exposed to severe harm and on this basis may be inclined to reject this aspect of the complaint.

If there had been substantial evidence, then a violation might well have been found. For instance in *López Ostra v. Spain*<sup>423</sup> (which concerned environmental issues similar to the present case) the Court's judgment was set out as follows:

*"47. Mrs López Ostra maintained that ... the plant continued to emit fumes, repetitive noise and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed.*

...

*49. On the basis of medical reports and expert opinions produced by the Government or the applicant ... the Commission noted, inter alia, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's daughter's ailments.*

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<sup>422</sup> App. No. 21915/93, Judgment date 20 March 1997, (1997) 24 E.H.R.R.121.

<sup>423</sup>App. No. 16798/90, Judgment date 9 December 1994, Series A, No. 303-C (1995) 20 E.H.R.R. 277.

...

51. Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8(1) - as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. ...

52. ... Admittedly, the Spanish authorities, ... were theoretically not directly responsible for the emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the State subsidised the plant's construction

....

58. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8."

The Court will ask the rhetorical question "What should a State do, if it knew such a dangerous situation existed in a region in its country?" Obviously one step would be to commission an expert investigation, and this has been done by Plodolot. However, the failure to disclose this report has arguably aggravated the situation - by increasing the anxiety and fear of the residents. The State would also be expected to hold an inquiry and take action to improve the conditions (i.e. propose changes to the water supply and so on). None of these things have occurred.

In *Fadeyeva v. Russia*<sup>424</sup> the European Court of Human Rights held that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The applicant lived within ½km of a steel-making plant which was found to have such high toxic contamination that the Government decided there should be resettlement of the residents - however the applicant was not offered alternative accommodation. Although the applicant advanced no medical evidence of ill health directly connected to the steel plant, the Court considered that prolonged exposure must have inevitably made her more vulnerable to disease and adversely affected the quality of life at her home. Although the plant was privately owned the Court held that the State had failed

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<sup>424</sup> App. No. 55723/00, Judgment date 9 June 2005.

in its positive obligation to prevent or reduce the emissions and found a violation of Article 8.

#### *Environmental information*

The applicants will argue that the refusal of access to the University report denied them evidence about the real risks they and their families were running in remaining in the area. The Court will consider that this case is similar in principle to both *Guerra v. Italy*<sup>425</sup> and to *Öneryildiz v. Turkey*<sup>426</sup> and on this basis it will almost certainly find that the refusal to disclose the evidence of risk amounts to an unreasonable interference with the applicants' rights to respect for their private life under Article 8. In so finding, it may also refer to *McGinley & Egan v. UK*<sup>427</sup> where it stated that:

*"97. The Court considers that, in view of the above, the issue of access to information which could either have allayed the applicants' fears in this respect, or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives within the meaning of Article 8 as to raise an issue under that provision. It follows that Article 8 is applicable.*

*98. The Court considers that the United Kingdom cannot be said to have "interfered" with the applicants' right to respect for their private or family lives. The instant complaint does not concern an act by the State, but instead its alleged failure to allow the applicants access to information.*

*Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual, or individuals, concerned."*<sup>428</sup>

The Court will refer to *Öneryildiz v. Turkey*<sup>429</sup> and *Guerra v. Italy*.<sup>430</sup> In *Guerra* (a case concerning pollution from a fertilizer factory) it stated that:

*"... severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, mutatis mutandis, the López Ostra judgment cited above, p. 54, § 51). In*

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<sup>425</sup> App. No. 14967/89, Judgment date 19 February 1998, (1998) 26 E.H.R.R. 357.

<sup>426</sup> App. No. 48939/99, Judgment date 30 November 2004 (2004) 39 E.H.R.R. 12.

<sup>427</sup> App. No. 21825/93, Judgment date 9 June 1998, (1999) 27 E.H.R.R. 1.

<sup>428</sup> See: *Gaskin v. UK* App. No. 10454/83, Judgment date 7 July 1989 Series A, No. 160, (1990) 12 EHRR 36, paragraph 42.

<sup>429</sup> App. No. 48939/99, Judgment date 30 November 2004 (2004) 39 E.H.R.R. 12.

<sup>430</sup> (1998) 26 E.H.R.R. 357.

*the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.*<sup>431</sup>

A similar conclusion was reached in *Öneryildiz v. Turkey*<sup>432</sup> where people living on a rubbish dump were killed as a result of an explosion, the risks of which were known to the municipal authorities. The Court considered that the positive obligations it had found in *Guerra* (to inform the local population of the environmental risk) applied in cases where the risk concerned Article 2 – and accordingly found a violation of Article 2.<sup>433</sup>

In *Roche v. UK*<sup>434</sup> a former soldier alleged that his ill-health stemmed from a training episode in the 1950s where he had been exposed to mustard gas. He tried to obtain the medical records for the incidents but the government was uncooperative and the process took over 10 years and countless applications (including an application to the European Court of Human Rights). The Court held (unanimously) that this amounted to a violation of Article 8.

In view of all these issues, the Court is likely to find a violation of Article 8(1).

**8. That the families only experienced these appalling environmental conditions because they were Roma and therefore this constitutes a breach of Article 8 in combination with Article 14.**

Although the Court is likely to have found a substantive violation of Article 8, it is also likely to consider whether there is also a violation of Article 8 in combination with Article 14.<sup>435</sup>

In *Moldovan v. Romania*<sup>436</sup> the Roma applicants had been forced to live in intolerable housing and had been the victims of an overtly racist police and judicial investigation – solely because of their race. Given the particularly harsh (and uncontested) facts of the case the Court found that the treatment was discriminatory contrary to Article 14 (in that case – in combination with Article 3). In this case, the evidence is less clear and it is unlikely that a violation of Article 14 will be found.

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<sup>431</sup> At paragraph 60 of the Judgment.

<sup>432</sup> App. No. 48939/99, Judgment date 30 November 2004 (2004) 39 E.H.R.R. 12.

<sup>433</sup> See paragraph 84 of the Judgment.

<sup>434</sup> See *Roche v. United Kingdom*, App. No. 32555/96, Judgment date 19 October 2005, (2006) 42 E.H.R.R. 30.

<sup>435</sup> See, by way of analogy, the cases of *Nachova v. Bulgaria*, App. Nos. 43577/98 - 43579/98, Judgment date 6 July 2005; and *Šećić v. Croatia*, App. No. 40116/02, Judgment date 31 May 2007.

<sup>436</sup> App. No. 41138/98, Judgment date 12 July 2005, (2007) 44 E.H.R.R. 16.

## 9. The alleged violation of Article 3 on the basis that the poor housing constituted degrading treatment (the *East African Asians* argument).

The applicants argue that they have been singled out for grossly discriminatory treatment in relation to the provision in housing, purely on the basis of race – and they thereby argue that this amounts to degrading treatment contrary to Article 3 on the basis of the Commission's findings in *Patel v. United Kingdom* (the *East African Asians* case)<sup>437</sup> and more recently by the Court in *Cyprus v. Turkey*<sup>438</sup> and *Moldovan v. Romania*.<sup>439</sup>

In the *East African Asians* case the Commission considered that degrading treatment was not restricted to actual assaults but included acts of a serious nature designed to interfere with the dignity of a person. The case concerned the mass expulsion of Asians from East Africa, some of whom, even though they held a valid British passport, were refused residence in the United Kingdom. By analogy the deliberate placing of a racial group in a ghetto, accompanied by severe environmental dangers, could constitute the same type of humiliating and degrading treatment. In the *East African Asians* case, the Commission considered that the State's immigration laws discriminated on grounds of race and colour to a degree that the complainants were the victims of degrading treatment:

*"207 ...the legislation applied in the present case discriminated against the applicants on the grounds of their colour or race ... discrimination based on race could, in certain circumstances, of itself amount to discrimination within the meaning of Article 3 of the Convention.*

...

*a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for different treatment on the basis of race might in certain circumstances constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.*

*208. The Commission considers that racial discrimination to which the applicants have been publicly subjected by the application of the above immigration legislation, constitutes an interference with the human dignity which in the special circumstances described above amounted to "degrading treatment" in the sense of Article 3 of the Convention."*

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<sup>437</sup> *Patel v. United Kingdom* (the *East African Asians* case), Judgment date 14 December 1973, (1981) 3 E.H.R.R.76.

<sup>438</sup> App. No. 25781/94, Judgment date 10 May 2001, (2002) 35 E.H.R.R. 30.

<sup>439</sup> App. No. 41138/98, Judgment date 12 July 2005, (2007) 44 E.H.R.R. 16.

In the subsequent complaint of *Abdulaziz Cabales and Balkandali v. United Kingdom*<sup>440</sup> (which concerned the United Kingdom's immigration policy of refusing to allow husbands from certain countries to join their wives in the UK) the Court held that:

*"91. ...the difference in treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase, but was intended solely to achieve the aims [of primary immigration control]. It cannot therefore be regarded as "degrading"."*

The *Abdulaziz* judgment can be distinguished from the present case of the five Roma families, since in their case there appears to be no legitimate aim underlying the policy of segregation.

In the *East African Asians* and the *Cyprus* cases there were established administrative practices of racial segregation. In the present case the evidence is not so clear and the State argues that many of the Roma simply chose to live together and have refused alternative accommodation. Accordingly, though the allegation made in the present case could (if supported by conclusive evidence) constitute grossly discriminatory behaviour so as to bring it within the ambit of Article 3, the applicants will find it difficult to establish such a violation.

#### **10. The alleged violation of Article 13: the lack of an effective remedy.**

The applicants alleged that although they have evidence to show the State has violated a number of their Convention rights, they do not have access to an adequate domestic remedy to resolve these matters. However, the State has indicated that there are a number of other possible domestic remedies that the applicants could have pursued – for example, by bringing contractual, environmental and constitutional actions. In circumstances where the applicants have not attempted to pursue such actions, the Court is likely to conclude that this aspect of their complaint is not made out and to find no violation of Article 13.

#### **11. The alleged violation of Article 2 of Protocol 1 (alone and in combination with Article 14) on the basis of the inferior education provided for the Roma in Hell.**

##### *Article 2 of Protocol 1 alone*

The Court will reiterate its restrictive interpretation of Article 2 of Protocol 1 – namely, that this Article does not require the State to provide education to any

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<sup>440</sup> App. No. 9214/80; 9473/81; 9474/81; Judgment date 28 May 1985, Series A, No. 94, (1985) 7 E.H.R.R. 471.

particular standard - and, accordingly, it will find no substantive violation of this right.

*Article 2 of Protocol 1 in combination with Article 14*

The Court will consider the statistical evidence and the State's argument that although only 8% of the population of Plodalot are Roma, there is a far higher percentage of Roma in the city of Plod and in the region of Hell in particular. Set against this the Court will be concerned that the only possible school in Hell is one for children with learning disabilities and will be likely to conclude that the applicants have shown there to be a difference in treatment. Furthermore, given the Grand Chamber's decision in *D.H. v. The Czech Republic* it is also likely that the Court would be prepared to find a violation of Article 14 in conjunction with Article 2 of Protocol 1 in this case.

## Appendix 1 – Table of Relevant Cases

- A v. United Kingdom*, App. No. 25599/94, Judgment date 23 September 1998
- A and Others v. The Netherlands*, App. No. 14209/88, Judgment date 16 December 1988, D.R. 59
- Aarts v. Netherlands*, App. No. 4056/88, Admissibility decision 28 May 1991, 70 D.R. 208
- Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. No. 9214/80; 9473/81; 9474/81; Judgment date 28 May 1985, Series A, No. 94, (1985) 7 E.H.R.R. 471
- Agee v. United Kingdom*, App. No. 7229/76, Admissibility decision 17 December 1976, 7 D.R. 164
- Agrotexim v. Greece*, App. No. 14807/89, 24 October 1995, Series A, No. 330, (1996) 21 E.H.R.R. 250
- Ahmed v. Austria*, App. No. 25964/94, Judgment date 17 December 1996, (1997) 24 E.H.R.R. 278
- Airey v. Ireland*, App. No. 6289/73, Judgment date 9 October 1979, Series A, No. 32, (1979-80) 2 E.H.R.R. 305
- Aksoy v. Turkey*, App. No. 21987/93, Judgment date 18 December 1996, (1997) 23 E.H.R.R. 553  
*Aksu v. Turkey*, App. Nos. 4149/04, 41029/04, Judgment date 15 March 2012, (2013) 56 E.H.R.R. 4
- Ali and Ayse Duran v. Turkey*, App. No. 42942/02, Judgment date 8 April 2008
- Andrić v. Sweden* App. No. 45917/99, [Section 1], Admissibility decision 23 February 1999, (1999) 28 E.H.R.R. CD218
- Angelova and Illiev v. Bulgaria*, App. No. 55523/00, Judgment date 27 July 2007 (2008) 47 E.H.R.R. 7
- Anguelova v. Bulgaria*, App. No. 38361/97, Judgment date 13 June 2002, (2004) 38 E.H.R.R. 31
- Artico v. Italy*, App. No. 6694/74, Judgment date 13 May 1980, Series A, No. 37 (1981) 3 E.H.R.R. 1
- Assenov and Others v. Bulgaria*, App. No. 24760/94, Judgment date 28 October 1998, (1999) 28 E.H.R.R. 652
- Autio v. Finland*, App. No. 17086/90, Admissibility decision date 6 December 1991, 72 D.R. 245
- Autotronic AG v. Switzerland* (1990) 12 E.H.R.R. 485
- Aziz v. Cyprus*, App. No. 69949/01, Judgment date 22 June 2004, (2005) 41 E.H.R.R. 11
- BC v. Switzerland*, App. No. 19898/92, Admissibility decision 30 August 1993, 75 D.R. 223
- Balogh v. Hungary*, App. No. 47940/99, Judgment date 20 July 2004
- Banković and others v. Belgium and Others*, App. No. 52207/99, Admissibility decision, 12 December 2001, (2007) 44 E.H.R.R. SE5

- Baragiola v. Switzerland*, App. No. 17265/90, Decision on admissibility date, 21 October 1993, (1993) 75 D.R. 76
- Barberà, Messegué and Jabardo v. Spain*, Judgment date 6 December 1988, Series A, No. 146, (1989) 11 E.H.R.R. 360
- Beard v. United Kingdom*, App. No. 24882/94, Judgment date 18 January 2001 (2001) 33 E.H.R.R. 19
- Beganović v. Croatia*, App. No. 46423/06, Judgment date 25 September 2009
- Case "Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium"* (known as the "Belgian linguistic case"), App. No. 1474/62, Judgment date, 23 July 1998; Series A, No. 6 (1979-80) 1 E.H.R.R. 252
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## **Appendix II – The Convention for the Protection of Human Rights and Fundamental Freedoms**

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol Nos. 11 and 14 with Protocol Nos. 1, 4, 6, 7, 12 and 13.

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.

The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5(3) thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

Registry of the European Court of Human Rights  
June 2010

Convention for the Protection of Human Rights  
and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political

democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

**Article 1**

**Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

**Section I**

**Rights and freedoms**

**Article 2**

**Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Article 3**

#### **Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **Article 4**

#### **Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

### **Article 5**

#### **Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

#### **Article 6**

##### **Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 7**

##### **No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty

be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **Article 8**

##### **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 9**

##### **Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### **Article 10**

##### **Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **Article 11**

##### **Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## **Article 12**

### **Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

## **Article 13**

### **Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## **Article 14**

### **Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## **Article 15**

### **Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

## **Article 16**

### **Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

#### **Article 17**

##### **Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

#### **Article 18**

##### **Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

#### Section II

#### European Court of Human Rights

##### **Article 19**

##### **Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

##### **Article 20**

##### **Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

##### **Article 21**

##### **Criteria for office**

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

##### **Article 22**

##### **Election of judges**

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

##### **Article 23**

##### **Terms of office and dismissal**

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

#### **Article 24**

##### **Registry and rapporteurs**

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

#### **Article 25**

##### **Plenary Court**

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court;
- (e) elect the Registrar and one or more Deputy Registrars;
- (f) make any request under Article 26 (paragraph 2).

#### **Article 26**

##### **Single-judge formation, Committees, Chambers and Grand Chamber**

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up Committees for a fixed period of time.
2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in

accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

#### **Article 27**

##### **Competence of single judges**

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a Committee or to a Chamber for further examination.

#### **Article 28**

##### **Competence of Committees**

1. In respect of an application submitted under Article 34, a Committee may, by a unanimous vote,
  - (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
  - (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the Committee, the Committee may at any stage of the proceedings invite that judge to take the place of one of the members of the Committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1 (b).

#### **Article 29**

##### **Decisions by Chambers on admissibility and merits**

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

#### **Article 30**

##### **Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution

of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

### **Article 31**

#### **Powers of the Grand Chamber**

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46 (paragraph 4); and
- (c) consider requests for advisory opinions submitted under Article 47.

### **Article 32**

#### **Jurisdiction of the Court**

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 33**

#### **Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

### **Article 34**

#### **Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

### **Article 35**

#### **Admissibility criteria**

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
  - (a) is anonymous; or
  - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

#### **Article 36**

##### **Third party intervention**

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

#### **Article 37**

##### **Striking out applications**

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

#### **Article 38**

##### **Examination of the case**

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

#### **Article 39**

### **Friendly settlements**

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
2. Proceedings conducted under paragraph 1 shall be confidential.
3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

### **Article 40**

#### **Public hearings and access to documents**

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

### **Article 41**

#### **Just satisfaction**

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

### **Article 42**

#### **Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44 (paragraph 2).

### **Article 43**

#### **Referral to the Grand Chamber**

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

### **Article 44**

#### **Final judgments**

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final

- (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

#### **Article 45**

##### **Reasons for judgments and decisions**

- 1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
- 2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

#### **Article 46**

##### **Binding force and execution of judgments**

- 1. The High Contracting Parties under-take to abide by the final judgment of the Court in any case to which they are parties.
- 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
- 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
- 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
- 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

#### **Article 47**

##### **Advisory opinions**

- 1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
- 2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of

Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

#### **Article 48**

##### **Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

#### **Article 49**

##### **Reasons for advisory opinions**

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

#### **Article 50**

##### **Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.

#### **Article 51**

##### **Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

#### **Section III**

##### **Miscellaneous provisions**

#### **Article 52**

##### **Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

#### **Article 53**

##### **Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

#### **Article 54**

##### **Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

#### **Article 55**

##### **Exclusion of other means of dispute settlement**

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

#### **Article 56**

##### **Territorial application**

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

#### **Article 57**

##### **Reservations**

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

#### **Article 58**

##### **Denunciation**

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

#### **Article 59**

##### **Signature and ratification**

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

**Protocol to the Convention for the  
Protection of Human Rights and  
Fundamental Freedoms**

Paris, 20.III.1952

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

**Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

**Article 2 – Right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

**Article 3 – Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

#### **Article 4 – Territorial application**

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

#### **Article 5 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

#### **Article 6 – Signature and ratification**

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

**Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto**

Strasbourg, 16.IX.1963

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

**Article 1 – Prohibition of imprisonment for debt**

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

**Article 2 – Freedom of movement**

- 1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- 2 Everyone shall be free to leave any country, including his own.
- 3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- 4 The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

**Article 3 – Prohibition of expulsion of nationals**

- 1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

- 2 No one shall be deprived of the right to enter the territory of the state of which he is a national.

#### **Article 4 – Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.

#### **Article 5 – Territorial application**

- 1 Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
- 2 Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
- 3 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 4 The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.
- 5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol."

#### **Article 6 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **Article 7 – Signature and ratification**

- 1 This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
- 2 The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

**Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty**

Strasbourg, 28.IV.1983

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

**Article 2 – Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

**Article 3 – Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

#### **Article 4 – Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

#### **Article 5 – Territorial application**

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

#### **Article 6 – Relationship to the Convention**

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

#### **Article 7 – Signature and ratification**

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **Article 8 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

### **Article 9 – Depositary functions**

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 5 and 8;
- d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 7 to the Convention for  
the Protection of Human Rights and  
Fundamental Freedoms**

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

**Article 1 – Procedural safeguards relating to expulsion of aliens**

- 1 An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
  - a to submit reasons against his expulsion,
  - b to have his case reviewed, and
  - c to be represented for these purposes before the competent authority or a person or persons designated by that authority.
- 2 An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

**Article 2 – Right of appeal in criminal matters**

- 1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
- 2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person

concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

#### **Article 3 – Compensation for wrongful conviction**

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

#### **Article 4 – Right not to be tried or punished twice**

- 1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
- 2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
- 3 No derogation from this Article shall be made under Article 15 of the Convention.

#### **Article 5 – Equality between spouses**

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

#### **Article 6 – Territorial application**

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.
- 4 A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 5 The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.
- 6 Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

#### **Article 7 – Relationship to the Convention**

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 8 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of

Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 9 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

#### **Article 10 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- d any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 12 to the Convention for  
the Protection of Human Rights and Fundamental  
Freedom**

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

**Article 1 – General prohibition of discrimination**

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

**Article 2 – Territorial application**

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.
- 4 A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
- 5 Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

### **Article 3 – Relationship to the Convention**

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **Article 4 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **Article 5 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

### **Article 6 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- d any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the abolition of the death penalty in all circumstances**

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

**Article 2 – Prohibitions of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

**Article 3 – Prohibitions of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

#### **Article 4 – Territorial application**

- 1 Any state may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
- 2 Any state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

#### **Article 5 – Relationship to the Convention**

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 6 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 7 – Entry into force**

- 1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.
- 2 In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the

month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

### **Article 8 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- d any other act, notification or communication relating to this Protocol;

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, this 3rd day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

### **Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention**

**Strasbourg, 13.V.2004**

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Having regard to Resolution No. 1 and the Declaration adopted at the European Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000;

Having regard to the Declarations adopted by the Committee of Ministers on 8 November 2001, 7 November 2002 and 15 May 2003, at their 109th, 111th and 112th Sessions, respectively;

Having regard to Opinion No. 251 (2004) adopted by the Parliamentary Assembly of the Council of Europe on 28 April 2004;

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the

European Court of Human Rights and the Committee of Ministers of the Council of Europe;

Considering, in particular, the need to ensure that the Court can continue to play its preeminent role in protecting human rights in Europe,

Have agreed as follows:

### **Article 1**

Paragraph 2 of Article 22 of the Convention shall be deleted.

### **Article 2**

Article 23 of the Convention shall be amended to read as follows:

“Article 23 – Terms of office and dismissal

1 The judges shall be elected for a period of nine years. They may not be re-elected.

2 The terms of office of judges shall expire when they reach the age of 70.

3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.”

### **Article 3**

Article 24 of the Convention shall be deleted.

### **Article 4**

Article 25 of the Convention shall become Article 24 and its text shall be amended to read as

follows:

“Article 24 – Registry and rapporteurs

1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.

2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court’s registry.”

### **Article 5**

Article 26 of the Convention shall become Article 25 (“Plenary Court”) and its text shall be amended as follows:

1 At the end of paragraph d, the comma shall be replaced by a semi-colon and the word “and” shall be deleted.

2 At the end of paragraph e, the full stop shall be replaced by a semi-colon.

3 A new paragraph f shall be added which shall read as follows:

“f make any request under Article 26, paragraph 2.”

## **Article 6**

Article 27 of the Convention shall become Article 26 and its text shall be amended to read as follows:

“Article 26 – Single-judge formation, committees, Chambers and Grand Chamber  
1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time.

2 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4 There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.”

## **Article 7**

After the new Article 26, a new Article 27 shall be inserted into the Convention, which shall read as follows:

“Article 27 – Competence of single judges

1 A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2 The decision shall be final.

3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.”

## **Article 8**

Article 28 of the Convention shall be amended to read as follows:

“Article 28 – Competence of committees

1 In respect of an application submitted under Article 34, a committee may, by a unanimous vote, a declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or b declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2 Decisions and judgments under paragraph 1 shall be final.

3 If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.”

### **Article 9**

Article 29 of the Convention shall be amended as follows:

1 Paragraph 1 shall be amended to read as follows: “If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.”

2 At the end of paragraph 2 a new sentence shall be added which shall read as follows: “The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.”

3 Paragraph 3 shall be deleted.

### **Article 10**

Article 31 of the Convention shall be amended as follows:

1 At the end of paragraph a, the word “and” shall be deleted.

2 Paragraph b shall become paragraph c and a new paragraph b shall be inserted and shall read as follows:

“b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and”.

### **Article 11**

Article 32 of the Convention shall be amended as follows:

At the end of paragraph 1, a comma and the number 46 shall be inserted after the number 34.

### **Article 12**

Paragraph 3 of Article 35 of the Convention shall be amended to read as follows:

“3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

### **Article 13**

A new paragraph 3 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“3 In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.”

### **Article 14**

Article 38 of the Convention shall be amended to read as follows:

“Article 38 – Examination of the case The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

### **Article 15**

Article 39 of the Convention shall be amended to read as follows:

“Article 39 – Friendly settlements

1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2 Proceedings conducted under paragraph 1 shall be confidential.

3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.”

### **Article 16**

Article 46 of the Convention shall be amended to read as follows:

“Article 46 – Binding force and execution of judgments

1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

### **Article 17**

Article 59 of the Convention shall be amended as follows:

1 A new paragraph 2 shall be inserted which shall read as follows:

"2 The European Union may accede to this Convention."

2 Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively.

### **Article 18**

1 This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by a signature without reservation as to ratification, acceptance or approval; or

b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **Article 19**

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.

## **Article 20**

1 From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.

2 The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.

## **Article 21**

The term of office of judges serving their first term of office on the date of entry into force of this Protocol shall be extended *ipso jure* so as to amount to a total period of nine years. The other judges shall complete their term of office, which shall be extended *ipso jure* by two years.

## **Article 22**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c the date of entry into force of this Protocol in accordance with Article 19; and
- d any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 13th day of May 2004, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.



Marc Willers has practised as a barrister since 1987. He was named Legal Aid Lawyer of the Year in 2011 and was appointed as a Queen's Counsel (QC) in 2014. He specialises in human rights and discrimination law with a particular emphasis on the representation of Gypsies and Travellers in the United Kingdom. He is also the co-editor/author of *Gypsy and Traveller Law*,

(Legal Action Group, 2007) and the editor of the Council of Europe's handbook *Ensuring access to rights for Roma and Travellers. The role of the European Court of Human Rights*. Marc Willers regularly writes for *Legal Action* and other legal publications and presents seminars on human rights and other issues both in the United Kingdom and abroad.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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