CASE LAW READER

CRIMINAL LAW - PART B

2025-2026

TABLE OF CONTENTS

CASE OF ALLAN v. THE UNITED KINGDOM

Application no. 48539/99 FOURTH SECTION, 5 November 2002

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 3 February 1995 Mr David Beesley, store manager, was shot dead in the manager's office of a Kwik-Save supermarket in Greater Manchester.
9. On 18 February 1995 the applicant and another man, by the name of Leroy Grant, were arrested on suspicion of having committed a robbery at the Late Saver shop, Cheadle. At the time, they were in possession of an 8-mm Beretta replica handgun. Charged in connection with this offence, Mr Grant admitted to the offence and several other late-night shop robberies. The applicant denied involvement in any of the offences. On or about 20 February 1995 an anonymous informant told the police that the applicant had been involved in the murder of David Beesley.
10. On 20 February 1995 the applicant and Leroy Grant appeared in custody at the Stockport Magistrates' Court and were further remanded in custody to reappear on 23 February 1995. On 20 February 1995 Detective Chief Inspector Dunn requested permission for the cell and the visiting areas used by the applicant and Leroy Grant to be bugged with audio and video technology, alleging that all regular methods of investigation to identify David Beesley's murderer had failed. The Chief Constable of the Greater Manchester Police granted authority on the same day for an unlimited period for both the police stations at Stockport and Cheadle Hulme. On 13 March 1995 similar authority was sought and obtained for the installation of a listening device with video system to be placed in the visiting area of Stretford police station, where the applicant was then held.
11. On 8 March 1995 the applicant was arrested for the murder and questioned. In the interviews with the police which followed, the police told the applicant that he was not obliged to say anything. He availed himself of that right.
12. During this time visits to the applicant by his female friend, J.N.S, were recorded on audio and videotape in the prison visiting area between 12 and 28 March 1995. The applicant and Leroy Grant were held for long periods in the same cell and recordings of their conversations were made from 20 February to 12 March 1995.
13. On 23 March 1995 H. was brought to Stretford police station. H. was a long-standing police informant with a criminal record who had been arrested on 21 March 1995 for unrelated offences. He was placed in the applicant's cell for the purpose of eliciting information from the applicant. As asserted by the applicant, H. had every incentive to inform on him. Telephone conversations between H. and the police included comments by the police instructing H. to “push him for what you can” and disclosed evidence of concerted police coaching. After 20 April 1995 he associated regularly with the applicant who was remanded at Strangeways Prison.
14. On 28 June 1995 the applicant was taken away from the prison to be interviewed by the police concerning the Kwik-Save robbery. He was attended and advised by his solicitor. During the course of the interview, the applicant was invited to comment on the recordings made in February and March 1995. He made no comment to any question. According to the applicant, he was interrogated at length by the police in an attempt to “rattle” or unsettle him, such that he would be more talkative and vulnerable to H. upon his return to the prison. H. had been fitted with recording devices. The recording thereby obtained was adduced in evidence at the applicant's trial.
15. The applicant was interviewed again in the presence of his solicitor on 29 June and 26 July 1995 and remained silent when faced with the allegations.

16. On 25 July 1995 H. made a 59- to 60-page witness statement detailing his conversations with the applicant and was released on bail on 4 August 1995. His sentence was postponed until after he had given evidence at the applicant's trial. The high point of H.'s evidence was the assertion that the applicant had admitted his presence at the murder scene. This asserted admission was not part of the recorded interview and was disputed. The thrust of the applicant's case was that he was discussing robberies and did not accede to H.'s efforts to channel their conversation into a discussion of the murder. The audio- and video-recordings (or transcripts thereof) were utilised in the trial of the applicant. No evidence, other than the alleged admissions, connected the applicant with the killing of Mr Beesley.

17. In January 1998 the applicant's trial on one count of murder and a count of conspiracy to rob began before a jury. He was represented by leading counsel.

18. During his trial, the applicant's counsel challenged the admissibility of extracts from covert audio- and video-recordings of conversations of the applicant with Leroy Grant and J.N.S., under sections 76 and 78 of the Police and Criminal Evidence Act 1984 (PACE). The judge concluded that there was evidence on the tapes from which the jury could infer that the applicant was involved in the events of 3 February 1995, and it was not so unreliable that it could not be left to the jury to assess for themselves. The judge also rejected the applicant's counsel's arguments under sections 76 and 78 of PACE that the evidence from H. was obtained by oppression or by such impropriety as to render it inadmissible. He considered that the use of an informant to talk and listen to the accused over a substantial period of time did not result in any unfairness to the accused. The fact that H. might be considered as having much to gain in giving evidence was also a matter to be left to the jury in their assessment of the reliability of his evidence. The evidence was accordingly admitted before the jury. The judge's ruling on the admissibility of the evidence was given on 26 January 1998, after a *voir dire* (submissions on a point of law in the absence of a jury) and consisted of a judgment of eighteen pages.

19. In his summing-up to the jury on 10 and 11 February 1998, the trial judge gave directions on the way in which the jury should assess the reliability of the disputed evidence. He told them that they were to judge whether the police had deliberately wound up the applicant during the interview on 28 June 1995 and how to approach the evidence put forward by H.:

"So at the end of the day with regard to H. you have his evidence about the conversations that he had with [the applicant] and what [the applicant] said. You have the tape recordings of the conversations on 28 June when H. had been wired up, between [the applicant] and H., and you have the transcripts of the conversations between H. and the police. I suggest ... that you approach the evidence of H. with the very greatest caution and care. He is a professional criminal. He behaved, and has behaved as he acknowledged, dishonestly and criminally for years. He saw the likelihood of advantage to himself, both in terms of bail and in the sentence that he was likely to receive. You have heard that he has not yet been sentenced on matters for which he was in custody in early 1995. The defence say if you consider the whole picture you simply cannot rely upon H.; quite unsafe to do so. The prosecution say the contents of the tapes of 28 June can be relied on and are consistent with what H. says [the applicant] had said to him previously, before he, H., was wired up. Of course tapes of ... conversations cannot possibly constitute any independent confirmation of what H. says about what [the applicant] had said to him previously, because, and you will understand the logic of that, the information is all coming from one source, namely H. and the witness cannot strengthen his own evidence essentially by repetition.

So, ladies and gentlemen, at the end of the day how do you regard H.? Was he or may he have been lying, or are you sure that he was telling the truth? If you are sure, for example, in relation to things said on the tapes of 28 June or other aspects of H.'s evidence that his evidence is true, that [the applicant] did say a number of things, what do those things mean? Do they point to his guilt, to his presence at Kwik-Save on 3 February 1995, or are they capable of meaning something else? ..."

20. The judge also directed the jury concerning the possible drawing of inferences from the applicant's silence in police interview on 28 and 29 June and 26 July 1995, pursuant to section 34 of the Criminal Justice and Public Order Act 1994. He reminded the jury that the defence had contended that the applicant's silence had been adopted on legal advice because of the view that oppressive interrogation techniques were being used.

21. On 17 February 1998, after the jury had deliberated for a total of twenty-one and a half hours, the applicant was convicted of murder before the Crown Court at Manchester by a majority of ten to two and sentenced to life imprisonment. The applicant thereafter lodged a notice of appeal, asserting, *inter alia*, that the judge ought to have excluded evidence of the audio- and video-recordings of his conversations with Leroy Grant and J.N.S. and the evidence put forward by H. He also argued that the judge had erred in his directions as to the circumstances in which the jury could draw inferences from the applicant's failure to respond to police questions in interviews of 28 and 29 June, when the police strategy was to "spook" the applicant into a state of garrulousness when he returned to prison, where he had a conversation with H.

22. On 31 July 1998 he was refused leave to appeal against his conviction by a single judge. His renewed application was refused by the Court of Appeal (Criminal Division) on 18 January 1999, after a hearing at which he was represented by leading counsel. In the court's judgment of that date, Lord Justice Rose found that the trial judge gave a very careful and impeccable ruling as regards the admissibility of the tapes and evidence put forward by H. and that he had considered all the matters which he should have considered and had not considered any matter which he ought not to have considered. There was no basis for holding that the exercise of his discretion had been so flawed that the Court of Appeal should intervene. In so far as the applicant complained that the judge should have warned the jury not to take into account the applicant's failure to answer police questioning in the light of the police strategy to "spook" him, Lord Justice Rose found that the judge had given an entirely appropriate direction to the jury in the circumstances of the case.

II. RELEVANT DOMESTIC LAW

The Home Office Guidelines

23. Guidelines on the use of equipment in police surveillance operations (The Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application. They provide, *inter alia*:

"4. In each case, the authorising officer should satisfy himself that the following criteria are met:

the investigation concerns serious crime;

normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried;

there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;

use of equipment must be operationally feasible.

5. In judging how far the seriousness of the crime under investigation justifies the use of a particular surveillance technique, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected is commensurate with the seriousness of the offence."

24. The Guidelines also state that there may be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

The Police Act 1997

25. The 1997 Act provides a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, came into force on 22 February 1998.

26. Since 25 September 2000 these controls have been augmented by Part II of the Regulation of Investigatory Powers Act 2000 (RIPA). In particular, covert surveillance in a police cell is now governed by sections 26(3) and 48(1) of RIPA. RIPA also establishes a statutory Investigatory Powers Tribunal to deal with complaints about intrusive surveillance and the use of informants by the police.

The Police and Criminal Evidence Act 1984

27. Section 76 provides:

"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession that might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it might be true, was not obtained as aforesaid."

1. Section 78(1) provides:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." (…)

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

34. The applicant relied on Article 8 of the Convention in respect of the use of covert video- and audio-recording devices in his cell and prison visiting area and on the person of a fellow prisoner. The relevant parts of Article 8 provide:

"1. Everyone has the right to respect for his private ... life ...

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."

35. The Government accepted, following the judgment in *Khan v. the United Kingdom* (no. 35394/97, §§ 26-28, ECHR 2000-V) that the use of the audio- and video-recording devices in the applicant's cell, the prison visiting area and on a fellow prisoner amounted to an interference with the applicant's right to private life under Article 8 § 1 of the Convention and that the measures were not used "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

36. The Court recalls, as in *Khan*, cited above, that at the relevant time there existed no statutory system to regulate the use of covert recording devices by the police. The interferences disclosed by the measures implemented in respect of the applicant were therefore not "in accordance with the law" as required by the second paragraph of Article 8 and there have thus been violations of this provision.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained of the use at his trial of evidence gathered by the covert recording devices and of the admission of evidence from the prisoner H. concerning conversations which they had together in their cell. He relied on Article 6 of the Convention, which provides as relevant in its first sentence:
"In the determination 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."

A. The parties' submissions

1. The applicant

38. As regards the use of the evidence from the surveillance at trial, the applicant submitted that the remarks recorded on tape were not an accurate reflection of the Kwik-Save murder, referring to discrepancies with regard to what in fact happened. The time over which the recordings were made, namely, weeks, was oppressive. As he was aware of the possible recording, he was in a no-win situation because if he whispered or gestured, that was said to be incriminating, and if his remarks were not incriminating, he was said to be tailoring his remarks for the microphone. The tapes were also used in the police interviews to unsettle the applicant and set him up for adverse inferences in the event that he exercised his right to silence. This case was also different from that in *Khan* (cited above) relied on by the Government as the recording in this case was much more invasive and protracted and the evidence obtained filled with inaccuracies and unreliable.

39. The police used H. not as an inanimate listening post but as a means of conducting surreptitious interrogation, circumventing the protections for a suspect who has availed himself of legal advice and exercised the right to silence (referring to the Canadian authorities' finding that this constituted a violation of the right to silence, *Hebert* and *Broyles*, both cited above). In particular, on 28 June 1995 the applicant was removed from prison to a police station and interrogated for a day as a "softening-up" process prior to his being questioned by H. The applicant's conviction was based substantially, if not decisively, on the evidence put forward by H. who was a persistent criminal under threat of sentencing which would depend on his role in the applicant's trial. The one and only alleged admission by the applicant of presence at the scene of the murder was not recorded but rested solely on the H.'s word. This was in all circumstances unfair and oppressive. The applicant further disputed that he suspected H.'s role in this connection or could in any way be regarded as waiving his right to complain about it.

2. The Government

40. The Government submitted, relying on *Khan*, cited above, that the admission at trial of recorded evidence obtained secretly by the police under the Guidelines did not violate Article 6. The surveillance had been lawful in domestic terms, there was no reason to suppose that the tapes were not an accurate reflection of what was said, they had not been obtained under any form of pressure and the applicant had an opportunity under domestic law to challenge their use. Furthermore, the tapes were not the only evidence against the applicant and the jury were made fully aware of any possible deficiencies in this evidence. There was no basis on which to distinguish this case from *Khan*, as in that case no violation was found despite the fact that the recording involved trespass and the evidence obtained

was the only evidence against the applicant, whereas in this case the surveillance was lawful under domestic law and the recordings were not the only evidence against the applicant, as there was also the evidence put forward by H. They argued that in serious cases such as murder there was a particularly strong public interest in admitting such material, provided that, as here, the applicant had an opportunity to challenge its use.

41. Concerning H.'s testimony, the Government pointed out that questions of admissibility of evidence are for domestic courts. Issues of H.'s credibility and reliability were fully argued and explained to the jury which was in a good position to determine whether any findings of fact could be drawn from his statements. The applicant's counsel had been able to cross-examine H. Furthermore, the applicant had spoken voluntarily to H., knowing or at least suspecting that his conversations were being recorded and therefore must be taken as waiving his right to complain about it. There was accordingly no unfairness contrary to Article 6 § 1 in the use of this evidence at trial. Finally, the Government disputed the relevance of the Canadian cases cited by the applicant, noting that the *Hebert* case concerned the use of evidence actively elicited by an undercover agent (not covert audio- or video-recordings) and which was the only evidence against the accused, while in *Broyles* the information given by the accused to his visitor was obtained in the functional equivalent of an interrogation and the accused's special trust in his friend exploited.

B. The Court's assessment

1. General principles

42. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found.

43. In that context, regard must also be had to whether the rights of the defence have been respected, in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use, as well as the opportunity of examining any relevant witnesses; whether the admissions made by the applicant during the conversations were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions (see *Khan*, cited above, § 36); and the quality of the evidence, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy (ibid., § 37). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (ibid.).

44. As regards the privilege against self-incrimination or the right to silence, the Court has reiterated that these are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, p. 49, § 45). The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes

that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, §§ 68-69). In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.

2. Application in the present case

45. The Court notes that the recordings made of the applicant in the police station and prison when he was with Leroy Grant, J.N.S. and H. and the testimony of H. who had been placed in the applicant's cell by the police to obtain evidence against him constituted the principal evidence relied on by the prosecution at his trial.

46. The Court observes, firstly, that as in *Khan* the material obtained by audio- and video-recordings was not unlawful in the sense of being contrary to domestic criminal law. Similarly, there is no suggestion that any admissions made by the applicant during the conversations taped with Leroy Grant and J.N.S. were not voluntary in the sense that the applicant was coerced into making them or that there was any entrapment or inducement. Indeed, the applicant has stated that he was aware that he was possibly being taped while in the police station.

47. The applicant has argued that the evidence from the recordings was unreliable and contained many inconsistencies, while the Government have pointed to the admissions that it contained which were probative of the applicant's knowledge of the incident. As the applicant alleged that he knew of the possible recording and as the tapes indicated that a certain amount of whispering or gesturing was being carried out at times, the Court considers that an assessment of the strength or the reliability of the evidence concerned is not a straightforward matter. The applicant's conduct as a whole must have played a role in the assessment of the evidence and this Court is not well-placed to express a view. In those circumstances, the existence of fair procedures to examine the admissibility and test the reliability of the evidence takes on an even greater importance.

48. In that regard, the Court notes that the applicant's counsel challenged the admissibility of the recordings in a *voir dire*, and was able to put forward arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner. The judge, in a careful ruling however, admitted the evidence, finding that it was of probative value and had not been shown to be so unreliable that it could not be left to the jury to decide for themselves. This decision was reviewed on appeal by the Court of Appeal which found that the judge had taken into account all the relevant factors and that his ruling could not be faulted. At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and significance of the recording evidence. The Court is not persuaded that the use of the taped material concerning Leroy Grant and J.N.S. at the applicant's trial conflicted with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

49. The applicant's second ground of objection, concerning the way in which the informer H. was used by the police to obtain evidence, including taped conversations with the applicant, a written statement and oral testimony about other allegedly incriminating conversations, raises more complex issues.

50. While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose

whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.

51. Whether the right to silence is undermined to such an extent as to give rise to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance may be found in the decisions of the Supreme Court of Canada, referred to in paragraphs 30-32 above, in which the right to silence, in circumstances which bore some similarity to those in the present case, was examined in the context of section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right to silence of the accused was not obviously a State agent, the analysis should focus on both the relationship between the informer and the State and the relationship between the informer and the accused: the right to silence would only be infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Whether an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused.

52. In the present case, the Court notes that in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. and instructed him to "push him for what you can". In contrast to the position in *Khan*, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the "voluntariness" of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination.

53. Accordingly, in this respect there has been a violation of Article 6 § 1 of the Convention.

(…)

CASE OF BROGAN AND OTHERS v. THE UNITED KINGDOM

Application no. 11209/84; 11234/84; 11266/84; 11386/85
COURT (PLENARY) 29 November 1988

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Terence Patrick Brogan

11. The first applicant, Mr Terence Patrick Brogan, was born in 1961. He is a farmer and lives in County Tyrone, Northern Ireland.
12. He was arrested at his home at 6.15 a.m. on 17 September 1984 by police officers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act"). He was then taken to Gough Barracks, Armagh, where he was detained until his release at 5.20 p.m. on 22 September 1984, that is a period of detention of five days and eleven hours.
13. Within a few hours of his arrest, he was questioned about his suspected involvement in an attack on a police mobile patrol which occurred on 11 August 1984 in County Tyrone and resulted in the death of a police sergeant and serious injuries to another police officer. He was also interrogated concerning his suspected membership of the Provisional Irish Republican Army ("IRA"), a proscribed organisation for the purposes of the 1984 Act. He maintained total silence and refused to answer any questions put to him. In addition, he turned away from his questioners and stared at the floor, ceiling or wall and periodically stood to attention. He was visited by his solicitor on 19 and 21 September 1984.

B. Dermot Coyle

14. The second applicant, Mr Dermot Coyle, was born in 1953. He is at present unemployed and lives in County Tyrone, Northern Ireland.
15. He was arrested at his home by police officers at 6.35 a.m. on 1 October 1984 under section 12 of the 1984 Act. He was then taken to Gough Barracks, Armagh, where he was detained until his release at 11.05 p.m. on 7 October 1984, that is a period of detention of six days and sixteen and a half hours.
16. Within a few hours of his arrest, he was questioned about the planting of a land-mine intended to kill members of the security forces on 23 February 1984 and a blast incendiary bomb attack on 13 July 1984, both of which occurred in County Tyrone. He was also interrogated about his suspected provision of firearms and about his suspected membership of the Provisional IRA. He maintained complete silence apart from one occasion when he asked for his cigarettes. In one interview, he spat several times on the floor and across the table in the interview room. He was visited by his solicitor on 3 and 4 October 1984.

C. William McFadden

17. The third applicant, Mr William McFadden, was born in 1959. He is at present unemployed and lives in Londonderry, Northern Ireland.
18. He was arrested at his home at 7.00 a.m. on 1 October 1984 by a police officer under section 12 of the 1984 Act. He was then taken to Castlereagh Police Holding Centre, Belfast, where he was detained until his release at 1.00 p.m. on 5 October 1984, that is a period of four days and six hours.
19. Within a few hours of his arrest, he was questioned about the murder of a soldier in a bomb attack in Londonderry on 15 October 1983 and the murder of another soldier during a petrol bomb and gunfire attack in Londonderry on 23 April 1984. He was also interrogated

about his suspected membership of the Provisional IRA. Apart from one interview when he answered questions of a general nature, he refused to answer any questions put to him. In addition, he periodically stood up or sat on the floor of the interview room. He was visited by his solicitor on 3 October 1984.

D. Michael Tracey

20. The fourth applicant, Mr Michael Tracey, was born in 1962. He is an apprentice joiner and lives in Londonderry, Northern Ireland.

21. He was arrested at his home at 7.04 a.m. on 1 October 1984 by police officers under section 12 of the 1984 Act. He was then taken to Castlereagh Royal Ulster Constabulary ("RUC") Station, Belfast, where he was detained until his release at 6.00 p.m. on 5 October 1984, that is a detention period of four days and eleven hours.

22. Within a few hours of his arrest, he was questioned about the armed robbery of post offices in Londonderry on 3 March 1984 and 29 May 1984 and a conspiracy to murder members of the security forces. He was also interrogated concerning his suspected membership of the Irish National Liberation Army ("INLA"), a proscribed terrorist organisation. He remained silent in response to all questions except certain questions of a general nature and sought to disrupt the interviews by rapping on heating pipes in the interview room, singing, whistling and banging his chair against the walls and on the floor. He was visited by his solicitor on 3 October 1984.

E. Facts common to all four applicants

23. All of the applicants were informed by the arresting officer that they were being arrested under section 12 of the 1984 Act and that there were reasonable grounds for suspecting them to have been involved in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. They were cautioned that they need not say anything, but that anything they did say might be used in evidence.

24. On the day following his arrest, each applicant was informed by police officers that the Secretary of State for Northern Ireland had agreed to extend his detention by a further five days under section 12(4) of the 1984 Act. None of the applicants was brought before a judge or other officer authorised by law to exercise judicial power, nor were any of them charged after their release.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Introduction

25. The emergency situation in Northern Ireland in the early 1970s and the attendant level of terrorist activity form the background to the introduction of the Prevention of Terrorism (Temporary Provisions) Act 1974 ("the 1974 Act"). Between 1972 and 1983, over two thousand deaths were attributable to terrorism in Northern Ireland as compared with about one hundred in Great Britain. In the mid 1980s, the number of deaths was significantly lower than in the early 1970s but organised terrorism continued to thrive.

26. The 1974 Act came into force on 29 November 1974. The Act proscribed the IRA and made it an offence to display support in public for that organisation in Great Britain. The IRA was already a proscribed organisation in Northern Ireland. The Act also conferred special powers of arrest and detention on the police so that they could deal more effectively with the threat of terrorism (see paragraphs 30-33 below).

27. The 1974 Act was subject to renewal every six months by Parliament so that, inter alia, the need for the continued use of the special powers could be monitored. The Act was thus renewed until March 1976 when it was re-enacted with certain amendments.

Under section 17 of the 1976 Act, the special powers were subject to parliamentary renewal every twelve months. The 1976 Act was in turn renewed annually until 1984,

when it was re-enacted with certain amendments. The 1984 Act, which came into force in March 1984, proscribed the INLA as well as the IRA. It has been renewed every year but will expire in March 1989, when the Government intend to introduce permanent legislation.

28. The 1976 Act was reviewed by Lord Shackleton in a report published in July 1978 and subsequently by Lord Jellicoe in a report published in January 1983. Annual reports on the 1984 Act have been presented to Parliament by Sir Cyril Philips (for 1984 and 1985) and Viscount Colville (for 1986 and 1987), who also completed in 1987 a wider-scale review of the operation of the 1984 Act.

29. These reviews were commissioned by the Government and presented to Parliament to assist consideration of the continued need for the legislation. The authors of these reviews concluded in particular that in view of the problems inherent in the prevention and investigation of terrorism, the continued use of the special powers of arrest and detention was indispensable. The suggestion that decisions extending detention should be taken by the courts was rejected, notably because the information grounding those decisions was highly sensitive and could not be disclosed to the persons in detention or their legal advisers. For various reasons, the decisions fell properly within the sphere of the executive.

B. Power to arrest without warrant under the 1984 and other Acts

30. The relevant provisions of section 12 of the 1984 Act, substantially the same as those of the 1974 and 1976 Acts, are as follows:

"12 (1) [A] constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be

...

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;

...

(3) The acts of terrorism to which this Part of this Act applies are

(a) acts of terrorism connected with the affairs of Northern Ireland;

...

(4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him.

(5) Any such further period or periods shall not exceed five days in all.

(6) The following provisions (requirement to bring accused person before the court after his arrest) shall not apply to a person detained in right of the arrest

...

(d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981;

...

(8) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section."

31. According to the definition given in section 14 (1) of the 1984 Act, terrorism "means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear". An identical definition of terrorism in the Northern Ireland (Emergency Provisions) Act 1978 was held to be "in wide terms" by the House of Lords, which rejected an interpretation of the word "terrorist" that would have been "in narrower terms than popular usage of the word 'terrorist' might connote to a police officer or a layman" (McKee v. Chief Constable for Northern Ireland [1985] 1 All England Law Reports 1 at 3-4, per Lord Roskill).

32. Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981, declared inapplicable by section 12(6)(d) of the 1984 Act (see paragraph 30 above), provides that where a person

arrested without warrant is not within twenty-four hours released from custody, he must be brought before a Magistrates' Court as soon as practicable thereafter but not later than forty-eight hours after his arrest.

33. The Northern Ireland (Emergency Provisions) Act 1978 also conferred special powers of arrest without warrant. Section 11 provided that a constable could arrest without warrant any person whom he suspected of being a terrorist. Such a person could be detained for up to seventy-two hours without being brought before a court.
The 1978 Act has been amended by the Northern Ireland (Emergency Provisions) Act 1987, which came into force on 15 June 1987. The powers of arrest under the 1978 Act have been replaced by a power to enter and search premises for the purpose of arresting a suspected terrorist under section 12 of the 1984 Act.

C. Exercise of the power to make an arrest under section 12 (1)(b) of the 1984 Act

34. In order to make a lawful arrest under section 12(1)(b) of the 1984 Act, the arresting officer must have a reasonable suspicion that the person being arrested is or has been concerned in the commission, preparation or instigation of acts of terrorism. In addition, an arrest without warrant is subject to the applicable common law rules laid down by the House of Lords in the case of Christie v. Leachinsky [1947] Appeal Cases 573 at 587 and 600. The person being arrested must in ordinary circumstances be informed of the true ground of his arrest at the time he is taken into custody or, if special circumstances exist which excuse this, as soon thereafter as it is reasonably practicable to inform him. This does not require technical or precise language to be used provided the person being arrested knows in substance why.
In the case of Ex parte Lynch [1980] Northern Ireland Reports 126 at 131, in which the arrested person sought a writ of habeas corpus, the High Court of Northern Ireland discussed section 12(1)(b). The arresting officer had told the applicant that he was arresting him under section 12 of the 1976 Act as he suspected him of being involved in terrorist activities. The High Court held that the officer had communicated the true ground of arrest and had done what was reasonable in the circumstances to convey to the applicant the nature of his suspicion, namely that the applicant was involved in terrorist activities. Accordingly, the High Court found that the lawfulness of the arrest could not be impugned in this respect.

35. The arresting officer's suspicion must be reasonable in the circumstances and to decide this the court must be told something about the sources and grounds of the suspicion (per Higgins J. in Van Hout v. Chief Constable of the RUC and the Northern Ireland Office, decision of Northern Ireland High Court, 28 June 1984).

D. Purpose of arrest and detention under section 12 of the 1984 Act

36. Under ordinary law, there is no power to arrest and detain a person merely to make enquiries about him. The questioning of a suspect on the ground of a reasonable suspicion that he has committed an arrestable offence is a legitimate cause for arrest and detention without warrant where the purpose of such questioning is to dispel or confirm such a reasonable suspicion, provided he is brought before a court as soon as practicable (R. v. Houghton [1979] 68 Criminal Appeal Reports 197 at 205 and Holgate-Mohammed v. Duke [1984] 1 All England Law Reports 1054 at 1059).
On the other hand, Lord Lowry LCJ held in the case of Ex parte Lynch (loc. cit. at 131) that under the 1984 Act no specific crime need be suspected to ground a proper arrest under section 12 (1)(b). He added (ibid.):
"... [I]t is further to be noted that an arrest under section 12(1) leads ... to a permitted period of detention without preferring a charge. No charge may follow at all; thus an arrest is not necessarily ... the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated."

E. Extension of period of detention

37. In Northern Ireland, applications for extended detention beyond the initial forty-eight-hour period are processed at senior police level in Belfast and then forwarded to the Secretary of State for Northern Ireland for approval by him or, if he is not available, a junior minister.

There are no criteria in the 1984 Act (or its predecessors) governing decisions to extend the initial period of detention, though strict criteria that have been developed in practice are listed in the reports and reviews appended to the Government's memorial.

According to statistics quoted by the Standing Advisory Commission on Human Rights in its written submissions (see paragraph 6 above), just over 2% of police requests for extended detention in Northern Ireland between the entry into force of the 1984 Act in March 1984 and June 1987 were refused by the Secretary of State.

F. Remedies

38. The principal remedies available to persons detained under the 1984 Act are an applica tion for a writ of habeas corpus and a civil action claiming damages for false imprisonment.

1. Habeas corpus

39. Under the 1984 Act, a person may be arrested and detained in right of arrest for a total period of seven days (section 12 (4) and (5) - see paragraph 30 above). Paragraph 5 (2) of Schedule 3 to the 1984 Act provides that a person detained pursuant to an arrest under section 12 of the Act "shall be deemed to be in legal custody when he is so detained". However, the remedy of habeas corpus is not precluded by paragraph 5 (2) cited above. If the initial arrest is unlawful, so also is the detention grounded upon that arrest (per Higgins J. in the Van Hout case, loc. cit., at 18).

40. Habeas corpus is a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful.

The court hearing the application does not sit as a court of appeal to consider the merits of the detention: it is confined to a review of the lawfulness of the detention. The scope of this review is not uniform and depends on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised. The review will encompass compliance with the technical requirements of such a statute and may extend, inter alia, to an inquiry into the reasonableness of the suspicion grounding the arrest (ex parte Lynch, loc. cit., and Van Hout, loc. cit.). A detention that is technically legal may also be reviewed on the basis of an alleged misuse of power in that the authorities may have acted in bad faith, capriciously or for an unlawful purpose (R v. Governor of Brixton Prison, ex parte Sarno [1916] 2 King's Bench Reports 742 and R v. Brixton Prison (Governor), ex parte Soblen [1962] 3 All England Law Reports 641).

The burden of proof is on the respondent authorities which must justify the legality of the decision to detain, provided that the person applying for a writ of habeas corpus has firstly established a prima facie case (Khawaja v. Secretary of State [1983] 1 All England Law Reports 765).

2. False imprisonment

41. A person claiming that he has been unlawfully arrested and detained may in addition bring an action seeking damages for false imprisonment. Where the lawfulness of the arrest depends upon reasonable cause for suspicion, it is for the defendant authority to prove the existence of such reasonable cause (Dallison v. Caffrey [1965] 1 Queen's Bench Reports 348 and Van Hout, loc. cit., at 15).

In false imprisonment proceedings, the reasonableness of an arrest may be examined on the basis of the well-established principles of judicial review of the exercise of executive discretion (see Holgate-Mohammed v. Duke, loc. cit.).
(…)

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

44. At the public hearing on 25 May 1988, the Government maintained in substance the concluding submissions set out in their memorial, whereby they requested the Court to decide
"(1) that the facts disclose no breach of paragraphs 1, 3, 4 or 5 of Article 5 (art. 5-1, art. 5-3, art. 5-4, art. 5-5) of the Convention;
(2) that the facts disclose no breach of Article 13 (art. 13) of the Convention, alternatively that no separate issue arises under Article 13 (art. 13) of the Convention".
In addition, the Government requested the Court not to entertain the complaint raised under Article 5 para. 2 (art. 5-2).

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

45. In their original petitions to the Commission, the applicants alleged breach of paragraph 2 of Article 5 (art. 5-2), which provides:
"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."
However, they subsequently withdrew the claim, and the Commission noted in its admissibility decision that the applicants were no longer complaining under paragraph 2 (art. 5-2).
In a letter filed in the registry on 17 May 1988, the applicants sought the leave of the Court to reinstate the complaint. In their oral pleadings both the respondent Government and the Commission objected to the applicants' request.
46. The scope of the Court's jurisdiction is determined by the Commission's decision declaring the originating application admissible (see, inter alia, the Weeks judgment of 2 March 1987, Series A no. 114, p. 21, para. 37). The Court considers that regard must be had in the instant case to the express withdrawal of the claim under paragraph 2 (art. 5-2). As a result, the Commission discontinued its examination of the admissibility of this complaint. To permit the applicants to resuscitate this complaint before the Court would be to circumvent the machinery established for the examination of petitions under the Convention.
47. Consequently, the allegation that there has been a breach of Article 5 para. 2 (art. 5-2) cannot be entertained.

II. GENERAL APPROACH

48. The Government have adverted extensively to the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism.
The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights (see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 23 and 27-28, paras. 48-49 and 59).

The Government informed the Secretary General of the Council of Europe on 22 August 1984 that they were withdrawing a notice of derogation under Article 15 (art. 15) which had relied on an emergency situation in Northern Ireland (see Yearbook of the Convention, vol. 14, p. 32 [1971], vol. 16, pp. 26-28 [1973], vol. 18, p. 18 [1975], and vol. 21, p. 22 [1978], for communications giving notice of derogation, and Information Bulletin on Legal Activities within the Council of Europe and in Member States, vol. 21, p. 2 [July, 1985], for the withdrawal). The Government indicated accordingly that in their opinion "the provisions of the Convention are being fully executed". In any event, as they pointed out, the derogation did not apply to the area of law in issue in the present case.

Consequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 (art. 15) by reason of a terrorist campaign in Northern Ireland. Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. In the context of Article 5 (art. 5), it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose.

III. ALLEGED BREACH OF ARTICLE 5 PARA. 1 (art. 5-1)

49. The applicants alleged breach of Article 5 para. 1 (art. 5-1) of the Convention, which, in so far as relevant, provides:

"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:

...

(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 ...;

..."

There was no dispute that the applicants' arrest and detention were "lawful" under Northern Ireland law and, in particular, "in accordance with a procedure prescribed by law". The applicants argued that the deprivation of liberty they suffered by virtue of section 12 of the 1984 Act failed to comply with Article 5 para. 1 (c) (art. 5-1-c), on the ground that they were not arrested on suspicion of an "offence", nor was the purpose of their arrest to bring them before the competent legal authority.

50. Under the first head of argument, the applicants maintained that their arrest and detention were grounded on suspicion, not of having committed a specific offence, but rather of involvement in unspecified acts of terrorism, something which did not constitute a breach of the criminal law in Northern Ireland and could not be regarded as an "offence" under Article 5 para. 1 (c) (art. 5-1-c).

The Government have not disputed that the 1984 Act did not require an arrest to be based on suspicion of a specific offence but argued that the definition of terrorism in the Act was compatible with the concept of an offence and satisfied the requirements of paragraph 1 (c) (art. 5-1-c) in this respect, as the Court's case-law confirmed. In this connection, the Government pointed out that the applicants were not in fact suspected of involvement in terrorism in general, but of membership of a proscribed organisation and involvement in specific acts of terrorism, each of which constituted an offence under the law of Northern Ireland and each of which was expressly put to the applicants during the course of their interviews following their arrests.

51. Section 14 of the 1984 Act defines terrorism as "the use of violence for political ends", which includes "the use of violence for the purpose of putting the public or any section of the public in fear" (see paragraph 31 above). The same definition of acts of terrorism - as contained in

the Detention of Terrorists (Northern Ireland) Order 1972 and the Northern Ireland (Emergency Provisions) Act 1973 - has already been found by the Court to be "well in keeping with the idea of an offence" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 74-75, para. 196).

In addition, all of the applicants were questioned within a few hours of their arrest about their suspected involvement in specific offences and their suspected membership of proscribed organisations (see paragraphs 13, 16, 19 and 22 above).

Accordingly, the arrest and subsequent detention of the applicants were based on a reasonable suspicion of commission of an offence within the meaning of Article 5 para. 1 (c) (art. 5-1-c).

52. Article 5 para. 1 (c) (art. 5-1-c) also requires that the purpose of the arrest or detention should be to bring the person concerned before the competent legal authority.

The Government and the Commission have argued that such an intention was present and that if sufficient and usable evidence had been obtained during the police investigation that followed the applicants' arrest, they would undoubtedly have been charged and brought to trial.

The applicants contested these arguments and referred to the fact that they were neither charged nor brought before a court during their detention. No charge had necessarily to follow an arrest under section 12 of the 1984 Act and the requirement under the ordinary law to bring the person before a court had been made inapplicable to detention under this Act (see paragraphs 30 and 32 above). In the applicants' contention, this was therefore a power of administrative detention exercised for the purpose of gathering information, as the use in practice of the special powers corroborated.

53. The Court is not required to examine the impugned legislation in abstracto, but must confine itself to the circumstances of the case before it.

The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 para. 1 (c) (art. 5-1-c). As the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest (see paragraph 51 above). Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority.

Their arrest and detention must therefore be taken to have been effected for the purpose specified in paragraph 1 (c) (art. 5-1-c).

54. In conclusion, there has been no violation of Article 5 para. 1 (art. 5-1).

IV. ALLEGED BREACH OF ARTICLE 5 PARA. 3 (art. 5-3)

55. Under the 1984 Act, a person arrested under section 12 on reasonable suspicion of involvement in acts of terrorism may be detained by police for an initial period of forty-eight hours, and, on the authorisation of the Secretary of State for Northern Ireland, for a further period or periods of up to five days (see paragraphs 30-37 above).

The applicants claimed, as a consequence of their arrest and detention under this legislation, to have been the victims of a violation of Article 5 para. 3 (art. 5-3), which provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) 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."

The applicants noted that a person arrested under the ordinary law of Northern Ireland must be brought before a Magistrates' Court within forty-eight hours (see paragraph 32 above); and that under the ordinary law in England and Wales (Police and Criminal Evidence Act 1984) the maximum period of detention permitted without charge is four days, judicial approval being required at the thirty-six hour stage. In their submission, there was no plausible reason why a seven-day detention period was necessary, marking as it did such a radical departure from ordinary law and even from the three-day period permitted under the special powers of detention embodied in the Northern Ireland (Emergency Provisions) Act 1978 (see paragraph 33 above). Nor was there any justification for not entrusting such decisions to the judiciary of Northern Ireland.

56. The Government have argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed (see paragraphs 26-29 above). In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. The Government claimed that the need for a power of extension of the period of detention was borne out by statistics. For instance, in 1987 extensions were granted in Northern Ireland in respect of 365 persons. Some 83 were detained in excess of five days and of this number 39 were charged with serious terrorist offences during the extended period.

    As regards the suggestion that extensions of detention beyond the initial forty-eight-hour period should be controlled or even authorised by a judge, the Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. Not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details. This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach. Moreover, the merits of each request to extend detention were personally scrutinised by the Secretary of State or, if he was unavailable, by another Minister (see paragraph 37 above).

57. The Commission, in its report, cited its established case-law to the effect that a period of four days in cases concerning ordinary criminal offences and of five days in exceptional cases could be considered compatible with the requirement of promptness in Article 5 para. 3 (art. 5-3) (see respectively the admissibility decisions in application no. 2894/66, X v. the Netherlands, Yearbook of the Convention, vol. 9, p. 568 (1966), and in application no. 4960/71, X v. Belgium, Collection of Decisions, vol. 42, pp. 54-55 (1973)). In the Commission's opinion, given the context in which the applicants were arrested and the special problems associated with the investigation of terrorist offences, a somewhat longer period of detention than in normal cases was justified. The Commission concluded that the periods of four days and six hours (Mr McFadden) and four days and eleven hours (Mr Tracey) did satisfy the requirement of promptness, whereas the periods of five days and eleven hours (Mr Brogan) and six days and sixteen and a half hours (Mr Coyle) did not.

58. The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5 para. 3 (art. 5-3). No violation of Article 5 para. 3 (art. 5-3) can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible (see the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52). If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.
The assessment of "promptness" has to be made in the light of the object and purpose of Article 5 (art. 5) (see paragraph 48 above). The Court has regard to the importance of this Article (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (see the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, para. 54). Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 25-26, para. 55) and "from which the whole Convention draws its inspiration" (see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 28, para. 69).
59. The obligation expressed in English by the word "promptly" and in French by the word "aussitôt" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 (art. 5-3) ("reasonable time"/"délai raisonnable") and even from that in paragraph 4 of Article 5 (art. 5-4) ("speedily"/"à bref délai"). The term "promptly" also occurs in the English text of paragraph 2 (art. 5-2), where the French text uses the words "dans le plus court délai". As indicated in the Ireland v. the United Kingdom judgment (18 January 1978, Series A no. 25, p. 76, para. 199), "promptly" in paragraph 3 (art. 5-3) may be understood as having a broader significance than "aussitôt", which literally means immediately. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, para. 48, and Article 33 para. 4 of the Vienna Convention of 23 May 1969 on the Law of Treaties).
The use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3 (art. 5-3). Whereas promptness is to be assessed in each case according to its special features (see the above-mentioned de Jong, Baljet and van den Brink judgment, Series A no. 77, p. 25, para. 52), the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3 (art. 5-3), that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.
60. The instant case is exclusively concerned with the arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland. The requirements under the ordinary law in Northern Ireland as to bringing an accused before a court were expressly made inapplicable to such arrest and detention by section 12(6) of the 1984 Act (see paragraphs 30 and 32 above). There is no call to determine in the present judgment whether in an ordinary criminal case any given period, such as four days, in police or administrative custody would as a general rule be capable of being compatible with the first part of Article 5 para. 3 (art. 5-3).
None of the applicants was in fact brought before a judge or judicial officer during his time in custody. The issue to be decided is therefore whether, having regard to the special features relied on by the Government, each applicant's release can be considered as "prompt" for the purposes of Article 5 para. 3 (art. 5-3).

61. The investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5 para. 1 (art. 5-1) (see paragraph 53 above). The Court takes full judicial notice of the factors adverted to by the Government in this connection. It is also true that in Northern Ireland the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control (see paragraph 37 above). In addition, the need for the continuation of the special powers has been constantly monitored by Parliament and their operation regularly reviewed by independent personalities (see paragraphs 26-29 above). The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

    The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para. 3 (art. 5-3), for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para. 3 (art. 5-3), dispensing altogether with "prompt" judicial control.

62. As indicated above (paragraph 59), the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 (art. 5-3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).

There has thus been a breach of Article 5 para. 3 (art. 5-3) in respect of all four applicants. (…)

CASE OF COLOZZA v. ITALY

Application no. 9024/80 COURT (CHAMBER), 12 February 1985

AS TO THE FACTS

I. THE PARTICULAR FACTS OF THE CASE

9. Mr. Giacinto Colozza was born in 1924 and died in 1983. He was an Italian citizen and lived in Rome.

10. On 20 June 1972, the carabinieri reported the applicant to the Rome public prosecutor's office for various alleged offences, including fraud, committed before November 1971. They said that they had not questioned the suspect because they had failed to contact him at his last-known address. In fact, his flat, in via Longanesi, had been closed and his furniture seized by the judicial authorities; the manager of the building, who was also the administrator appointed by the court in the attachment proceedings, was unaware of Mr. Colozza's new address.
On 4 October 1973, the investigating judge issued a "judicial notification" (comunicazione giudiziaria) intended to inform the applicant of the opening of criminal proceedings against him. A bailiff attempted to serve it on Mr. Colozza at the address - via Fonteiana - shown in the Registrar-General's records, but without success: he had moved - about ten years earlier according to the carabinieri and five years earlier according to the police - and had omitted to inform the City Hall of his change of residence as required by law.

11. Meanwhile Mr. Colozza, when renewing his driving licence in September 1973, had given, as his current address, that shown in the Registrar-General's records (via Fonteiana).

12. On 14 November 1973, after unsuccessful searches at the latter address, the investigating judge declared the accused untraceable (irreperibile), appointed an official defence lawyer for him and continued the investigations. Thereafter, in pursuance of Article 170 of the Code of Criminal Procedure (see paragraph 19 below), all the documents which had to be served on the applicant were lodged in the registry of the investigating judge, the defence counsel being informed in each case.
On 12 November 1974 and 30 May and 3 June 1975, the investigating judge issued three arrest warrants which were not executed because the competent authorities still did not know where Mr. Colozza was living. It should, however, be noted that the address indicated on the warrants was via Longanesi. On each occasion, the carabinieri drew up a report of fruitless searches (vane ricerche). Mr. Colozza was thenceforth regarded as "latitante", that is as a person wilfully evading the execution of a warrant issued by a court (see paragraph 20 below).

13. By a decision of 9 August 1975, the applicant was committed for trial.
A first hearing was held by the Rome Regional Court on 6 May 1976. Although he had been informed of the lodging of the summons to appear (see paragraph 12 above), the accused's officially-appointed defence counsel did not appear, with the result that the court had to appoint a replacement and postponed the hearings until 26 November. On that date, a new lawyer was officially assigned, because the one appointed on 6 May did not appear either. The court adjourned the trial and concluded it on 17 December 1976, after appointing, during the sitting and again for the same reason, another official defence lawyer. It sentenced Mr. Colozza to six years' imprisonment (reclusione) and a fine (multa) of 600,000 Lire. The public prosecutor had called for sentences of five years' imprisonment and a fine of 2,000,000 Lire and the officially-appointed defence counsel had agreed with his submissions.
The judgment was lodged in the registry on 29 December 1976 and a copy was served on the lawyer. It became final on 16 January 1977, as he had not entered an appeal.

14. On 20 May 1977, the public prosecutor's office issued an arrest warrant. The applicant was arrested at his home in Rome, 31 via Pian Due Torri, on the following 24 September. On the next day, he raised a "procedural objection" (incidente d'esecuzione) as regards this warrant and at the same time filed a "late appeal" (appello apparentemente tardivo; see paragraph 23 below). He appointed a lawyer and instructed him to draft the grounds of appeal. However, he submitted them himself on 24 December 1977 and lodged a supplementary memorial on 25 July 1978. On 15 November and 28 December 1977, he appointed new lawyers.

15. On 29 April 1978, the Rome Regional Court dismissed the "procedural objection" and ordered that the papers be sent to the Rome Court of Appeal for a ruling on the "late appeal".

Mr. Colozza maintained that he had been wrongly declared "latitante" and that the notifications of the summons to appear and of the extract from the judgment rendered by default were therefore null and void.

He explained that, as he had received notice to quit from his landlord at the end of 1971, he had left his flat in via Fonteiana and, before finding a new one, had lived in a hotel. He pointed out that his new address (via Pian Due Torri) was known to the police since, on 12 March 1977, they had summoned him to the local police station for questioning; the same applied both to the Rome public prosecutor's office, which, on 7 October 1976 (that is to say, almost two months before adoption of the judgment), had sent him a "judicial notification" concerning other criminal proceedings, and to various public authorities, which had served documents on him, using the notification service of the Rome City Hall.

16. Mr. Colozza's appeal was examined together with an appeal that had been entered by his co-accused. The Court of Appeal heard Mr. Colozza both on the merits of the case and on the fact that he had been treated as "latitante".

The public prosecutor attached to the Court of Appeal also submitted that the judgment of 17 December 1976 should be set aside; in his view, Mr. Colozza should not have been regarded as "latitante".

On 10 November 1978, the Court of Appeal confirmed the conviction of the co-accused. As to Mr. Colozza, it held that his appeal was inadmissible for failure to observe time-limits. It ruled that the time-limit for filing the grounds of appeal - twenty days, under Article 201 of the Code of Criminal Procedure - had begun to run on 13 October 1977, the date on which the arrest warrant had been served, whereas the memorial had not been submitted until 24 December 1977.

17. Mr. Colozza lodged an appeal on points of law but it was dismissed by the Court of Cassation on 5 November 1979. It accepted that the Court of Appeal had wrongly declared the "late appeal" inadmissible for failure to file the grounds in time: it should first have determined whether, as the appellant alleged, the first-instance proceedings were void. However, the Court of Cassation concluded that this was not so: it considered that Mr. Colozza had rightly been declared first to be "irreperibile" and then to be "latitante". It added that the Court of Appeal should have declared the appeal inadmissible as out of time, since it had been lodged at a time when the judgment under appeal had already become final.

Mr. Colozza, who had been in custody since 23 September 1977 to serve his sentence, as well as other suspended sentences previously passed on him, died in prison on 2 December 1983 (see paragraph 6 above).

II. RELEVANT DOMESTIC LAW

A. Notification

1. General principles concerning notification to an accused person who is not in custody

18. The Code of Criminal Procedure lays down the methods for notifying an accused person who is not in custody of the various documents pertaining to the investigations and the trial.
When the first procedural step involving the presence of such an accused is taken, the court, the public prosecutor's office or the official of the criminal investigation department must ask the accused to indicate the place where notifications should be made or to elect an address for service (Article 171, first paragraph). If he does not do so, Article 169 applies; this provides, inter alia, that if the first notification cannot be made to the party concerned in person, it is to be delivered, at his place of residence or of work, to a person living with him or to the caretaker. If those two places are not known, notification is to be left where the party concerned is living temporarily or has an address, by delivery to one of the above-mentioned persons.

2. Notification to an accused who is "irreperibile" or "latitante"

19. The Code of Criminal Procedure does not define the concept of "irreperibile". Nevertheless, according to the relevant rules, it may apply to any person on whom a document concerning criminal proceedings opened against him has to be served and whom it has not been possible to trace because his address was unknown. The mere establishment of this fact - the question whether there has been a wilful evasion of the investigations being irrelevant in this context - is enough for this purpose. According to Article 170, the bailiff has to inform the judge who ordered the notification. The latter, after directing that further searches be conducted at the place of birth or last residence, will then issue a decree (decreto) to the effect that notifications shall be effected by being lodged in the registry of the court before which proceedings are in progress. The defence lawyer must be informed immediately whenever a document is so lodged; if the accused has no lawyer, the court has to assign one to him officially.

20. This system of notification is also used if the accused is "latitante" (Article 173).
According to the first paragraph of Article 268, any person wilfully evading execution of, inter alia, an arrest warrant shall be regarded as being "latitante". The third paragraph states that whenever classification as "latitante" entails legal consequences, these are to extend to the other proceedings instituted against the person in question. If he does not have a lawyer of his own choosing, an official appointment will be made.
The Court of Cassation has consistently held that an intention to evade arrest is to be presumed where adequate searches by the criminal investigation police have been unsuccessful. This presumption exists even if the person in question, after moving and failing to make the statutory declaration of change of residence, has not resorted to any special subterfuges to avoid arrest (3rd Criminal Chamber, 12 March 1973, no. 559, Repertorio 1974, no. 3440; 6th Criminal Chamber, 20 October 1971, no. 3195, Repertorio 1973, no. 4897; Massimario delle decisioni penali, 1972, no. 1959). In its judgment no. 98 of 2 June 1977, the Constitutional Court specified, however, that the presumption can be rebutted and is thus not irrefutable.
The term "adequate searches" leaves the criminal investigation police with a measure of discretion as to the steps to be taken; this discretion is however limited, in that the person concerned must be sought at the residence indicated in the arrest warrant (2nd Criminal Chamber, 19 October 1978, no. 12698, massima no. 140224).

B. Trial by default (contumacia)

21. Although trial by "contumacia" (by default; Articles 497 to 501 of the Code of Criminal Procedure) is classified as a special form of proceedings, the ordinary procedure is followed (Article 499, first paragraph). Such a trial is held when the accused, after being duly summoned, does not appear at the hearing and neither requests nor agrees that it take place in his absence.

22. Under Italian law, an accused who fails to appear (contumace) has the same rights as an accused who is present. He is, for example, entitled to be defended by a lawyer - who will be officially assigned to him by the court if he has not chosen one himself - and to lodge an ordinary appeal or an appeal on points of law against the judgment concerning him. The time-limit for entering such an appeal begins to run only from the day on which he was notified of the decision by means of service of an extract from the judgment. However, in the case of a person who has also been declared to be "irreperibile" or "latitante", time begins to run from the date of the lodging of the judgment in the registry of the court that rendered it.

C. "Late appeal"

23. According to Italian case-law, individuals who have not entered an appeal and who consider that the notification of the judgment was irregular can lodge a "late appeal". The time-limits to be observed are the same as for the ordinary appeal (three days for giving notice of appeal and twenty days for submitting the grounds), but both start to run from the date when the person in question had knowledge of the judgment. Nevertheless, in the case of a person regarded as "latitante" the court hearing the appeal can determine the merits of the criminal charge only if it finds that there has been a failure to comply with the rules governing declarations that an accused is "latitante" or governing service on him of the documents in the proceedings; in addition, it is for the person concerned to prove that he was not seeking to evade justice.

D. Defence of the accused; related rules as to nullity

24. Article 185 of the Code of Criminal Procedure provides, inter alia, that proceedings shall be null and void if the rules on the participation, assistance and representation of the accused have not been observed. Failure to serve a summons to appear at the hearing and the absence, at that stage, of the accused's defence counsel constitute grounds of incurable nullity, of which the court must take notice of its own motion at any point in the proceedings.

(…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

26. At the hearings before the Court, the applicant's lawyer contended that there had been a violation of paragraph 3 (a) of Article 6 (art. 6-3-a). The Commission, for its part, considered the case under paragraph 1 (art. 6-1); the Government denied that there had been any breach at all.

The Court recalls that the guarantees contained in paragraph 3 of Article 6 (art. 6-3) are constituent elements, amongst others, of the general notion of a fair trial (see the Goddi judgment of 9 April 1984, Series A no. 76, p. 11, para. 28). In the circumstances of the case,

the Court, whilst also having regard to those guarantees, considers that it should examine the complaint under paragraph 1, which provides

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... ."

The basic question is whether the combined recourse to the procedure for notifying persons who are untraceable (irreperibile) and to the procedure for holding a trial by default - in the form applicable to "latitanti" (see paragraph 20 above) - deprived Mr. Colozza of the right thus guaranteed.

27. Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present.

28. In the instant case, the Court does not have to determine whether and under what conditions an accused can waive exercise of his right to appear at the hearing since in any event, according to the Court's established case-law, waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the Neumeister judgment of 7 May 1974, Series A no. 17, p. 16, para. 36; the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, pp. 25-26, para. 59; the Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 19, para. 35).

In fact, the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption (see paragraphs 12 and 20 above), inferred from the status of "latitante" which they attributed to Mr. Colozza that there had been such a waiver.

In the Court's view, this presumption did not provide a sufficient basis. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General's records (via Fonteiana), yet it was known that he was no longer living there (see paragraphs 10 and 12 above). The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor's office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr. Colozza's new address (see paragraph 15 above); it was thus possible to locate him even though - as the Government mentioned by way of justification - no data-bank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner (see, mutatis mutandis, the Artico judgment of 13 May 1980, Series A no. 37, p. 18, para. 37).

In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question.

29. According to the Government, the right to take part in person in the hearing does not have the absolute character which is apparently attributed to it by the Commission in its report; it has to be reconciled, through the striking of a "reasonable balance", with the public interest and notably the interests of justice.

It is not the Court's function to elaborate a general theory in this area (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, p. 25, para. 49). As

was pointed out by the Government, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.

30. The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 para. 1 (art. 6-1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved (see, mutatis mutandis, the De Cubber judgment of 26 October 1984, Series A no. 86, p. 20, para. 35). For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure.

31. According to Italian case-law, the applicant was entitled to lodge a "late appeal" and, in fact, he did so (see paragraphs 14 and 23 above).

This remedy does not satisfy the criteria mentioned above. The court hearing the appeal can determine the merits (in French: "bien-fondé") of the criminal charge, as regards the factual and legal issues, only if it finds that the competent authorities have failed to comply with the rules governing declarations that an accused is "latitante" or governing service on him of the documents in the proceedings; in addition, it is for the person concerned to prove that he was not seeking to evade justice (see paragraph 23 above).

In the present case, neither the Court of Appeal nor the Court of Cassation redressed the alleged violation: the former confined itself to holding the appeal inadmissible and the latter concluded that the declaration of "latitanza" was legitimate (see paragraphs 16 and 17 above).

32. Thus, Mr. Colozza's case was at the end of the day never heard, in his presence, by a "tribunal" which was competent to determine all the aspects of the matter.

According to the Government, however, the applicant himself was responsible for this state of affairs since he neither informed the City Hall of his change of address nor, once he was treated as "latitante", took the initiative of supplying an address for the service of documents or of giving himself up.

The Court does not see how Mr. Colozza could have taken the second or the third course; it is not established that he was in any way aware of the proceedings instituted against him.

The first alleged shortcoming concerns nothing more than a regulatory offence (illecito amministrativo); the consequences which the Italian judicial authorities attributed to it are manifestly disproportionate, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see, mutatis mutandis, the above-mentioned De Cubber judgment, Series A no. 86, p. 16, para. 30 in fine).

33. There was therefore a breach of the requirements of Article 6 para. 1 (art. 6-1).

(…)

CASE OF DE CUBBER v. BELGIUM

(Application no. 9186/80) COURT (CHAMBER), 26 October 1984

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Belgian citizen born in 1926. He lives in Brussels and is a sales manager.
8. On 4 April 1977, he was arrested by the police at his home and taken to Oudenaarde where he was questioned in connection with a car theft.
   Warrants of arrest for forgery and uttering forged documents were issued against the applicant on the following day, on 6 May and on 23 September 1977. The first warrant - notice no. 10.971/76 - was issued by Mr. Pilate, an investigating judge at the Oudenaarde criminal court (tribunal correctionnel), and the second and third - notices nos. 3136/77 and 6622/77 - by Mr. Van Kerkhoven, the other investigating judge at the same court.
9. Prior to that, in the capacity of judge (juge assesseur) of the same court sitting either on appeal (judgment of 3 May 1968) or at first instance (judgments of 17 January, 7 March and 28 November 1969), Mr. Pilate had already dealt with criminal proceedings brought against Mr. De Cubber in connection with a number of offences; those proceedings had led variously to an unconditional or conditional discharge (relaxe) (17 January and 7 March 1969, respectively) or to conviction.
   More recently, Mr. Pilate had had to examine, in his capacity of investigating judge, a criminal complaint filed by Mr. De Cubber (16 November 1973) and, in his capacity of judge dealing with the attachment of property (juge des saisies), certain civil cases concerning him (1974-1976). In regard to each of these cases, the applicant had applied to the Court of Cassation to have the case removed, on the ground of bias (suspicion légitime; Article 648 of the Judicial Code), from Mr. Pilate or from the Oudenaarde court as a whole; each of these requests had been held inadmissible or unfounded.
10. At the outset Mr. Van Kerkhoven dealt with cases nos. 3136/77 and 6622/77 but he was on several occasions prevented by illness from attending his chambers. He was replaced, initially on an occasional and temporary basis and, as from October 1977, on a permanent basis, by Mr. Pilate, who retained responsibility for case no. 10.971/76.
11. In case no. 6622/77, a single-judge chamber of the Oudenaarde court (Mr. De Wynter) sentenced Mr. De Cubber on 11 May 1978 to one year's imprisonment and a fine of 4,000 BF. He did not appeal against this decision.
12. After preliminary investigations lasting more than two years, a chamber of the court (the chambre du conseil) ordered the joinder of cases nos. 10.971/76 and 3136/77 and on 11 May 1979 committed Mr. De Cubber for trial. These cases related to several hundred alleged offences committed by fifteen accused, headed by the applicant; there were no less than nineteen persons intervening to claim damages.
    For the purpose of the trial, the court, which over the years had nine or ten titular judges, sat as a chamber composed of a president and two judges, including Mr. Pilate. Mr. De Cubber stated that he protested orally against the latter's presence, but he did not have recourse to any of the legal remedies open to him for this purpose, such as a formal challenge.
    After a hearing which lasted two half-days on 8 and 22 June 1979, the court gave judgment on 29 June 1979. Mr. De Cubber was acquitted on two counts and convicted on the remainder, note being taken of the fact that he was a recidivist. He was accordingly sentenced, in respect of one matter, to five years' imprisonment and a fine of 60,000 BF and, in respect of another, to one year's imprisonment and a fine of 8,000 BF; his immediate arrest was ordered.

13. Both the applicant and the public prosecutor's department appealed. On 4 February 1980, the Ghent Court of Appeal reduced the first sentence to three years' imprisonment and a fine of 20,000 BF and upheld the second. In addition, it unanimously imposed a third sentence, namely one month's imprisonment and a fiscal fine, for offences which the Oudenaarde court had - wrongly, in the Court of Appeal's view - treated as being linked with others by reason of a single criminal intent.

14. Mr. De Cubber appealed to the Court of Cassation, raising some ten different points of law. One of his grounds, based on Article 292 of the Judicial Code (see paragraph 19 below) and Article 6 para. 1 (art. 6-1) of the Convention, was that Mr. Pilate had been both judge and party in the case since after conducting the preliminary investigation he had acted as one of the trial judges.

The Court of Cassation gave judgment on 15 April 1980. It held that this combination of functions violated neither Article 292 of the Judicial Code nor any other legal provision - such as Article 6 para. 1 (art. 6-1) of the Convention - nor the rights of the defence. On the other hand, the Court of Cassation upheld a plea concerning the confiscation of certain items of evidence and, to this extent, referred the case back to the Antwerp Court of Appeal; the latter court has in the meantime (on 4 November 1981) directed that the items in question be returned. The Court of Cassation also quashed, of its own motion and without referring the case back, the decision under appeal in so far as the appellant had been sentenced to a fiscal fine. The remainder of the appeal was dismissed.

II. THE RELEVANT LEGISLATION

A. Status and powers of investigating judges

15. Investigating judges, who are appointed by the Crown "from among the judges of the court of first instance" (Article 79 of the Judicial Code), conduct the preparatory judicial investigation (Articles 61 et seq. of the Code of Criminal Procedure). The object of this procedure is to assemble the evidence and to establish any proof against the accused as well as any circumstances that may tell in his favour, so as to provide the chambre du conseil or the chambre des mises en accusation, as the case may be, with the material which it needs to decide whether the accused should be committed for trial. The procedure is secret; it is not conducted in the presence of both parties nor is there any legal representation.

The investigating judge also has the status of officer of the criminal investigation police. In this capacity, he is empowered to inquire into serious and lesser offences (crimes et délits), to assemble evidence and to receive complaints from any person claiming to have been prejudiced by such offences (Articles 8, 9 in fine and 63 of the Code of Criminal Procedure). When so acting, he is placed under the "supervision of the procureur général (State prosecutor)" (Article 279 of the Code of Criminal Procedure and Article 148 of the Judicial Code), although this does not include a power to give directions. "In all cases where the suspected offender is deemed to have been caught in the act", the investigating judge may take "directly" and in person "any action which the procureur du Roi (public prosecutor) is empowered to take" (Article 59 of the Code of Criminal Procedure).

16. Save in the latter category of case, the investigating judge can take action only after the matter has been referred to him either by means of a formal request from the procureur du Roi for the opening of an inquiry (Articles 47, 54, 60, 61, 64 and 138 of the Code of Criminal Procedure) or by means of a criminal complaint coupled with a claim for damages (constitution de partie civile; Articles 63 and 70).

If a court includes several investigating judges, it is for the presiding judge to allocate cases amongst them. In principle, cases are assigned to them in turn, from week to week; however, this is not an inflexible rule and the presiding judge may depart therefrom, for

example if the matter is urgent or if a new case has some connection with one that has already been allocated.

17. In order to facilitate the ascertainment of the truth, the investigating judge is invested with wide powers; according to the case-law of the Court of Cassation, he may "take any steps which are not forbidden by law or incompatible with the standing of his office" (judgment of 2 May 1960, Pasicrisie 1960, I, p. 1020). He can, inter alia, summon the accused to appear or issue a warrant for his detention, production before a court or arrest (Articles 91 et seq. of the Code of Criminal Procedure); question the accused, hear witnesses (Articles 71 to 86 and 92 of the same Code), confront witnesses with each other (Article 942 of the Judicial Code), visit the scene of the crime (Article 62 of the Code of Criminal Procedure), visit and search premises (Articles 87 and 88 of the same Code), take possession of evidence (Article 89), and so on. The investigating judge has to report to the chambre du conseil on the cases with which he is dealing (Article 127); he takes, by means of an order, decisions on the expediency of measures requested by the public prosecutor's department, such orders being subject to an appeal to the chambre des mises en accusation of the Court of Appeal.

18. When the investigation is completed, the investigating judge transmits the case-file to the procureur du Roi, who will return it to him with his submissions (Article 61, first paragraph).

It is then for the chambre du conseil, which is composed of a single judge belonging to the court of first instance (Acts of 25 October 1919, 26 July 1927 and 18 August 1928), to decide - unless it considers it should order further inquiries - whether to discharge the accused (non-lieu; Article 128 of the Code of Criminal Procedure), to commit him for trial before a district court (tribunal de police; Article 129) or a criminal court (tribunal correctionnel; Article 130) or to send the papers to the procureur général attached to the Court of Appeal (Article 133), depending upon the circumstances.

Unlike his French counterpart, the Belgian investigating judge is thus never empowered to refer a case to the trial court himself. Before taking its decision, the chambre du conseil - which sits in camera - will hear the investigating judge's report. This report will take the form of an oral account of the state of the investigations; the investigating judge will express no opinion therein as to the accused's guilt, it being for the public prosecutor's department to deliver concluding submissions calling for one decision or another.

B. Investigating judges and incompatibilities

19. Article 292 of the 1967 Judicial Code prohibits "the concurrent exercise of different judicial functions ... except where otherwise provided by law"; it lays down that "any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function" shall be null and void.

This rule applies to investigating judges, amongst others. Article 127 specifies that "proceedings before an assize court shall be null and void if the presiding judge or another judge sitting is a judicial officer who has acted in the case as investigating judge ...".

Neither can an investigating judge sit as an appeal-court judge, for otherwise he would have "to review on appeal, and thus as last-instance trial judge, the legality of investigation measures ... which [he] had taken or ordered at first instance" (Court of Cassation, 18 March 1981, Pasicrisie 1981, I, p. 770, and Revue de droit pénal et de criminologie, 1981, pp. 703-719).

20. On the other hand, under the third paragraph of Article 79 of the Judicial Code, as amended by an Act of 30 June 1976, "investigating judges may continue to sit, in accordance with their seniority, to try cases brought before a court of first instance". According to the drafting history and decided case-law on this provision, it is immaterial that the cases are ones previously investigated by the judges in question: they would in that event be exercising, not "some other judicial function" within the meaning of Article 292, but rather

the same function of judge on the court of first instance; it would be only their assignment that had changed (Parliamentary Documents, House of Representatives, no. 59/49 of 1 June 1967; Court of Cassation, 8 February 1977, Pasicrisie 1977, I, p. 622-623; Court of Cassation judgment of 15 April 1980 in the present case, see paragraph 14 above).
In the case of Blaise, the Court of Cassation confirmed this line of authority in its judgment of 4 April 1984, which followed the submissions presented by the public prosecutor's department. After dismissing various arguments grounded on general principles of law, the Court of Cassation rejected the argument put forward by the appellant on the basis of Article 6 para. 1 (art. 6-1) of the Convention:
"However, as regards the application of Article 6 para. 1 (art. 6-1) ..., when a case requires a determination of civil rights and obligations or of a criminal charge, the authority hearing the case at first instance and the procedure followed by that authority do not necessarily have to satisfy the conditions laid down by the above-mentioned provision, provided that the party concerned or the accused is able to lodge an appeal against the decision affecting him taken by that authority with a court which does offer all the guarantees stipulated by Article 6 para. 1 (art. 6-1) and has competence to review all questions of fact and of law. In the present case, the appellant does not maintain that the court of appeal which convicted him did not offer those guarantees ...
In any event, the principles and the rule relied on in the ground of appeal do not have the scope therein suggested;
From the sole fact that a trial judge inquired into the case as an investigating judge it cannot be inferred that the accused's right to an impartial court has been violated. It cannot legitimately be feared that the said judge does not offer the guarantees of impartiality to which every accused is entitled.
The investigating judge is not a party adverse to the accused, but a judge of the court of first instance with the responsibility of assembling in an impartial manner evidence in favour of as well as against the accused. (…) " (…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

23. Under Article 6 para. 1 (art. 6-1),
"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ... ."
One of the three judges of the Oudenaarde criminal court who, on 29 June 1979, had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question: in one case he had done so from the outset and in the other he had replaced a colleague, at first on a temporary and then on a permanent basis (see paragraphs 8, 10 and 12 above). On the strength of this, Mr. De Cubber contended that he had not received a hearing by an "impartial tribunal"; his argument was, in substance, upheld by the Commission.
The Government disagreed. They submitted:
- as their principal plea, that Mr. Pilate's inclusion amongst the members of the trial court had not adversely affected the impartiality of that court and had therefore not violated Article 6 para. 1 (art. 6-1);
- in the alternative, that only the Ghent Court of Appeal, whose impartiality had not been disputed, had to satisfy the requirements of that Article (art. 6-1);
- in the further alternative, that a finding of violation would entail serious consequences for courts, such as the Oudenaarde criminal court, with "limited staff".

A. The Government's principal plea

24. In its Piersack judgment of 1 October 1982, the Court specified that impartiality can "be tested in various ways": a distinction should be drawn "between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect" (Series A no. 53, p. 14, para. 30).

25. As to the subjective approach, the applicant alleged before the Commission that Mr. Pilate had for years shown himself somewhat relentless in regard to his (the applicant's) affairs (see paragraphs 45-47 of the Commission's report), but his lawyer did not maintain this line of argument before the Court; the Commission, for its part, rejected the Government's criticism that it had made a subjective analysis (see paragraphs 63, 68-69 and 72-73 of the report; verbatim record of the hearings held on 23 May 1984).
However this may be, the personal impartiality of a judge is to be presumed until there is proof to the contrary (see the same judgment, loc. cit.), and in the present case no such proof is to be found in the evidence adduced before the Court. In particular, there is nothing to indicate that in previous cases Mr. Pilate had displayed any hostility or ill-will towards Mr. De Cubber (see paragraph 9 above) or that he had "finally arranged", for reasons extraneous to the normal rules governing the allocation of cases, to have assigned to him each of the three preliminary investigations opened in respect of the applicant in 1977 (see paragraphs 8, 10 and 16 above; paragraph 46 of the Commission's report).

26. However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of 17 January 1970 (Series A no. 11, p. 17, para. 31), "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed (21 February 1979, Pasicrisie 1979, I, p. 750), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see the above-mentioned judgment of 1 October 1982, pp. 14-15, para. 30).

27. Application of these principles led the European Court, in its Piersack judgment, to find a violation of Article 6 para. 1 (art. 6-1): it considered that where an assize court had been presided over by a judge who had previously acted as head of the very section of the Brussels public prosecutor's department which had been responsible for dealing with the accused's case, the impartiality of the court "was capable of appearing open to doubt" (ibid., pp. 15-16, para. 31). Despite some similarities between the two cases, the Court is faced in the present proceedings with a different legal situation, namely the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case.

28. The Government put forward a series of arguments to show that this combination of functions, which was unquestionably compatible with the Judicial Code as construed in the light of its drafting history (see paragraph 20, first sub-paragraph, above), was also reconcilable with the Convention. They pointed out that in Belgium an investigating judge is fully independent in the performance of his duties; that unlike the judicial officers in the public prosecutor's department, whose submissions are not binding on him, he does not have the status of a party to criminal proceedings and is not "an instrument of the prosecution"; that "the object of his activity" is not, despite Mr. De Cubber's allegations, "to establish the guilt of the person he believes to be guilty" (see paragraph 44 of the Commission's report), but to "assemble in an impartial manner evidence in favour of as well as against the accused", whilst maintaining "a just balance between prosecution and defence", since he "never ceases to be a judge"; that he does not take the decision whether to commit the accused for trial - he merely presents to the chambre du conseil, of which

he is not a member, objective reports describing the progress and state of the preliminary investigations, without expressing any opinion of his own, even assuming he has formed one (see paragraphs 52-54 of the Commission's report and the verbatim record of the hearings held on 23 May 1984).

29. This reasoning no doubt reflects several aspects of the reality of the situation (see paragraphs 15, first sub-paragraph, 17 in fine and 18 above) and the Court recognises its cogency. Nonetheless, it is not in itself decisive and there are various other factors telling in favour of the opposite conclusion.

To begin with, a close examination of the statutory texts shows the distinction between judicial officers in the public prosecutor's department and investigating judges to be less clear-cut than initially appears. An investigating judge, like "procureurs du Roi and their deputies", has the status of officer of the criminal investigation police and, as such, is "placed under the supervision of the procureur général"; furthermore, "an investigating judge" may, in cases "where the suspected offender is deemed to have been caught in the act", "take directly" and in person "any action which the procureur du Roi is empowered to take" (see paragraph 15, second sub-paragraph, above).

In addition to this, as an investigating judge he has very wide-ranging powers: he can "take any steps which are not forbidden by law or incompatible with the standing of his office" (see paragraph 17 above). Save as regards the warrant of arrest issued against the applicant on 5 April 1977, the Court has only limited information as to the measures taken by Mr. Pilate in the circumstances, but, to judge by the complexity of the case and the duration of the preparatory investigation, they must have been quite extensive (see paragraphs 8 and 12 above).

That is not all. Under Belgian law the preparatory investigation, which is inquisitorial in nature, is secret and is not conducted in the presence of both parties; in this respect it differs from the procedure of investigation followed at the hearing before the trial court, which, in the instant case, took place on 8 and 22 June 1979 before the Oudenaarde court (see paragraphs 12 and 15 above). One can accordingly understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the preparatory investigation, albeit with questions dictated by a concern to ascertain the truth.

Furthermore, through the various means of inquiry which he will have utilised at the investigation stage, the judge in question, unlike his colleagues, will already have acquired well before the hearing a particularly detailed knowledge of the - sometimes voluminous - file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused, appear, firstly, to be in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision. In addition, the criminal court (tribunal correctionnel) may, like the court of appeal (see paragraph 19 in fine above), have to review the lawfulness of measures taken or ordered by the investigating judge. The accused may view with some alarm the prospect of the investigating judge being actively involved in this process of review.

Finally, the Court notes that a judicial officer who has "acted in the case as investigating judge" may not, under the terms of Article 127 of the Judicial Code, preside over or participate as judge in proceedings before an assize court; nor, as the Court of Cassation has held, may he sit as an appeal-court judge (see paragraph 19 above). Belgian law-makers and case-law have thereby manifested their concern to make assize courts and appeal courts free of any legitimate suspicion of partiality. However, similar considerations apply to courts of first instance.

30. In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation (see paragraph 25 above), it recognises, having regard to the various factors

discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. Without underestimating the force of the Government's arguments and without adopting a subjective approach (see paragraphs 25 and 28 above), the Court recalls that a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the above-mentioned Delcourt judgment, Series A no. 11, pp. 14-15, para. 25 in fine).

B. The Government's first alternative plea

32. (...) The thrust of the plea summarised above is that the proceedings before the Oudenaarde court fell outside the ambit of 1Article 6 para. 1 (art. 6-1). At first sight, this plea contains an element of paradox. Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up. (...)

The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms.

The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies, contained in Article 26 (art. 26) (see the Guzzardi and the Van Oosterwijck judgments of 6 November 1980, Series A no. 39, p. 27, para. 72, and Series A no. 40, p. 17, para. 34). Thus, the Adolf judgment of 26 March 1982 noted that the Austrian Supreme Court had "cleared ... of any finding of guilt" an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6 para. 2 (art. 6-2) (Series A no. 49, pp. 17-19, paras. 38-41).

The circumstances of the present case, however, were different. The particular defect in question did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety.

C. The Government's further alternative plea

34. In the further alternative, the Government pleaded that a finding by the Court of a violation of Article 6 para. 1 (art. 6-1) would entail serious consequences for Belgian courts with "limited staff", especially if it were to give a judgment "on the general question of principle" rather than a judgment "with reasoning limited to the very special" facts of the case. In this connection, the Government drew attention to the following matters. From 1970 to 1984, the workload of such courts had more than doubled, whereas there had been no increase in the number of judges. At Oudenaarde and at Nivelles, for example, taking account of vacant posts (deaths, resignations, promotions) and occasional absences (holidays, illness, etc.), there were only six or seven judges permanently in attendance, all of whom were "very busy", if not overwhelmed with work. Accordingly, it was virtually inevitable that one of the judges had to deal in turn with different aspects of the same case. To avoid this, it would be necessary either to constitute "special benches" - which would be liable to occasion delays incompatible with the principle of trial "within a reasonable time" - or to

create additional posts, an alternative that was scarcely realistic in times of budgetary stringency.

35. The Court recalls that the Contracting States are under the obligation to organise their legal systems "so as to ensure compliance with the requirements of Article 6 para. 1 (art. 6-1)" (see the Guincho judgment of 10 July 1984, Series A no. 81, p. 16, para. 38); impartiality is unquestionably one of the foremost of those requirements. The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised.

D. Conclusion

36. To sum up, Mr. De Cubber was the victim of a breach of Article 6 para. 1 (art. 6-1).

CASE OF GÄFGEN v. GERMANY

Application no. 22978/05 GRAND CHAMBER, 1 June 2010

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The kidnapping of J. and the police investigation

10. J. was the youngest son of a banking family in Frankfurt am Main. He got to know the applicant, a law student, as an acquaintance of his sister.
11. On 27 September 2002 the applicant lured J., aged 11, into his flat in Frankfurt am Main by pretending that the child's sister had left a jacket there. He then killed the boy by suffocating him.
12. Subsequently, the applicant deposited a ransom note at J.'s parents' place of residence stating that J. had been kidnapped and demanding one million euros. The note further stated that if the kidnappers received the ransom and managed to leave the country, then the child's parents would see their son again. The applicant then drove to a pond located on a private property near Birstein, approximately one hour's drive from Frankfurt, and hid J.'s corpse under a jetty.
13. On 30 September 2002 at around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was under police surveillance. He paid part of the ransom money into his bank accounts and hid the remainder of the money in his flat. That afternoon, he was arrested at Frankfurt am Main airport with the police pinning him face down on the ground.
14. After having been examined by a doctor at the airport's hospital on account of shock and skin lesions, the applicant was taken to the Frankfurt am Main police headquarters. He was informed by detective officer M. that he was suspected of having kidnapped J. and was instructed about his rights as a defendant, notably the right to remain silent and to consult a lawyer. He was then questioned by M. with a view to finding J. Meanwhile, the police, having searched the applicant's flat, found half of the ransom money and a note concerning the planning of the crime. The applicant intimated that the child was being held by another kidnapper. At 11.30 p.m. he was allowed to consult a lawyer, Z., for thirty minutes at his request. He subsequently indicated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake.
15. Early in the morning of 1 October 2002, before M. came to work, Mr Daschner ("D."), deputy chief of the Frankfurt police, ordered another officer, Mr Ennigkeit ("E."), to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. D.'s subordinate heads of department had previously and repeatedly opposed such a measure (see also paragraph 47 below). Detective officer E. thereupon threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him in a cell with two huge black men who would sexually abuse him. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. The Government disputed that the applicant had been threatened with sexual abuse or had been physically assaulted during the questioning.
16. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of J.'s body after approximately ten minutes.

17. The applicant was then driven with M. and numerous other police officers to Birstein. He had refused to go with detective officer E. The police waited for a video camera to be brought to the scene. Then, the applicant, on the communicated order of the police officer in command and while being filmed, pointed out the precise location of the body. The police found J.'s corpse under the jetty at the pond near Birstein as indicated by the applicant. The applicant claimed that he had been obliged to walk without shoes through woods to where he had left the corpse and, on the orders of the police, he had had to point out its precise location. The Government disputed that the applicant had had to walk without shoes.

18. Upon forensic examination of the scene, the police discovered tyre tracks left by the applicant's car near the pond near Birstein. Under questioning by detective officer M. on the return journey from Birstein the applicant confessed to having kidnapped and killed J. He was then taken by the police to various other locations indicated by him where they secured J.'s school exercise books, a backpack, J.'s clothes and a typewriter used for the blackmail letter in containers. An autopsy carried out on J.'s corpse on 2 October 2002 confirmed that J. had died of suffocation.

19. Having returned to the police station, the applicant was then permitted to consult his lawyer, En., who had been instructed to act on his behalf by his mother and who had tried, in vain, to contact and advise the applicant earlier that morning.

20. In a note for the police file dated 1 October 2002, the deputy chief of the Frankfurt police, D., stated that he believed that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be threatened by detective officer E. with considerable pain which would not leave any trace of injury. He confirmed that the treatment itself was to be carried out under medical supervision. D. further admitted that he had ordered another police officer to obtain a "truth serum" to be administered to the applicant. According to the note, the threat to the applicant was exclusively aimed at saving the child's life rather than furthering the criminal proceedings concerning the kidnapping. As the applicant had disclosed the whereabouts of J.'s body, having been threatened with pain, no measures had in fact been carried out.

21. A medical certificate issued by a police doctor on 4 October 2002 confirmed that the applicant had a haematoma (7 cm x 5 cm) below his left collarbone, skin lesions and blood scabs on his left arm and his knees and swellings on his feet. A further medical certificate dated 7 October 2002 noted that, following an examination of the applicant on 2 October 2002, two haematomas on the left-hand side of the applicant's chest of a diameter of around 5 cm and 4 cm were confirmed, together with superficial skin lesions or blood scabs on his left arm, his knees and his right leg and closed blisters on his feet. According to the certificate, these discreet traces of injuries indicated that the injuries had been caused a few days before the examination. The precise cause of the injuries could not be diagnosed.

22. During subsequent questioning by the police on 4 October 2002, by a public prosecutor on 4, 14 and 17 October 2002, and by a district court judge on 30 January 2003 the applicant confirmed the confession he had made on 1 October 2002.

23. In January 2003 the Frankfurt am Main public prosecutor's office opened criminal investigation proceedings against the deputy chief of the Frankfurt police, D., and detective officer E. on the basis of the applicant's allegations that he had been threatened on 1 October 2002.

B. The criminal proceedings against the applicant

1. The proceedings in the Frankfurt am Main Regional Court

(a) The preliminary applications concerning the discontinuation of the proceedings and the inadmissibility of evidence

24. On 9 April 2003, the first day of the hearing, the applicant, represented by counsel, lodged a preliminary application for the proceedings to be discontinued. The basis of his claim was that during interrogation and prior to confessing he had been threatened by detective officer E. with being subjected to severe pain and sexual abuse. He argued that this treatment had been in breach of Article 136a of the Code of Criminal Procedure (see paragraph 61 below) and Article 3 of the Convention and warranted the discontinuation of the proceedings against him.

25. The applicant also lodged an alternative preliminary application seeking a declaration that, owing to the continuous effect (Fortwirkung) of the threat of violence against him on 1 October 2002, all statements which he had made to the investigation authorities should not be relied upon in the criminal proceedings. Moreover, the applicant sought a declaration that on account of the violation of Article 136a of the Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the confession extracted – the so-called "fruit of the poisonous tree" – was prohibited (Fernwirkung).

26. On 9 April 2003, in response to the first preliminary application, the Frankfurt am Main Regional Court dismissed the applicant's application for the discontinuation of the criminal proceedings. The court noted that in the applicant's submission, detective officer E. had threatened that a specialist was on his way to the police station by helicopter who, without leaving any traces, would inflict on him intolerable pain the likes of which he had never before experienced, if he continued to refuse to disclose J.'s whereabouts. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter. E. had further threatened that the applicant would be locked up in a cell with two big "Negroes" who would anally assault him. He would wish that he had never been born. The court found as a fact that the applicant had been threatened with the infliction of considerable pain if he refused to disclose the victim's whereabouts. However, the court did not find it established that the applicant had also been threatened with sexual abuse or had been otherwise influenced. The threat to inflict pain upon the applicant had been illegal pursuant to Article 136a of the Code of Criminal Procedure, and also pursuant to Article 1 and Article 104 § 1 of the Basic Law (see paragraphs 59-60 below) and in violation of Article 3 of the Convention.

27. However, notwithstanding this breach of the applicant's constitutional rights, the court found that the criminal proceedings were not, in consequence, barred and could proceed. It found that the use of the investigation methods in question, though prohibited in law, had not so restricted the rights of the defence that the criminal proceedings could not be pursued. In view of the seriousness of the charges against the applicant on the one hand, and the severity of the unlawful conduct during investigation on the other, there had not been such an exceptional and intolerable violation of the rule of law as to bar the continuation of the criminal proceedings.

28. In response to the applicant's second preliminary application, the Frankfurt am Main Regional Court found that, in accordance with Article 136a § 3 of the Code of Criminal Procedure, all confessions and statements hitherto made by the applicant before the police, a public prosecutor and a district court judge were inadmissible as evidence in the criminal proceedings because they had been obtained through the use of prohibited methods of interrogation.

29. The court found that on 1 October 2002 detective officer E. had used prohibited methods of interrogation within the meaning of Article 136a § 1 of the Code of Criminal Procedure by threatening the applicant with intolerable pain if he did not disclose the child's whereabouts. Therefore, any statements which the applicant had made as a consequence of this forbidden investigative measure were inadmissible as evidence. This exclusion of evidence (Beweisverwertungsverbot) did not only comprise the statements made immediately after the unlawful threat. It covered all further statements which the applicant had made to the investigation authorities since that date in view of the continuous effect of the violation of Article 136a of the Code of Criminal Procedure.

30. The procedural irregularity caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that his earlier statements made as a consequence of the threat of pain could not be used as evidence against him. However, the applicant had only been instructed about his right not to testify, without having been informed about the inadmissibility of the evidence that had been improperly obtained. He had therefore not been given the necessary "qualified instruction" (qualifizierte Belehrung) before making further statements.

31. However, the court limited the inadmissible evidence to the above-mentioned statements. It went on to dismiss the applicant's application for a declaration that, on account of the prohibited investigation methods, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities as a consequence of the statements extracted from the applicant ought to be excluded from trial (Fernwirkung). The court found as follows:

"... there is no long-range effect of the breach of Article 136a of the Code of Criminal Procedure meaning that the items of evidence which have become known as a result of the statement may likewise not be used [as evidence]. The Chamber agrees in this respect with the conciliatory view (Mittelmeinung) taken by scholars and in court rulings ... according to which a balancing [of interests] in the particular circumstances of the case had to be carried out, taking into account, in particular, whether there had been a flagrant violation of the legal order, notably of provisions on fundamental rights, and according to which the seriousness of the offence investigated also had to be considered. Balancing the severity of the interference with the defendant's fundamental rights – in the present case the threat of physical violence – and the seriousness of the offence he was charged with and which had to be investigated – the completed murder of a child – makes the exclusion of evidence which has become known as a result of the defendant's statement – in particular the discovery of the dead child and the results of the autopsy – appear disproportionate."

(b) The Regional Court's judgment

32. Following the above ruling on the applicant's preliminary applications lodged on the opening day of the trial, the proceedings continued. The next day, in his statement on the charges, the applicant admitted having killed J., but stated that he had not initially intended to do so. His defence counsel submitted that by confessing, the applicant wanted to take responsibility for his offence notwithstanding the interrogation methods used on 1 October 2002. As the trial proceeded, all further items of evidence found as a consequence of the applicant's original statement and which the applicant sought to have excluded were adduced. At the close of the trial on 28 July 2003 the applicant admitted that he had also intended from the outset to kill the child. He described his second confession as "the only way to accept his deep guilt" and as the "greatest possible apology for the murder of the child".

33. On 28 July 2003 the Frankfurt am Main Regional Court convicted the applicant, inter alia, of murder and kidnapping with extortion causing the death of the victim. It sentenced him to

life imprisonment and declared that his guilt was of particular gravity, warranting a maximum sentence (see paragraph 63 below).

34. The court found that at the hearing the applicant had been instructed anew about his right to remain silent and about the fact that none of his earlier statements could be used as evidence against him and had thereby been given the necessary qualified instruction. However, the applicant had, following the qualified instruction, confessed that he had kidnapped and killed J. His statements at the trial concerning the planning of his offence formed the essential, if not the only, basis for the court's findings of fact. They were corroborated by the testimony of J.'s sister, the blackmail letter and the note concerning the planning of the crime found in the applicant's flat. The findings of fact concerning the execution of the crime were exclusively based on the applicant's confession at the trial. Further items of evidence showed that he had told the truth also in this respect. These included the findings of the autopsy as to the cause of the child's death, the tyre tracks left by the applicant's car near the pond where the child's corpse had been found, and the discovery of money from the ransom which had been found in his flat or paid into his accounts.

35. In assessing the gravity of the applicant's guilt, the court observed that he had killed his 11-year-old victim and demanded one million euros in ransom in order to preserve his self-created image of a rich and successful young lawyer. It did not share the views expressed by the public prosecutor's office and the private accessory prosecutors that the applicant's confession "was worth nothing" as the applicant had only confessed to what had in any event already been proven. The fact that the applicant had volunteered a full confession at the trial, even though all his earlier confessions could not be used as evidence pursuant to Article 136a § 3 of the Code of Criminal Procedure, was a mitigating factor. However, even without his confession, the applicant would have been found guilty of kidnapping with extortion causing the death of the victim. The applicant had been kept under police surveillance after he had collected the ransom, which had later been found in his flat or paid into his accounts. Furthermore, it had been proved by the autopsy on J.'s corpse that the boy had been suffocated, and tyre tracks left by the applicant's car had been detected at the place where J.'s body had been found.

36. The court further observed that in questioning the applicant, methods of interrogation prohibited under Article 136a of the Code of Criminal Procedure had been employed. Whether and to what extent detective officer E. and the deputy chief of the Frankfurt police, D., were guilty of an offence because of these threats had to be determined in the criminal investigations then pending against them. However, their allegedly illegal acts did not mitigate the applicant's own guilt. The misconduct of police officers, belonging to the executive power, could not prevent the judiciary from assessing findings of fact in accordance with the law.

2. The proceedings in the Federal Court of Justice

37. On the day following his conviction, the applicant lodged an appeal on points of law with the Federal Court of Justice. He complained that the Regional Court, in its decision of 9 April 2003, had refused his preliminary application to discontinue the criminal proceedings against him. It had further refused to declare that the use in the criminal proceedings of all other items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the statements unlawfully extracted was prohibited. The applicant included a full copy of these applications of 9 April 2003, including the grounds given for them. He further included a copy of the Regional Court's decision of 9 April 2003 dismissing his application for the proceedings to be discontinued and argued in respect of the police's threats of torture against him that, developing the case-law of the Federal Court of Justice, such conduct "leapt beyond" the exclusion of

evidence and led to an impediment to the proceedings (dass ein derartiges Verhalten das Verwertungsverbot "überspringt" und ein Verfahrenshindernis begründet).

38. In his observations dated 9 March 2004 the Federal Public Prosecutor objected that the applicant's appeal on points of law was manifestly ill-founded. He argued that the use of prohibited methods of interrogation did not lead to an impediment to the criminal proceedings. Article 136a of the Code of Criminal Procedure expressly provided that the use of any of the prohibited methods enumerated entailed only the exclusion of evidence. The applicant had not complained of a breach of Article 136a § 3 of the Code of Criminal Procedure. In any event, there would be no grounds for such a complaint as the Regional Court had only used the applicant's confession at the trial, which he had made after having been informed that his previous statements had not been admitted as evidence.

39. On 21 May 2004 the Federal Court of Justice, without giving further reasons, dismissed the applicant's appeal on points of law as ill-founded.

3. The proceedings in the Federal Constitutional Court

40. On 23 June 2004 the applicant lodged a complaint with the Federal Constitutional Court. Summarising the facts underlying the case and the content of the impugned decisions, he complained under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law about the way in which he had been questioned by the police on the morning of 1 October 2002. He argued that he had been threatened with being subjected to torture and sexual abuse if he did not disclose the child's whereabouts. In the circumstances of the case, this treatment amounted to torture within the meaning of Article 3 of the Convention and infringed Article 104 § 1 of the Basic Law. It also violated his absolute right to human dignity under Article 1 of the Basic Law, which lay at the heart of the provisions in question. These unjustifiable human rights violations ought to have been a bar to the criminal proceedings for murder and a prohibition on using the evidence obtained as a consequence of the confession extracted from him by means of prohibited measures.

41. On 14 December 2004 the Federal Constitutional Court, sitting as a panel of three judges, held that the applicant's constitutional complaint was inadmissible.

42. Firstly, in so far as the applicant complained of the failure of the criminal courts to discontinue the proceedings against him, the court found that he had not sufficiently substantiated his complaint. It observed that the Regional Court had already stated that the police's threat to inflict pain on the applicant had violated Article 136a of the Code of Criminal Procedure and Article 3 of the Convention and that the applicant's rights under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law had been disregarded.

43. However, the violation of fundamental rights outside the trial did not necessarily warrant the conclusion that the judgment delivered by a criminal court, which was based on the findings made during the trial, breached constitutional law. In the present case, the criminal courts had found that the methods of investigation used by the police had been prohibited, but had differed from the applicant as to the legal consequences that flowed from that finding. They had taken the view that the statements obtained as a result of the measures in question could not be used but that there was no bar to the specific criminal proceedings being pursued.

44. According to the Federal Constitutional Court, the procedural flaw of having used prohibited investigation measures could be regarded as having been remedied by the criminal courts, because they had prohibited the admission of the statements obtained thereby. Such a prohibition was prescribed by Article 136a § 3 of the Code of Criminal Procedure in order to compensate for a prior infringement of the rights of the person concerned. However, the circumstances in which substantial procedural irregularities might entail a bar to criminal proceedings were not laid down in law. In these circumstances, the applicant had failed to explain why the contested methods of

investigation had not only required a prohibition on using the statements obtained thereby as evidence, but should also lead to a bar to criminal proceedings against him.

45. Secondly, the Federal Constitutional Court found that, in so far as the applicant complained that the Regional Court had refused to exclude the use in the proceedings of all items of evidence obtained as a result of the confession extracted under duress, his constitutional complaint was likewise inadmissible. It held that the applicant had failed to raise this issue in the proceedings before the Federal Court of Justice.

46. The decision was served on the applicant's lawyer on 22 December 2004.

C. Subsequent events

1. The criminal proceedings against the police officers

47. On 20 December 2004 the Frankfurt am Main Regional Court delivered judgments against the deputy chief of the Frankfurt police, D., and detective officer E. The court found that on the morning of 1 October 2002 D. had ordered that the applicant was to be questioned while being subjected to pain in the manner set out in his subsequent note for the police file (see paragraph 20 above). By doing so, he had acted against the advice of all his subordinate heads of department entrusted with the investigation into J.'s kidnapping. The heads of department had opposed this measure, which D. had previously ordered on the evening of 30 September 2002 and then twice on the morning of 1 October 2002. The heads of department had resisted the orders, proposing instead further questioning and confrontation of the applicant with J.'s family. D. had then issued an order to detective officer E. directing him to comply with his instructions that the applicant should be threatened with torture and, if necessary, subjected thereto. The subjection to pain was to be carried out under medical supervision, without any traces being left, by another specially trained police officer, who would be brought to the police station by helicopter. A police doctor had agreed to supervise the execution of D.'s order. The court noted that the measure had been aimed at finding out where the applicant had hidden J., whose life D. believed was at great risk. Therefore, E. had threatened the applicant in the manner ordered by D. and had also informed him that a "truth serum" would be administered. After approximately ten minutes, the applicant confessed that he had hidden J.'s body under a jetty at a pond near Birstein.

48. The Regional Court observed that the method of investigation had not been justified. It rejected the defence of "necessity" because the method in question violated human dignity, as codified in Article 1 of the Basic Law. Respect for human dignity also lay at the heart of Article 104 § 1, second sentence, of the Basic Law and Article 3 of the Convention. The protection of human dignity was absolute, allowing of no exceptions or any balancing of interests.

49. The Frankfurt am Main Regional Court convicted detective officer E. of coercion committed by an official in the course of his duties. However, in terms of penalty, it cautioned the defendant and imposed a suspended fine of 60 euros (EUR) per diem for 60 days, which the defendant would be required to pay if he committed another offence during the probation period. Furthermore, the court convicted the deputy chief of the Frankfurt police, D., of having incited E., a subordinate, to commit coercion in the course of his duties. It also cautioned D. and imposed on him a suspended fine of EUR 120 per diem for 90 days. The applicant had given evidence as a witness in these proceedings.

50. In determining the sentences, the Regional Court considered that there were significant mitigating factors to be taken into account. It took into consideration that the defendants' sole concern had been to save J.'s life and that they had been under extreme pressure because of their respective responsibilities vis-à-vis the superior authority and the public. They had been exhausted at the relevant time and had acted in a very tense and hectic

situation. They did not have any previous convictions. Moreover, D. had taken responsibility for his acts by admitting and explaining them in a note for the police file on the same day. The proceedings had lasted a long time and had attracted immense media attention. The defendants had suffered prejudice in their professional career: D. had been transferred to the Hessian Ministry of the Interior, and E. had been prohibited from acting in the prosecution of criminal offences. Furthermore, it was the first time that a conflict situation such as the one in the defendants' case had been assessed by a German criminal court. The court took into consideration as aggravating factors that D. had not acted spontaneously as he had already directed the use of force on the evening before he had given the order to E. Moreover, by their acts, the defendants had risked compromising the applicant's conviction for murder. The court further found that the preservation of the legal order did not warrant the enforcement of the fines imposed. Through the defendants' criminal conviction it had been made clear that an order by a State agent to use force to obtain information was illegal.

51. The judgment became final on 20 December 2004.

52. Subsequently, D. was appointed chief of the Police Headquarters for Technology, Logistics and Administration.

2. The official liability proceedings brought by the applicant

53. On 28 December 2005 the applicant applied to the Frankfurt am Main Regional Court for legal aid for bringing official liability proceedings against the Land of Hesse for the payment of compensation. He claimed that he had been traumatised and in need of psychological treatment because of the methods deployed during the police investigation.

54. In its submissions dated 27 March 2006 the Frankfurt am Main police headquarters contested that E.'s conduct when questioning the applicant in the morning of 1 October 2002 was to be legally classified as coercion and amounted to a breach of official duties.

55. On 28 August 2006 the Frankfurt am Main Regional Court dismissed the applicant's application for legal aid and the applicant appealed.

56. On 28 February 2007 the Frankfurt am Main Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it confirmed, in particular, that police officers D. and E., when threatening the applicant, had infringed human dignity, which was inviolable, and had thus breached their official duties. However, the applicant would face difficulties establishing causation between the threats of torture and alleged mental damage allegedly necessitating psychological treatment. The officers' threat was negligible compared to the traumatisation caused by the fact of having killed a child. Moreover, even assuming that the applicant would be able to prove that detective officer E. had shaken him, causing him to hit his head against a wall, or had once hit him on the chest, allegedly causing a haematoma, such physical damage would be too minor to necessitate the payment of compensation. Furthermore, the violation of his human dignity by the threat of torture did not warrant the payment of compensation since the applicant had obtained sufficient satisfaction for this by the exclusion of his statements as evidence and the criminal conviction of the police officers.

57. On 19 January 2008 the Federal Constitutional Court, allowing a constitutional complaint by the applicant, quashed the Court of Appeal's decision and remitted the case to that court. It found that in refusing to grant the applicant legal aid, the Court of Appeal had violated the principle of equal access to court. In particular, that court had speculated that the applicant would not be able to prove that the threat to torture him had led to mental damage. In addition to that, it was not obvious that the physical injuries the applicant claimed to have suffered in the course of the interrogation, during which he had been handcuffed, could be considered to be of minor importance. Moreover, the question whether the violation of the applicant's human dignity necessitated the payment of damages despite the satisfaction he had already obtained was a difficult legal question on

which no precedent existed in a judgment of a court of final instance. It should, therefore, not be determined in an application for legal-aid proceedings.

58. The remitted proceedings are still pending before the Frankfurt am Main Regional Court.

II. RELEVANT DOMESTIC, PUBLIC INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE

A. Provisions of domestic law

1. The Basic Law

59. Article 1 § 1 of the Basic Law, on the protection of human dignity, reads as follows:
"Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authorities."

60. Article 104 § 1, second sentence, of the Basic Law, on the rights of persons in detention, provides:
"Persons taken into custody may not be subjected to mental or to physical ill-treatment."

2. The Code of Criminal Procedure

61. Article 136a of the Code of Criminal Procedure, on prohibited methods of interrogation (verbotene Vernehmungsmethoden), provides:
"1. The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.
2. Measures which impair the accused's memory or ability to understand and accept a given situation [Einsichtsfähigkeit] shall not be permitted.
3. The prohibition under sub-paragraphs 1 and 2 shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use." (…)

3. The Criminal Code

62. According to Article 211 of the Criminal Code, the intentional killing of a person is to be classified as murder if certain aggravating elements are present such as cupidity, treachery or intent to cover up another offence. Murder is punishable by life imprisonment.

63. A declaration by the sentencing court that the defendant's guilt is of a particular gravity may, inter alia, have a bearing on a subsequent decision regarding suspension of the latter part of the defendant's prison sentence on probation. Article 57a of the Criminal Code states that the court is to suspend the remainder of a life sentence on probation if the convicted person has served fifteen years of his sentence, provided that this can be justified in the interests of public security and the particular gravity of the defendant's guilt does not warrant the continued execution of the sentence. (…)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

75. The applicant complained that he had been subjected to torture contrary to Article 3 of the Convention in the context of his police interrogation on 1 October 2002. He argued that he was still a victim of that breach of Article 3, which provides:
"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

76. The Government contested that view, arguing that the applicant could no longer claim to be the victim of a violation of Article 3.

A. The applicant's victim status

77. Article 34 of the Convention provides, where relevant:
"The Court may receive applications from any person ... 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. ..."

78. The Court considers that in the present case it cannot answer the question whether the applicant subsequently lost his initial status as the victim of a breach of Article 3 of the Convention within the meaning of Article 34 of the Convention without having first established how the applicant was treated in the context of his questioning, and without having assessed the severity of that treatment in the light of Article 3. Thereafter, the adequacy or otherwise of the authorities' response thereto can be considered.

1. Whether the impugned treatment was contrary to Article 3

(a) The Chamber judgment

79. The Chamber considered that the applicant had been threatened by detective officer E. on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence causing considerable pain in order to make him disclose J.'s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond reasonable doubt. Having regard to all the circumstances of the case, the Chamber characterised this threat of violence as inhuman treatment prohibited by Article 3.

(b) The parties' submissions

(i) The applicant

80. The applicant claimed that during his interrogation by detective officer E. on 1 October 2002, he had been subjected to treatment prohibited by Article 3. Detective officer E. had threatened that "intolerable pain the likes of which he had never before experienced" would be inflicted on him if he did not disclose J.'s whereabouts. He had threatened that this pain would be inflicted without leaving any traces and that an officer, specially trained in such techniques, was en route to the police station in a helicopter. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter and had described the pain of the torture in graphic detail. The applicant alleged that concrete measures had in fact been taken at that time in that a police doctor had subsequently confirmed that she

had been prepared to be present during the torture so as to prevent the applicant from losing consciousness or the procedure from leaving any traces.

81. The applicant further alleged that he had been threatened with sexual abuse in that he would be locked up in a cell with two large "Negroes" who would anally assault him. Physical injuries had also been inflicted on him during the interrogation. E. had hit him several times on the chest, causing bruising, and on one occasion had pushed him, causing his head to hit the wall. He produced two medical certificates of 4 and 7 October 2002 issued by police doctors to support this claim (see paragraph 21 above). He claimed that, afterwards, he had been taken to Birstein against his will and had been obliged to walk without shoes through woods to where he had left the corpse and, at the command of the police, he had had to point out its precise location. He had also been forced to disclose other evidence on the return journey from Birstein. He claimed that he had been threatened by the police at a time when they had already been aware that J. was dead and had therefore been forced to incriminate himself solely in order to further the criminal investigations against him.

82. Referring, in particular, to Articles 1 and 15 of the United Nations Convention against Torture (see paragraph 64 above), the applicant argued that the treatment to which he had been subjected in order to force him to confess should be characterised as torture.

(ii) The Government

83. As in their submissions before the Chamber, the Government recognised that, regrettably, Article 3 had been violated during the applicant's questioning on 1 October 2002. They stressed, however, that the applicant had only been threatened with severe pain if he did not inform the police about J.'s whereabouts. They contested that there had been additional threats of sexual assault upon the applicant. They further contested that the injuries the applicant had suffered had been caused during the interrogation in question and that he had been forced to walk without shoes at Birstein. He had suffered skin lesions when he was arrested at Frankfurt am Main airport. They underlined that until now, the applicant had claimed that E. had hit him only once on the chest and that his head had only once hit the wall. The domestic courts had not found the additional threats or injuries to have been established.

84. The Government further pointed out that police officers D. and E. had resorted to the method of interrogation in question in order to save the life of J., which they had considered to be at great risk. They had not known that J. had already been killed at that time.

(…)

(c) The Court's assessment

(i) Recapitulation of the relevant principles

87. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation. The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective

of the conduct of the person concerned. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.

88. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see Jalloh v. Germany [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it.

89. The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (see Jalloh, cited above, § 68).

90. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating.

91. The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment.

92. In assessing the evidence on which to base the decision as to whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see Jalloh, cited above, § 67). The Court has held, in particular, that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.

93. Where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny. Where domestic proceedings have taken place, however, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts.

(ii) Application of these principles to the present case

(α) The Court's assessment of the facts

94. In assessing the treatment to which the applicant was subjected on 1 October 2002, the Court notes that it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., with intolerable pain if he refused to

disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. This was, indeed, established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant (see paragraph 26 above) and in the criminal proceedings against the police officers (see paragraph 47 above). Furthermore, it is clear both from D.'s note for the police file (see paragraph 20 above) and from the Regional Court's finding in the criminal proceedings against D. (see paragraph 47 above) that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent.

95. As D. had ordered his subordinate heads of department on several occasions to use force against the applicant, if necessary, before finally ordering E. to threaten the applicant with torture (see paragraph 47 above), his order cannot be regarded as a spontaneous act and a clear element of intention was present. It further appears that the applicant, while detained, was handcuffed in the interrogation room (see paragraph 57 above) and was therefore in a situation of particular vulnerability and constraint. The Court, having regard to the findings of the domestic courts and to the material before it, is persuaded that the police officers resorted to the method of interrogation in question in the belief that J.'s life might be saved.

96. The Court further observes that the applicant alleged that he had also been physically assaulted and injured and threatened with sexual abuse during interrogation. In assessing whether these allegations, which were contested by the Government, have been proven beyond reasonable doubt, the Court finds that in view of the medical certificates furnished by the applicant, his assertion of assault during his interrogation is not wholly without foundation. These certificates indicate that the applicant had indeed sustained bruising to his chest in the days prior to the medical examinations.

97. However, the Court also notes the Government's explanation as to the cause of the applicant's injuries, together with the submissions of J.'s parents on this point. They argued, by reference to the applicant's own statements in his book published in 2005, that all of the injuries, including lesions to his skin, which the applicant had incontestably sustained had been caused during his arrest when he was pinned, face down, on the ground (see paragraphs 13 and 14 above). The Court further notes that the domestic courts did not find any of the applicant's additional allegations to have been established. It would appear that before the domestic courts, which heard and evaluated the evidence, the applicant had not made the allegations of physical injuries having been sustained during interrogation, at least not to the same extent as the way in which he did before this Court (see, in particular, paragraph 26 above). Moreover, the medical certificates contain no indication as to the probable causation of injuries (see paragraph 21 above).

98. In view of the foregoing, the Court is unable to conclude that the applicant's complaints concerning physical assaults and injuries together with the alleged threat of sexual abuse during interrogation have been established beyond reasonable doubt.

99. The Court further observes that in the applicant's submission, he was again subjected to treatment prohibited by Article 3 in that he was obliged to walk without shoes through woods in Birstein and was directly forced to point out the precise location of the corpse and to disclose other items of evidence. These allegations are likewise contested by the Government. The Court notes that, according to the findings of the domestic authorities, the applicant, following his interrogation, had agreed to accompany the police officers to the pond where he had hidden J.'s corpse (see paragraph 17 above). There is nothing to indicate that the applicant was verbally threatened en route to Birstein by any of the police officers present in order to make him indicate the precise location of the corpse. However, the question as to whether and to what extent the disclosure of evidence by the applicant in Birstein was causally connected to the threats issued at the police station remains a

question to be determined under Article 6. In view of the fact that the medical certificates contained a diagnosis of swellings and blisters on the applicant's feet (see paragraph 21 above), the Court finds that his allegation that he had been obliged to walk without shoes is not entirely without foundation. However, the domestic courts, having examined the evidence before them, did not consider this allegation – which the applicant does not appear to have mentioned from the outset in the domestic proceedings either – to have been proven (see, in particular, paragraph 26 above). The cause of the injuries was not established by the examining doctors. In these circumstances, the Court does not consider the applicant's allegations in this regard to have been proven beyond reasonable doubt.

100. In view of the foregoing, the Court considers it established that the applicant was threatened in the morning of 1 October 2002 by the police with being subjected to intolerable pain in the manner set out in paragraphs 94 to 95 above in order to make him disclose J.'s whereabouts.

(β) Legal qualification of the treatment

101. The Court notes the Government's acknowledgment that the treatment the applicant was subjected to by E. violated Article 3 of the Convention. However, having regard to the serious allegations of torture made by the applicant and the Government's claim of loss of victim status, the Court considers it necessary to make its own assessment of whether this treatment can be said to have attained the minimum level of severity to bring it within the scope of Article 3 and, if so, how it is to be classified. Having regard to the relevant factors indicated in the Court's case-law (see paragraphs 88-91 above), it will examine, in turn, the duration of the treatment to which the applicant was subjected, its physical or mental effects on him, whether it was intentional or otherwise, its purpose and the context in which it was inflicted.

102. In so far as the duration of the impugned conduct is concerned, the Court notes that the interrogation under threat of ill-treatment lasted for approximately ten minutes.

103. As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J.'s whereabouts, confessed under threat as to where he had hidden the body. Thereafter, he continued to elaborate in detail on J.'s death throughout the investigation proceedings. The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering. The applicant, however, did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result.

104. The Court further observes that the threat was not a spontaneous act but was premeditated and calculated in a deliberate and intentional manner.

105. As regards the purpose of the threats, the Court is satisfied that the applicant was intentionally subjected to such treatment in order to extract information on J.'s whereabouts.

106. The Court further notes that the threats of deliberate and imminent ill-treatment were made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability. It is clear that D. and E. acted in the performance of their duties as State agents and that they intended, if necessary, to carry out that threat under medical supervision and by a specially trained officer. Moreover, D.'s order to threaten the applicant was not a spontaneous decision, since he had given such an order on a number of earlier occasions and had become increasingly impatient at the non-compliance of his subordinates with his directions. The threat took place in an atmosphere of heightened tension and emotions in circumstances where the

police officers were under intense pressure, believing that J.'s life was in considerable danger.

107. In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law (see paragraph 87 above), the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

108. Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law (see paragraph 91 above), which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture (see paragraphs 64 and 90 above), and according to the views taken by other international human rights monitoring bodies (see paragraphs 66-68 above), to which the Redress Trust likewise referred, a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.

2. Whether the applicant lost his victim status

(a) The Chamber judgment

109. The Chamber considered that the applicant could no longer claim to be the victim of a violation of Article 3. It found that the domestic courts had expressly acknowledged, both in the criminal proceedings against the applicant and in the criminal proceedings against police officers D. and E., that the applicant's treatment during his interrogation by E. had violated Article 3. Moreover, the applicant had been afforded sufficient redress for this breach at national level. The two police officers involved in threatening him had been convicted and punished and had suffered prejudice in their careers. In the circumstances of the present case, these convictions had to be considered sufficient in affording redress in a manner other than by way of monetary compensation. Furthermore, the use of the proscribed methods of investigation had resulted in sanctions in that none of the applicant's pre-trial statements had been admitted as evidence at his trial.

(b) The parties' submissions

(i) The applicant

110. The applicant argued that he had not lost his status as the victim of a breach of Article 3. The domestic courts had failed to acknowledge clearly a breach of his Convention right in a legally binding manner. They had merely mentioned Article 3 in their decisions dismissing the applicant's applications and complaints.

111. Furthermore, the applicant claimed that he had not received adequate redress for the breach of the prohibition of torture. He had not derived any personal benefit from the convictions of D. and E., who, in any event, had been sentenced to very modest, suspended fines and who had otherwise suffered no disciplinary consequences for their conduct. D. had even been promoted following his conviction. The official liability proceedings, in which the applicant had claimed compensation for the damage resulting from his treatment in breach of Article 3, were still pending before the civil courts and, to date, he had not received any compensation. Furthermore, he argued that the status quo ante could only have been restored by the exclusion, at trial, of all items of evidence which had been obtained as a direct result of the violation of Article 3. This evidence, the admissibility of which had been determined at the outset of his trial, had secured his conviction and, by implication, the imposition of the maximum applicable penalty. The exclusion only of the pre-trial statements he had made as a result of coercion was not sufficient redress as such statements were not necessary for the prosecution's case against him once the real evidence had been admitted.

(ii) The Government

112. The Government asked the Grand Chamber to confirm the Chamber's finding that the applicant had lost his status as the victim of a violation of Article 3. Three German courts – namely the Regional Court and the Federal Constitutional Court in the criminal proceedings against the applicant and the Regional Court in the criminal proceedings against the police officers – had expressly acknowledged the breach of Article 3. These courts had underlined that human dignity was inviolable and that torture was prohibited even if the life of a person were at stake.

113. In the Government's submission, the applicant had also been afforded sufficient redress. The two police officers involved had been convicted in criminal proceedings and sentenced. The Government stressed that for a police officer to be tried and convicted of coercion was a very serious matter. Moreover, both police officers had been removed from their posts. The Government admitted that the applicant had not yet received compensation, but argued that since he had brought official liability proceedings before the domestic courts only after lodging his application with the Court, the fact that those proceedings were still pending could not be taken into consideration as far as the loss of his victim status was concerned. Moreover, the Frankfurt am Main Regional Court had excluded the admissibility not only of the confession of 1 October 2002, but also of all subsequent confessions made by the applicant before the police, the prosecution and a judge prior to his trial. However, the applicant, after having been instructed that his previous confessions could not be used in evidence, had nevertheless made a new full confession on the second day of his trial, before any other evidence had been introduced.
(…)

(c) The Court's assessment

(i) Recapitulation of the relevant principles

115. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention.

116. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake. In cases of willful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Secondly, an award of compensation to the applicant is required where appropriate or, at least, the possibility of seeking and obtaining compensation for the damage which the applicant sustained as a result of the ill-treatment.

117. As regards the requirement of a thorough and effective investigation, the Court reiterates that 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. Such an investigation, as with one under Article 2, should be capable of leading to the identification and punishment of those responsible. For an investigation to be effective in practice it is a prerequisite that the State has enacted criminal-law provisions penalising practices that are contrary to Article 3.

118. With regard to the requirement for compensation to remedy a breach of Article 3 at national level, the Court has repeatedly found that, in addition to a thorough and effective investigation, it is necessary for the State to have made an award of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment (see, in detail, the references in paragraph 116 above). The Court has already had occasion to indicate in the context of other Convention Articles that an applicant's victim status may depend on the level of compensation awarded at domestic level, having regard to the facts about which he or she complains before the Court. This finding applies, mutatis mutandis, to complaints concerning a breach of Article 3.

119. In cases of willful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of willful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice.

(ii) Application of these principles to the present case

120. The Court thus has to examine, firstly, whether the national authorities have acknowledged, either expressly or in substance, the breach of the Convention. It notes in this connection that in the criminal proceedings against the applicant, the Frankfurt am Main Regional Court, in its decision dated 9 April 2003, expressly stated that the threat to cause the applicant pain in order to extract a statement from him had not only constituted a prohibited method of interrogation under Article 136a of the Code of Criminal Procedure; the threat had also disregarded Article 3 of the Convention, which underlay that provision of the Code (see paragraph 26 above). Likewise, the Federal Constitutional Court, referring to the Regional Court's finding of a violation of Article 3, observed that the applicant's human dignity and the prohibition on subjecting prisoners to ill-treatment (Article 1 and Article 104 § 1, second sentence, of the Basic Law) had been disregarded (see paragraph 42 above). In addition to that, in its judgment of 20 December 2004 convicting police officers D. and E., the Frankfurt am Main Regional Court found that such methods of investigation could not be justified as an act of necessity because "necessity" was not a defence to a violation of the absolute protection of human dignity under Article 1 of the Basic Law, which also lay at the heart of Article 3 of the Convention (see paragraph 48 above). In view of this, the Grand Chamber, which agrees with the findings of the Chamber in this respect, is satisfied that the domestic courts which were called upon to rule on this issue acknowledged expressly and in an unequivocal manner that the applicant's interrogation had violated Article 3 of the Convention.

121. In assessing whether the national authorities further afforded the applicant appropriate and sufficient redress for the breach of Article 3, the Court must determine, in the first place, whether they carried out a thorough and effective investigation against those responsible in compliance with the requirements of its case-law. In doing so, the Court has previously taken into account several criteria. Firstly, important factors for an effective investigation, viewed as a gauge of the authorities' determination to identify and prosecute those responsible, are its promptness. Furthermore, the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as disciplinary measures taken, have been considered decisive. It is vital in ensuring that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined.

122. The Court notes in the present case that criminal investigations against police officers D. and E. were opened some three to four months after the applicant's questioning on 1 October 2002 (see paragraph 23 above) and that the officers were convicted in a final judgment some two years and three months after that date. Even though the Court notes that the Frankfurt am Main Regional Court mitigated their sentence in view of, among many other factors, the long duration of the proceedings (see paragraph 50 above), it is prepared to accept that the investigation and the criminal proceedings were, nevertheless, sufficiently prompt and expeditious to meet the standards set by the Convention.

123. The Court further observes that the police officers were found guilty of coercion and incitement to coercion respectively, under the provisions of German criminal law, for their conduct in their interrogation of the applicant which was in contravention of Article 3. However, the Court notes that they were sentenced for this contravention only to very modest and suspended fines. The Court reiterates in this connection that it is not its task to rule on the degree of individual guilt, or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to

protect the rights of those under its jurisdiction is adequately discharged. It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the State's duty to carry out an effective investigation would lose much of its meaning.

124. The Court does not overlook the fact that the Frankfurt am Main Regional Court, in determining D.'s and E.'s sentences, took into consideration a number of mitigating circumstances (see paragraph 50 above). It accepts that the present application is not comparable to other cases concerning arbitrary and serious acts of brutality by State agents which the latter then attempted to conceal, and in which the Court considered that the imposition of enforceable prison sentences would have been more appropriate. Nevertheless, imposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120 respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.

125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of criminal offences (see paragraph 50 above). D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief (see paragraph 52 above). In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted. Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.'s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty.

126. As to the additional requirement of compensation in order to remedy a breach of Article 3 at national level, the Court observes that the applicant availed himself of the possibility of seeking compensation for the damage sustained as a result of the violation of Article 3. However, his application for legal aid to bring such official liability proceedings, following a remittal, has itself, apparently, been pending for more than three years and, consequently, no hearing has yet been held and no judgment given on the merits of his claim. The Court would observe that, in practice, it has made awards under Article 41 of the Convention in respect of non-pecuniary damage in view of the seriousness involved in a violation of Article 3.

127. In any event, it considers that appropriate and sufficient redress for a Convention violation can only be afforded on condition that an application for compensation remains itself an effective, adequate and accessible remedy. Excessive delays in an action for compensation, in particular, will render the remedy ineffective. It finds that the domestic courts' failure to decide on the merits of the applicant's compensation claim for more than three years raises serious doubts as to the effectiveness of the official liability proceedings in the circumstances of the present case. The authorities do not appear to be determined to decide on the appropriate redress to be awarded to the applicant and thus have not reacted adequately and efficiently to the breach of Article 3 at issue.

128. The Court further notes that in the applicant's submission, redress for the authorities' breach of Article 3 could only have been granted by also excluding, at his trial, all items of evidence obtained as a direct result of the violation of that Article. It observes that in its

case-law as it stands, it has generally considered compliance with the requirements of an investigation and compensation both necessary and sufficient in order for a respondent State to provide adequate redress at national level in cases of ill-treatment by its agents breaching Article 3 (see paragraphs 116-19 above). However, it has also found that the question as to what measures of redress are appropriate and sufficient in order to remedy a breach of a Convention right depends on all the circumstances of the case (see paragraph 116 above). It would not, therefore, exclude the possibility that in cases in which the deployment of a method of investigation prohibited by Article 3 led to disadvantages for an applicant in criminal proceedings against him, appropriate and sufficient redress for that breach may have to entail, in addition to the above-mentioned requirements, measures of restitution addressing the issue of the continuing impact of that prohibited method of investigation on the trial, in particular the exclusion of evidence obtained by breaching Article 3.

129. In the present case, the Court does not, however, have to determine that issue and does not, therefore, have to examine at this stage whether the prohibited method of interrogation in the investigation proceedings can be said to have had a continuing impact on the applicant's trial and to have entailed disadvantages for him. Having regard to its above findings, it considers that, in any event, the different measures taken by the domestic authorities failed to comply fully with the requirement of redress as established in its case-law. The respondent State therefore did not afford the applicant sufficient redress for his treatment in breach of Article 3.

130. It follows that the applicant may still claim to be the victim of a violation of Article 3 within the meaning of Article 34 of the Convention.

B. Compliance with Article 3

131. The Court refers to its above finding (see paragraphs 94-108) that while being interrogated by the police on 1 October 2002 the applicant was threatened with torture in order to make him disclose J.'s whereabouts and that this method of interrogation constituted inhuman treatment as prohibited by Article 3.

132. There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

133. The applicant further submitted that his right to a fair trial had been violated, in particular, by the admission and use of evidence that had been obtained only as a result of the confession extracted from him in breach of Article 3. Article 6 provides in its relevant parts as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ..."

(…)

C. Compliance with Article 6 of the Convention

1. The Chamber judgment

147. The Chamber held that there had been no violation of Article 6 §§ 1 and 3. It observed that the Regional Court had excluded the use at trial of all pre-trial statements made by the applicant to the investigation authorities owing to the continuous effects of the prohibited methods of interrogation in the investigation proceedings. The domestic court had, however, used some items of evidence secured as an indirect result of the statements extracted from the applicant. The Chamber considered that there was a strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 rendered a trial as a whole unfair in the same way as the use of the extracted confession itself. However, in the particular circumstances of the case, it had been the applicant's new confession at the trial which had been the essential basis for his conviction. Other items of evidence, including the impugned real evidence, had been of an accessory nature only and had been relied upon merely to prove the veracity of that confession.

148. The Chamber was not persuaded that the applicant had no longer had any defence option left to him but to confess at the trial in view of the admission of the impugned items of evidence. In the domestic proceedings, in which he had been assisted by counsel, he had confirmed that he had volunteered his confession out of remorse. The fact that his confessions at the trial had differed could be seen as a variation in his defence strategy. The applicant had also taken the opportunity to challenge the impugned real evidence at his trial, and the Chamber acknowledged that the Regional Court had weighed up all the interests involved in deciding to admit that evidence.

149. In view of these elements, the Chamber concluded that the use of the impugned items of evidence had not rendered the applicant's trial as a whole unfair.

2. The parties' submissions

(a) The applicant

150. In the applicant's submission, the admission of real evidence obtained in breach of Article 3 had rendered his criminal trial unfair in violation of Article 6. Once that evidence had been admitted, he had been deprived, entirely, of his right to defend himself. He had also been deprived of the protection afforded by the principle against self-incrimination. He claimed that the evidence recovered in Birstein and on the return journey therefrom had been obtained by the police order directly forcing him to point out its precise whereabouts. He had been obliged to walk, without shoes, through woods to the place where he had hidden J.'s corpse. The fact that his directions as to where he had hidden the corpse and its consequent discovery had been recorded on videotape demonstrated that the events at Birstein had not been about the child's rescue but about the recovery of evidence in a manner aimed at securing his conviction.

151. The applicant argued that the impugned real evidence had been decisive in, and not merely accessory to, securing his conviction. Though other charges would have been possible, the self-incriminating evidence obtained as a result of his extracted confession was wholly necessary for the charge of and conviction for murder. There had been no other hypothetical clean path which would have led the police to this evidence at the relevant time. Whether they would ever have found it was a matter of pure speculation.

152. As the trial court at the outset of the trial had rejected his application to exclude the evidence obtained in violation of Article 3, the outcome of the trial had, at that point, effectively, been determined. Every possible defence strategy, such as relying on the right

to remain silent or alleging that J. had been killed accidentally or volunteering at an early stage a full confession in the hope of mitigation of sentence, had become ineffective. He had partially confessed on the second day of the trial and had only admitted to having killed J. intentionally at the end of the trial after all the impugned items of evidence which he had sought to have excluded had been adduced. Indeed, even the prosecution and the accessory prosecutors, in opposing any possibility of mitigation of sentence, had pointed out that he had only confessed to what had already been proven.

153. The applicant further submitted that, regardless of whether the method of interrogation was to be classified as torture or as inhuman treatment, the Convention (he referred, in particular, to the Court's judgment in Jalloh, cited above) and provisions of public international law (in particular, Article 14 of the International Covenant on Civil and Political Rights and Articles 15 and 16 of the United Nations Convention against Torture) warranted the exclusion of all evidence obtained by means of a violation of the absolute prohibition of torture and inhuman treatment. Contrary to the view taken by the domestic courts and by the Chamber, protection of the absolute right under Article 3 could not and should not be weighed against other interests, such as the satisfaction of securing a conviction. As a matter of principle, the exclusion of the evidence in question was essential for removing all incentives for engaging in torture or ill-treatment and thus for preventing such conduct in practice.

(b) The Government

154. The Government invited the Grand Chamber to confirm the Chamber's finding that there had been no violation of Article 6 §§ 1 and 3 of the Convention. As regards the way in which the impugned evidence had been obtained, they contested that the applicant had had to walk without shoes or had been subjected to further threats either in Birstein or on the return journey.

155. The Government accepted that the Regional Court had decided at the outset of the trial that the impugned items of evidence found in Birstein would be admitted as evidence at the trial. Nevertheless, the applicant had confirmed before the domestic courts that he had volunteered his confession at the trial out of remorse and because he wanted to take responsibility for his crime, even though he could also have remained silent or could have lied to the court. He might have changed his defence strategy in the hope that he would receive a more lenient sentence, but this decision had not been related to the use of the impugned items of evidence. It was not correct that the applicant had had no choice but to confess at the trial because, as the trial court had confirmed, it was possible that he might not have been found guilty of murder had he not confessed anew. Following a qualified instruction by the trial court, he had confessed, on the second day of his trial, and it was clear from this confession that he had killed J. intentionally. The difference between the first trial confession and the later one was comparatively minor in that the former had not included an admission that the death of J. had been part of his plan from the outset. This additional admission was not a necessary element to prove murder.

156. The Government underlined that the applicant's conviction had been based on the confession he had volunteered at his trial. The items of evidence secured after the journey to Birstein, such as J.'s corpse and the autopsy report thereon and the tyre tracks from the applicant's car at the pond, had been of an accessory nature only and had been used merely to test the veracity of the applicant's confession at the trial. This was clearly stated in the reasoning of the Regional Court's judgment convicting the applicant.

157. The Government noted that Article 6 of the Convention did not lay down any rules on the admissibility of evidence, as such, which was primarily a matter for regulation under national law. They underlined their obligation under the Convention to apply the criminal

law against a murderer. The public interest in having the murderer of an abducted child convicted was of very serious weight. The Government further argued that the case-law of the United States Supreme Court, which went furthest in prohibiting the use of the "fruit of the poisonous tree", needed careful analysis. In the leading case of Nix v. Williams, for instance, that court had held that a body found after an improper investigation could be admitted into evidence in circumstances where it would have been found in any event. It was likely in the present case that J.'s corpse, hidden at a place which the applicant had previously visited, would have been found sooner or later. (…)

3. The Court's assessment

(a) Recapitulation of the relevant principles

162. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.

163. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, inter alia, Khan v. the United Kingdom, no. 35394/97, § 34, ECHR 2000 V; Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002 IX).

164. In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia, Khan, cited above, §§ 35 and 37; Allan, cited above, § 43; and the judgment in Jalloh, cited above, § 96). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, Khan, cited above, §§ 35 and 37).

165. As to the examination of the nature of the Convention violation found, the Court reiterates that the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question (compare, inter alia, Khan, cited above, §§ 35-40). However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the

proceedings, even if the admission of such evidence was not decisive in securing a conviction (see the judgment in Jalloh, cited above, §§ 99 and 104.

166. Accordingly, the Court has found in respect of confessions, as such, that the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction (ibid.).

167. As to the use at the trial of real evidence obtained as a direct result of ill-treatment in breach of Article 3, the Court has considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see the judgment in Jalloh, cited above, § 105). In its Jalloh judgment, the Court left open the question whether the use of real evidence obtained by an act classified as inhuman and degrading treatment, but falling short of torture, always rendered a trial unfair, that is, irrespective of, in particular, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial (ibid., §§ 106 07). It found a breach of Article 6 in the particular circumstances of that case (ibid., §§ 107-08).

168. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of fair procedures under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, inter alia, Saunders v. the United Kingdom [GC], 17 December 1996, § 68, Reports 1996-VI; and the judgment in Jalloh, cited above, § 100).

(b) Application of these principles to the present case

169. As the requirements of Article 6 § 3 concerning the rights of the defence and the principle against self-incrimination are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (compare, among other authorities Funke v. France, 25 February 1993, § 44, Series A no. 256 A; and Saunders, cited above, § 68).

170. In examining whether, in the light of the above principles, the criminal proceedings against the applicant, who, from the outset, had objected to the use of evidence obtained in breach of his Convention rights, can be deemed to have been fair as a whole, the Court must consider, firstly, the nature of the Convention violation at issue and the extent to which the impugned evidence was obtained thereby. It refers to its above finding that the applicant's statement on the morning of 1 October 2002 during his interrogation by E. was extracted in violation of Article 3 (see paragraph 108 above). It further concluded that there was nothing to indicate that the applicant had been threatened for a second time by the police, at Birstein or during the journey to and from that place, in order to make him disclose real evidence (see paragraph 99 above).

171. The Court notes the Regional Court's finding that the applicant's statements made following the threat, including those made at Birstein and those made on the return trip to the police station, had been made under the continuous effect of the threats issued during interrogation and were therefore inadmissible (see paragraph 29 above), whereas it regarded the real evidence which had become known as a result of such statements as admissible. The Court notes that in the proceedings before the domestic courts, the impugned real evidence was classified as evidence which had become known to the investigation authorities as a consequence of the statements extracted from the applicant (the "long-range effect" (Fernwirkung) – see paragraph 31 above). For the purposes of its own assessment under Article 6, it considers it decisive that there is a causal link between the applicant's interrogation in breach of Article 3 and the real evidence secured by the authorities as a result of the applicant's indications, including the discovery of J.'s body and the autopsy report thereon, the tyre tracks left by the applicant's car at the pond, as well as J.'s backpack, clothes and the applicant's typewriter. In other words, the impugned real evidence was secured as a direct result of his interrogation by the police that breached Article 3.

172. Furthermore, an issue arises under Article 6 in respect of evidence obtained as a result of methods in violation of Article 3 only if such evidence was not excluded from use at the applicant's criminal trial. The Court notes that at the trial the Regional Court did not admit any of the confessions the applicant had made in the investigation proceedings under threat or as a result of the continuous effects of the threat (see paragraphs 28-30 above). However, that court, rejecting the applicant's motion at the outset of the trial, refused to bar the admission of items of evidence which the investigation authorities had secured as a result of his statements made under the continuous effect of his treatment in breach of Article 3 (see paragraph 31 above).

173. The Court is therefore called upon to examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture. As shown above (see paragraphs 166-67), in its case-law to date, it has not yet settled the question whether the use of such evidence will always render a trial unfair, that is, irrespective of other circumstances of the case. It has, however, found that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and the use of real evidence obtained as a direct result of acts of torture made the proceedings as a whole automatically unfair, in breach of Article 6 (ibid.).

174. The Court notes that there is no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule (see the references in paragraphs 69 to 74 above). In particular, factors such as whether the impugned evidence would, in any event, have been found at a later stage, independently of the prohibited method of investigation, may have an influence on the admissibility of such evidence.

175. The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of – often reliable and compelling – real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2. On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as

a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.

176. While having regard to the above interests at stake in the context of Article 6, the Court cannot but take note of the fact that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. In the Court's view, neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice.

177. The Court also takes note, in this connection, of the Government's argument that they were obliged under the Convention to apply the criminal law against a murderer, and thus to protect the right to life. The Convention indeed requires that the right to life be safeguarded by the Contracting States. However, it does not oblige States to do so by conduct that violates the absolute prohibition of inhuman treatment under Article 3 or in a manner that breaches the right of every defendant to a fair trial under Article 6. The Court accepts that the State agents in this case acted in a difficult and stressful situation and were attempting to save a life. This does not, however, alter the fact that they obtained real evidence by a breach of Article 3. Moreover, it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (compare Salduz v. Turkey [GC], no. 36391/02, § 54, ECHR 2008).

178. However, contrary to Article 3, Article 6 does not enshrine an absolute right. The Court must therefore determine what measures are to be considered both necessary and sufficient in criminal proceedings concerning evidence secured as the result of a breach of Article 3 in order to secure effective protection of the rights guaranteed by Article 6. As established in its case-law (see paragraphs 165-67 above), the use of such evidence raises serious issues as to the fairness of the proceedings. Admittedly, in the context of Article 6, the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

179. The Court notes that, in the present case, the Regional Court expressly based its findings of fact concerning the execution of the crime committed by the applicant – and thus the findings decisive for the applicant's conviction for murder and kidnapping with extortion – exclusively on the new, full confession made by the applicant at the trial (see paragraph 34 above). Moreover, that court also considered the new confession the essential, if not the only, basis for its findings of fact concerning the planning of the crime, which likewise played a role in the applicant's conviction and sentence (ibid.). The additional evidence admitted at the trial was not used by the Regional Court against the applicant to prove his guilt, but only to test the veracity of his confession. This evidence included the results of the autopsy as to the cause of J.'s death and the tyre tracks left by the applicant's car near

the pond where the child's corpse had been found. The Regional Court further referred to corroborative evidence which had been secured independently of the first confession extracted from the applicant under threat, given that the applicant had been secretly observed by the police since the collection of the ransom and that his flat had been searched immediately after his arrest. This evidence, which was "untainted" by the breach of Article 3, comprised the testimony of J.'s sister, the wording of the blackmail letter, the note found in the applicant's flat concerning the planning of the crime, as well as ransom money which had been found in the applicant's flat or had been paid into his accounts (ibid.).

180. In the light of the foregoing, the Court considers that it was the applicant's second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence.

181. In the light of these findings, the Court further has to examine whether the breach of Article 3 in the investigation proceedings had a bearing on the applicant's confession at the trial. It notes that, in his application before the Court, the applicant submitted that this had been the case. In his submission, he had not had any other defence option at the trial but to confess once the Regional Court, at the outset of the trial, had dismissed his request to exclude the real evidence obtained in violation of Article 3.

182. The Court observes in the first place that prior to his confession on the second day of the trial, the applicant had been instructed about his right to remain silent and about the fact that none of the statements he had previously made on the charges could be used as evidence against him (see paragraph 34 above). It is therefore satisfied that domestic legislation and practice did attach consequences to the confessions obtained by means of prohibited ill-treatment and that the status quo ante was restored, that is, to the situation the applicant was in prior to the breach of Article 3, in this respect.

183. Moreover, the applicant, who was represented by defence counsel, stressed in his statements on the second day and at the end of the trial that he was confessing freely out of remorse and in order to take responsibility for his offence despite the events of 1 October 2002 (see paragraph 32 above). He did so notwithstanding the fact that he had previously failed in his attempt to have the impugned real evidence excluded. There is no reason, therefore, for the Court to assume that the applicant did not tell the truth and would not have confessed if the Regional Court had decided at the outset of the trial to exclude the impugned real evidence and that his confession should thus be regarded as a consequence of measures which extinguished the essence of his defence rights.

184. In any event, it is clear from the Regional Court's reasoning that the applicant's second confession on the last day of the trial was crucial for securing his conviction for murder, an offence of which he might otherwise not have been found guilty (see paragraphs 34 and 35 above). The applicant's confession referred to many additional elements which were unrelated to what could have been proven by the impugned real evidence. Whereas that evidence showed that J. had been suffocated and that the applicant had been present at the pond in Birstein, his confession notably proved his intention to kill J., as well as his motives for doing so. In view of these elements, the Court is not persuaded that, further to the failure to exclude the impugned evidence at the outset of the trial, the applicant could not have remained silent and no longer had any defence option but to confess. Therefore, the Court is not satisfied that the breach of Article 3 in the investigation proceedings had a bearing on the applicant's confession at the trial either.

185. As regards the rights of the defence, the Court further observes that the applicant was given, and availed himself of, the opportunity to challenge the admission of the impugned

real evidence at his trial and that the Regional Court had discretion to exclude that evidence. Therefore, the applicant's defence rights were not disregarded in this respect either.

186. The Court notes that the applicant claimed that he had been deprived of the protection afforded by the privilege against self-incrimination at his trial. As shown above (see paragraph 168), the right not to incriminate oneself presupposes that the prosecution prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the latter's will. The Court refers to its above findings that the domestic courts based the applicant's conviction on his second confession at the trial, without having recourse to the impugned real evidence as necessary proof of his guilt. The Court therefore concludes that the privilege against self-incrimination was complied with in the proceedings against the applicant.

187. The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.

188. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention. (…)

CASE OF JALLOH v. GERMANY

Application no. 54810/00 GRAND CHAMBER, 11 July 2006

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Investigation proceedings

11. On 29 October 1993 four plain-clothes policemen observed the applicant on at least two different occasions take a tiny plastic bag (a so called "bubble") out of his mouth and hand it over to another person in exchange for money. Believing that these bags contained drugs, the police officers went to arrest the applicant, whereupon he swallowed another bubble he still had in his mouth.
12. The police officers did not find any drugs on the applicant. Since further delay might have frustrated the conduct of the investigation, the public prosecutor ordered that emetics (Brechmittel) be administered to the applicant by a doctor in order to provoke the regurgitation of the bag (Exkorporation).
13. The applicant was taken to a hospital in Wuppertal-Elberfeld. According to the Government, the doctor who was to administer the emetics questioned the applicant about his medical history (a procedure known as obtaining an anamnesis). This was disputed by the applicant, who claimed that he had not been questioned by a doctor. As the applicant refused to take the medication necessary to provoke vomiting, he was held down and immobilised by four police officers. The doctor then forcibly administered to him a salt solution and the emetic ipecacuanha syrup through a tube introduced into his stomach through the nose. In addition, the doctor injected him with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine. Approximately an hour and a half after being arrested and taken to the hospital, the applicant was examined by a doctor and declared fit for detention.
14. When visited by the police in his cell two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence.
15. Pursuant to an arrest warrant that had been issued by the Wuppertal District Court, the applicant was remanded in custody on 30 October 1993.
16. The applicant maintained that for three days following the treatment to which he was subjected he was only able to drink soup and that his nose repeatedly bled for two weeks because of wounds he had received when the tube was inserted. This was disputed by the Government, who stressed that the applicant had failed to submit a medical report to prove his allegation.
17. Two and a half months after the administration of the emetics, the applicant underwent a gastroscopy in the prison hospital after complaining of continuous pain in the upper region of his stomach. He was diagnosed as suffering from irritation in the lower area of the oesophagus caused by the reflux of gastric acid. The medical report did not expressly associate this condition with the forced administration of the emetics.
18. The applicant was released from prison on 23 March 1994. He claimed that he had had to undergo further medical treatment for the stomach troubles he had suffered as a result of the forcible administration of the emetics. He did not submit any documents to confirm that he had received medical treatment. The Government, for their part, maintained that the applicant had not received any medical treatment.

B. Domestic court proceedings

19. In his submissions dated 20 December 1993 to the Wuppertal District Court, the applicant, who was represented by counsel throughout the proceedings, objected to the use at his trial of the evidence obtained through the administration of emetics, a method he considered to be illegal. By using force to provoke the regurgitation of the bubble of cocaine, the police officers and the doctor concerned were guilty of causing him bodily harm in the course of their duties (Körperverletzung im Amt). The administration of toxic substances was prohibited by Article 136a of the Code of Criminal Procedure (see paragraph 34 below). His bodily functions had been manipulated, since bodily activity had been provoked by suppressing the control reactions of the brain and the body. In any event, administering emetics was a disproportionate measure and therefore not authorised by Article 81a of the Code of Criminal Procedure (see paragraphs 33 and 35-40 below). It would have been possible to obtain evidence of the alleged offence by waiting for the bubble to pass through his system naturally. The applicant further argued that the only other method authorised by Article 81a of the Code of Criminal Procedure would have been irrigation of the stomach.
20. On 23 March 1994 the Wuppertal District Court convicted the applicant of drug trafficking and sentenced him to one year's imprisonment, suspended, and probation. It rejected the defence's argument that the administration of emetics under Article 81a of the Code of Criminal Procedure was a disproportionate means of recovering a bubble containing just 0.2 g of cocaine.
21. The applicant appealed against the judgment.
22. On 17 May 1995 the Wuppertal Regional Court upheld the applicant's conviction but reduced the length of the suspended prison sentence to six months. It further ordered the forfeiture (Verfall) of 100 German marks that had been found on the applicant at the time of his arrest on the ground that it was the proceeds of sale of two drug bubbles.
23. The Regional Court found that the evidence obtained following the public prosecutor's order to provoke the regurgitation of the bubble of cocaine was admissible. The measure had been carried out because further delay might have frustrated the conduct of the investigation. Pursuant to Article 81a of the Code of Criminal Procedure, the administration of the substances in question, even if effected against the suspect's will, was legal. The procedure had been necessary to secure evidence of drug trafficking. It had been carried out by a doctor and in compliance with the rules of medical science. The defendant's health had not been put at risk and the principle of proportionality had been adhered to.
24. The applicant appealed against this judgment on points of law. He argued in particular that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics, as it did not permit the administration of life-threatening substances by dangerous methods. Furthermore, Article 81a prohibited measures such as the one in question that resulted in a suspect effectively being forced to contribute actively to his own conviction. He further submitted that the impugned measure had violated Articles 1 and 2 of the Basic Law (Grundgesetz – see paragraphs 31-32 below), and disregarded in particular the right to respect for human dignity.
25. On 19 September 1995 the Düsseldorf Court of Appeal dismissed the applicant's appeal. It found that the Regional Court's judgment did not contain any error of law that was detrimental to the accused.
26. The applicant lodged a complaint with the Federal Constitutional Court. He reiterated that the administration of emetics was a disproportionate measure under Article 81a of the Code of Criminal Procedure.
27. On 15 September 1999 the Federal Constitutional Court declared the applicant's constitutional complaint inadmissible under the principle of subsidiarity.

28. It considered that the administration of emetics, including apomorphine, a morphine derivative, raised serious constitutional issues with respect to the right to physical integrity (Article 2 § 2 of the Basic Law – see paragraph 32 below) and to the principle of proportionality which the criminal courts had not yet addressed.

29. The Federal Constitutional Court found that the applicant had not availed himself of all the remedies at his disposal (alle prozessualen Möglichkeiten) to contest the measure before the criminal courts in order to avoid any underestimation of the importance and scope of the fundamental right laid down in Article 2 § 2, first sentence, of the Basic Law (um eine Verkennung von Bedeutung und Tragweite des Grundrechts des Art. 2 Abs. 2 Satz 1 GG zu verhindern).

30. It further stated that the administration of emetics did not give rise to any constitutional objections of principle either with respect to human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination guaranteed by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

II. RELEVANT DOMESTIC, COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

1. Domestic law and practice

(a) The Basic Law

31. Article 1 § 1 of the Basic Law reads as follows:
"The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it."

32. Article 2, in so far as relevant, provides:
"1. Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [Sittengesetz].
2. Every person shall have the right to life and physical integrity. ..."

(b) The Code of Criminal Procedure

33. Article 81a of the Code of Criminal Procedure, in so far as relevant, reads as follows:
"1. A physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. To this end, blood samples may be taken and other bodily intrusions effected by a doctor in accordance with the rules of medical science for the purpose of examination without the accused's consent, provided that there is no risk of damage to his health.
2. Power to make such an order shall be vested in the judge and, in cases in which delay would jeopardise the success of the examination, in the public prosecutor's office and officials assisting it ..."

34. Article 136a of the Code of Criminal Procedure on prohibited methods of interrogation (verbotene Vernehmungsmethoden) provides:
"1. The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.

2. Measures which impair the accused's memory or ability to understand and accept a given situation [Einsichtsfähigkeit] shall not be permitted.

3. The prohibition under sub-paragraphs 1 and 2 shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use."

35. German criminal courts and legal writers disagree as to whether Article 81a of the Code of Criminal Procedure authorises the administration of emetics to a suspected drug dealer who has swallowed drugs on arrest.

36. The view taken by the majority of the German courts of appeal (see, inter alia, the decision of the Bremen Court of Appeal of 19 January 2000, NStZ-RR 2000, p. 270, and the judgment of the Berlin Court of Appeal of 28 March 2000, JR 2001, pp. 162-64) is that Article 81a of the Code of Criminal Procedure can serve as a legal basis for the administration of emetics in such circumstances.

37. For example, in its judgment cited above, the Berlin Court of Appeal had to deal with the case of a suspected drug dealer who agreed to swallow ipecacuanha syrup after being threatened with its administration through a nasogastric tube if he refused. It found:

"Pursuant to Article 81a § 1, first sentence, of the Code of Criminal Procedure, a physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. ...

(a) Contrary to the view taken by the appellant, legal commentators are almost unanimous in agreeing that the administration of emetics in order to obtain quantities of drugs the accused has swallowed involves a bodily intrusion within the meaning of that provision (see HK-Lemke, StPO, 2nd edition, § 9; Dahs in Löwe Rosenberg, StPO, 24th edition, § 16; KK-Senge, StPO, 4th edition, §§ 6, 14; see, with regard to Article 81a of the Code of Criminal Procedure, Rogall, SK StPO, Article 81a, § 48 and NStZ 1998, pp. 66-67, and Schaefer, NJW 1997, pp. 2437 et seq.; contrast Frankfurt Court of Appeal, NJW 1997, p. 1647 with note by Weßlau, StV 1997, p. 341).

This intrusion also does not violate human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination contained in Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law. Pursuant to Article 2 § 2, third sentence, of the Basic Law, interferences with these basic rights are permitted if they have a statutory basis. The Federal Constitutional Court has already found on several occasions that, as a statutory provision enacted by Parliament, Article 81a of the Code of Criminal Procedure meets this requirement ... Furthermore, it has found more specifically that the administration of emetics in reliance on that provision did not give rise to any constitutional objections of principle either (see Federal Constitutional Court, StV 2000, p. 1 – the decision in the present case). It did not, therefore, find it necessary to discuss in detail the opinion expressed by the Frankfurt (Main) Court of Appeal (NJW 1997, pp. 1647-48) which is occasionally shared by legal writers (see Weßlau, StV 1997, pp. 341-42), ... that the administration of emetics forces the accused to contribute to his own conviction and to actively do something he does not want to, namely regurgitate. This Court does not share the [Frankfurt Court of Appeal's] view either, as the right of an accused to remain passive is not affected by his or her having to tolerate an intervention which merely provokes 'involuntary bodily reactions'. ...

(e) ... this Court does not have to decide whether the evidence obtained by the administration of emetics may be used if the accused has refused to comply with his duty to tolerate the measure and his resistance to the introduction of a tube though the nose has been overcome by physical force. That point is not in issue in the present case ... The Regional Court ... stated that [on the facts of] the case decided by the Frankfurt (Main) Court of Appeal it too would have excluded the use of the evidence obtained because of the clearly disproportionate nature of the measure. It did, however, expressly and convincingly demonstrate that the facts of the present case were different."

38. In its judgment of 11 October 1996, however, the Frankfurt (Main) Court of Appeal held that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics. The case concerned the administration of an overdose of ipecacuanha syrup to a suspected drug dealer by force through a nasogastric tube and his injection with apomorphine. The court found:

"The forced administration of emetics was not covered by the Code of Criminal Procedure. Even Article 81a does not justify the administration of an emetic by force. Firstly, the administration of an emetic constitutes neither a physical examination nor a bodily intrusion carried out by a doctor for examination purposes within the meaning of that provision. It is true that searching for foreign objects may be justified by Article 81a ... However, the emetic was used not to search for foreign objects, but to retrieve objects – whose presence was at least probable – in order to use them in evidence ... This aim was more akin to searching for or seizing an object within the meaning of Articles 102, 94 et seq. of the Code of Criminal Procedure than to a physical examination ... – although those provisions do not, on the face of it, include forcible interference with a person's physical integrity as a possible measure. ...

Secondly, an accused is not the object of criminal proceedings ... The forced administration of emetics violates the principle of passivity [Grundsatz der Passivität], since its purpose is to force the accused actively to do something that he is unwilling to do, namely regurgitate. This is neither permitted under Article 81a of the Code of Criminal Procedure nor compatible with the position of the accused in criminal proceedings. ...

Consequently, the conduct of the prosecuting authorities constitutes unlawful interference with the accused's physical integrity (Article 2 § 1, first sentence, of the Basic Law). ...

The forcible administration of emetics in the absence of any legal basis therefor also violates the duty to protect human dignity and the accused's general personality rights (Articles 1 § 1 and 2 § 1 of the Basic Law). ...

The prohibition on obtaining the evidence [in that manner] and the other circumstances of the case prevent this evidence from being used in court. ..."

39. According to many legal writers, Article 81a of the Code of Criminal Procedure authorises the administration of emetics to suspected drug dealers in order to obtain evidence (see also the authors cited above at paragraph 37). This view is taken, for example, by Rogall (NStZ 1998, pp. 66-68 and Systematischer Kommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz, München 2005, Article 81a StPO, § 48) and by Kleinknecht and Meyer-Goßner (StPO, 44th edition, Article 81a, § 22 – administration of emetics permitted for the investigation of serious offences).

40. A considerable number of legal writers, however, take the view that the Code of Criminal Procedure, Article 81a in particular, does not permit the administration of emetics. This opinion is held, for example, by Dallmeyer (StV 1997, pp. 606-10, and KritV 2000, pp. 252-59), who considers that Article 81a does not authorise a search – as opposed to an examination – of the interior of a defendant's body. Vetter (Problemschwerpunkte des § 81a StPO – Eine Untersuchung am Beispiel der Brechmittelvergabe im strafrechtlichen Ermittlungsverfahren, Neuried 2000, pp. 72-82, 161) considers that the forcible administration of emetics through a nasogastric tube is irreconcilable with the rules of medical science, disproportionate and liable to damage the defendant's health.

(a) Medical expert opinions on the forced administration of emetics to suspected drug dealers

41. Medical experts disagree as to whether the forcible administration of emetics through the insertion of a nasogastric tube is advisable from a medical point of view. While some

experts consider that emetics should be administered to a suspect in order to protect his health even if he resists such treatment, others take the view that such a measure entails serious health risks for the person concerned and should not therefore be carried out.

42. The medical experts who argue in favour of the forcible administration of emetics stress that even if this measure is not primarily carried out for medical reasons, it may nevertheless serve to prevent a possibly life-threatening intoxication. As the packaging of drugs swallowed on arrest is often unreliable, it is preferable from a medical standpoint for emetics to be administered. This measure poses very few risks, whereas there is a danger of death if the drugs are allowed to pass through the body naturally. Drugs can be extracted from the stomach up to one hour, in some cases two, after being swallowed. Administering emetics is a safe and fast method (the emetic usually takes effect within 15 to 30 minutes) of retrieving evidence of a drugs offence, as it is rare for them not to work. Even though the forcible introduction of a tube through the nose can cause pain, it does not pose any health risks as the act of swallowing can be induced by the mechanical stimulus of the tube in the throat (see, inter alia, Birkholz, Kropp, Bleich, Klatt and Ritter, "Exkorporation von Betäubungsmitteln – Erfahrungen im Lande Bremen", Kriminalistik 4/97, pp. 277-83).

43. The emetic ipecacuanha syrup has a high margin of safety. Side effects to be expected merely take the form of drowsiness, diarrhoea and prolonged vomiting. Rare, more serious complications include Mallory-Weiss syndrome or aspiration pneumonia. These may occur if the person concerned has sustained previous damage to his or her stomach or if the rules governing the administration of emetics, notably that the patient is fully alert and conscious, are not observed (see, for example, Birkholz, Kropp, Bleich, Klatt and Ritter, cited above, pp. 278-81, and American Academy of Clinical Toxicology/European Association of Poisons Centres and Clinical Toxicologists, "Position Paper: Ipecac Syrup", Journal of Toxicology, Clinical Toxicology, vol. 42, no. 2, 2004, pp. 133-43, in particular, p. 141).

44. Those medical experts who argue against the administration of emetics by force point out in particular that the forcible introduction of emetics through a nasogastric tube entails considerable health risks. Even though it is desirable for drugs to be eliminated from the suspect's body as quickly as possible, the use of a nasogastric tube or any other invasive method can be dangerous because of the risk of perforation of the drug packaging with potentially fatal consequences. Furthermore, if the tube is badly positioned liquid may enter the lungs and cause choking. Forced regurgitation also involves a danger of vomit being inhaled, which can lead to choking or a lung infection. The administration of emetics cannot therefore be medically justified without the consent of the person concerned, and, without this consent, this method of securing evidence will be incompatible with the ethics of the medical profession, as has been illustrated in particular by the death of a suspect following such treatment (see, inter alia, Odile Diamant-Berger, Michel Garnier and Bernard Marc, Urgences Médico Judiciaires, 1995, pp. 24-33; Scientific Committee of the Federal Medical Council, report dated 28 March 1996 in response to the Federal Constitutional Court's request to assess the dangers involved in the forcible administration of emetics; and the resolution adopted by the 105th German Medical Conference, Activity Report of the Federal Medical Association, point 3).

(d) Practice concerning the administration of emetics by force in Germany

45. There is no uniform practice on the use of emetics to secure evidence of a drugs offence in the German Länder. Since 1993, five of the sixteen Länder (Berlin, Bremen, Hamburg, Hesse and Lower Saxony) have used this measure on a regular basis. Whereas some Länder discontinued its use following the death of a suspect, others are still resorting to it.

In the vast majority of cases in which emetics have been used, the suspects chose to swallow the emetic themselves, after being informed that it would otherwise be administered forcibly. In other Länder, emetics are not forcibly administered, partly because, on the basis of medical advice, it is regarded as a disproportionate and dangerous measure, and partly because it is not considered a necessary means of combating drugs offences.

46. There have been two fatalities in Germany as a result of the forcible administration of ipecacuanha syrup to suspected drug dealers through a tube introduced through the nose into the stomach. In 2001 a Cameroonian national died in Hamburg. According to the investigation, he had suffered a cardiac arrest as a result of stress caused by the forcible administration of emetics. He was found to have been suffering from an undetected heart condition. In 2005 a Sierra Leonean national died in Bremen. The investigation into the cause of his death has not yet been completed. The emergency doctor and a medical expert suggested that the applicant had drowned as a result of a shortage of oxygen when water permeated his lungs. Criminal investigations for homicide caused by negligence have been launched against the doctor who pumped the emetic and water into the suspect's stomach and against the emergency doctor called to attend to him.

47. As a consequence of the fatality in Bremen, the Head of the Bremen Chief Public Prosecutors (Leitender Oberstaatsanwalt) has ordered the forcible administration of emetics to be discontinued in Bremen for the time being. Pending the outcome of the investigation, a new procedure has been set up by the Senators for Justice and the Interior. Under this procedure, a person suspected of swallowing drugs must be informed by a doctor about the risks to his health if the drugs remain in his body. The suspect can choose to take emetics or a laxative if a medical examination discloses that it poses no risks to his health. Otherwise, he is detained in a specially equipped cell until the drug packages are passed naturally. (…)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

56. The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention, which provides:

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

57. The Government contested this allegation.

A. The parties' submissions

1. The applicant

58. According to the applicant, the administration of emetics by force had constituted a serious interference with his physical integrity and posed a serious threat to his health, and even life, since the emetics used – ipecacuanha syrup and apomorphine – could have provoked life threatening side effects. The insertion of a tube by force through the nose of a suspect who did not cooperate in the procedure could have caused damage to the nose, throat and gullet and even burst drug bubbles in the stomach. The danger of administering emetics by force was illustrated by the fact that it had already resulted in the deaths of two suspects in Germany. The vast majority of the member States of the Council of Europe as well as the United States considered this method to be illegal. The interference could not be justified on grounds of medical assistance. On the contrary, it merely increased the risk

of the suspect being poisoned by the drugs he had swallowed. A suspect's express opposition to undergoing medical treatment had to be respected in a democratic society as part of the individual's right to self-determination.

59. The applicant further argued that the administration of emetics had been aimed at intimidating and debasing him in disregard of his human dignity. The manner in which he had been forced to undergo a life threatening medical intervention had been violent, agonising and humiliating. He had been degraded to the point of having to vomit while being observed by several police officers. Being in police custody, he had found himself in a particularly vulnerable position.

60. Moreover, the applicant maintained that no anamnesis to establish his medical history and physical condition had been obtained by a doctor prior to the execution of the impugned measure. Nor had he been given any medical care and supervision in prison afterwards.

61. The applicant also stressed that he had sustained bodily injury, notably to his stomach, as was proved by a gastroscopy that had been performed in the prison hospital. Furthermore, he had been subjected to intense physical and mental suffering during the process of the administration of the emetics and by the chemical effects of the substances concerned.

2. The Government

62. According to the Government, the forcible administration of emetics entailed merely negligible risks to health. Ipecacuanha syrup was not a dangerous substance. In fact, it was given to children who had been poisoned. The introduction of a very flexible tube through the applicant's nose had not put him at risk, even though he had resisted the procedure. The injection of apomorphine had not been dangerous either. The side effects and dangers described by the applicant could only be caused by chronic abuse or misuse of the emetics in question. The fact that two suspected drug dealers had died following the forcible administration of emetics in Hamburg and Bremen did not warrant the conclusion that the measure in general posed health risks. The method had been used on numerous occasions without giving rise to complications. The authorities resorted to the administration of emetics in those Länder where drug trafficking was a serious problem. In the vast majority of cases suspects chose to swallow the emetics after being informed that force would be used if they refused to do so. In the Hamburg case the defendant had suffered from an undetected heart condition and would have been equally at risk if he had resisted a different kind of enforcement measure. In the Bremen case the possibility that the defendant was poisoned by the drugs he had swallowed could not be excluded.

63. The Government pointed out that there had been a real, immediate risk that the drug bubble, which had not been packaged for long-term transport inside the body, would leak and poison the applicant. Even though the emetics had been administered primarily to obtain evidence rather than for medical reasons, the removal of the drugs from the applicant's stomach could still be considered to be required on medical grounds. It was part of the State's positive obligation to protect the applicant by provoking the regurgitation of the drugs. Awaiting the natural excretion of the drugs would not have been as effective a method of investigation or any less humiliating and may, in fact, have posed risks to his health. It was significant in this connection that the administration of emetics to a juvenile was only considered an option if he or she was suspected of selling drugs on a commercial basis.

64. In the Government's view, the impugned measure had not gone beyond what had been necessary to secure evidence of the commission of a drugs offence. The applicant had been administered harmless emetics in a hospital by a doctor acting lege artis. Such a measure could not be considered humiliating in the circumstances.

65. The Government further maintained that the emetics were administered to the applicant only after an anamnesis had been obtained by a doctor at the hospital. The same doctor had duly supervised the administration of the emetics to the applicant.

66. The Government stressed that there was no evidence that the applicant had suffered any injuries or lasting damage as a result of the administration of the emetics. He had merely been tired for several hours after the execution of the measure, either because of the effects of the apomorphine or because of the resistance he had put up. In the proceedings before the Court the applicant had claimed for the first time that he had suffered further damage to his health. However, he had not produced any documentary evidence to support his allegations.

B. The Court's assessment

1. Relevant principles

67. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

68. Treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

69. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation. A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. This can be said, for instance, about force feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with.

70. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that

the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them.

71. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health.

72. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention.

73. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision.

74. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health.

2. Application of those principles to the present case

75. At the outset the Court notes that in the Government's view the removal of the drugs from the applicant's stomach by the administration of emetics could be considered to be required on medical grounds, as he risked death through poisoning. However, it is to be observed that the domestic courts all accepted that, when ordering the administration of emetics, the authorities had acted on the basis of Article 81a of the Code of Criminal Procedure. This provision entitles the prosecuting authorities to order a bodily intrusion to be effected by a doctor without the suspect's consent in order to obtain evidence, provided that there is no risk of damage to the suspect's health. However, Article 81a does not cover measures taken to avert an imminent danger to a person's health. Furthermore, it is undisputed that the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Government also stated that emetics are never administered to juvenile dealers unless they are suspected of selling drugs on a commercial basis. Juvenile dealers are, however, in no less need of medical treatment than adults. Adult dealers, for their part, run the same risks to their health as juvenile dealers when administered emetics. Consequently, the Court is not satisfied that the prosecuting authorities' decision to order the impugned measure was based on and required by medical reasons, that is, the need to protect the applicant's health. Instead, it was aimed at securing evidence of a drugs offence.

76. This finding does not by itself warrant the conclusion that the impugned intervention contravenes Article 3. As noted above (see paragraph 70 above), the Court has found on several occasions that the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical

supervision available and the effects on the suspect's health (compare and contrast also the criteria established by the United States courts in similar cases – see paragraphs 51-52 above). In the light of all the circumstances of the individual case, the intervention must not attain the minimum level of severity that would bring it within the scope of Article 3. The Court will now examine each of these elements in turn.

77. As regards the extent to which the forcible medical intervention was necessary to obtain the evidence, the Court notes that drug trafficking is a serious offence. It is acutely aware of the problem confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs. However, in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. This is reflected in the sentence (a six-month suspended prison sentence and probation), which is at the lower end of the range of possible sentences. The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass through his system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences.

78. As regards the health risks attendant on the forcible medical intervention, the Court notes that it is a matter of dispute between the parties whether and to what extent the administration of ipecacuanha syrup through a tube introduced into the applicant's nose and the injection of apomorphine posed a risk to his health. Whether or not such measures are dangerous is, as has been noted above (see paragraphs 41-44), also a matter of dispute among medical experts. While some consider it to be entirely harmless and in the suspect's best interest, others argue that in particular the use of a nasogastric tube to administer emetics by force entails serious risks to life and limb and should therefore be prohibited. The Court is not satisfied that the forcible administration of emetics, a procedure that has to date resulted in the deaths of two people in the respondent State, entails merely negligible health risks. It also observes in this respect that the actual use of force – as opposed to the mere threat of force – has been found to be necessary in the respondent State in only a small proportion of the cases in which emetics have been administered. However, the fatalities occurred in cases in which force was used. Furthermore, the fact that in the majority of the German Länder and in at least a large majority of the other member States of the Council of Europe the authorities refrain from forcibly administering emetics does tend to suggest that such a measure is considered to pose health risks.

79. As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was subjected to a further bodily intrusion against his will through the injection of another emetic. Account must also be taken of the applicant's mental suffering while he waited for the emetics to take effect. During this time he was restrained and kept under observation by police officers and a doctor. Being forced to regurgitate under these conditions must have been humiliating for him. The Court does not share the Government's view that waiting for the drugs to pass through his body naturally would have been just as humiliating. Although it would have entailed some invasion of privacy because of the need for supervision, such a measure nevertheless involves a natural bodily function and so causes considerably less interference with a person's physical and mental integrity than forcible medical intervention.

80. As regards the medical supervision of the administration of the emetics, the Court notes that the impugned measure was carried out by a doctor in a hospital. In addition, after the measure was executed the applicant was examined by a doctor and declared fit for detention. However, it is a matter of dispute between the parties whether an anamnesis of the applicant was obtained prior to the execution of the measure in order to ascertain whether his health might be at risk if emetics were administered to him against his will. Since the applicant violently resisted the administration of the emetics and spoke no German and only broken English, the assumption must be that he was either unable or unwilling to answer any questions that were put by the doctor or to submit to a prior medical examination. The Government have not submitted any documentary or other evidence to show otherwise.

81. As to the effects of the impugned measure on the suspect's health, the Court notes that the parties disagree about whether the applicant has suffered any lasting damage to his health, notably to his stomach. Having regard to the material before it, it finds that it has not been established that either his treatment for stomach troubles in the prison hospital two and a half months after his arrest or any subsequent medical treatment he received was caused by the forcible administration of the emetics. This conclusion does not, of course, call into question the Court's above finding that the forcible medical intervention was not without possible risk to the applicant's health.

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.

83. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention.

(…)

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicant further considered that his right to a fair trial guaranteed by Article 6 of the Convention had been infringed by the use at his trial of the evidence obtained by the administration of the emetics. He claimed in particular that his right not to incriminate himself had been violated. The relevant part of Article 6 provides:
"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

88. The Government contested this view.

A. The parties' submissions

1. The applicant

89. In the applicant's view, the administration of the emetics was illegal and violated Articles 3 and 8 of the Convention. As the evidence thereby obtained had formed the sole basis for his conviction, the criminal proceedings against him had been unfair.

90. The applicant further argued that by forcing him against his will to produce evidence of an offence the authorities had violated his right not to incriminate himself and therefore his right to a fair trial. The principle against self-incrimination was not limited to statements obtained by coercion, but extended to objects so obtained. Moreover, the facts of his case were distinguishable from those in Saunders v. the United Kingdom (17 December 1996, Reports 1996-VI). Unlike the cases of blood or DNA testing referred to by the Court in its judgment in that case, the administration of emetics entailed the use of chemical substances that provoked an unnatural and involuntary activity of the body in order to obtain the evidence. His refusal to swallow the emetics was overcome by the use of considerable force. Therefore, the evidence that had been obtained had not existed independently of his will and he had been forced to contribute actively to his own conviction. The administration of emetics was comparable to the administration of a truth serum to obtain a confession, a practice which was expressly forbidden by Article 136a of the Code of Criminal Procedure. He referred to the judgment of the Frankfurt (Main) Court of Appeal of 11 October 1996 in support of his contention.

2. The Government

91. In the Government's view, the administration of the emetics to the applicant had not contravened either Article 3 or Article 8 of the Convention. Consequently, the use of the drug bubble thereby obtained as evidence in the criminal proceedings against the applicant had not rendered his trial unfair. Determining the exact nature, amount and quality of the drugs being sold by the applicant had been a crucial factor in securing the applicant's conviction and passing sentence.

92. The Government further submitted that the right not to incriminate oneself only prohibited forcing a person to act against his or her will. Provoking an emesis was a mere reaction of the body which could not be controlled by a person's will, and was therefore not prohibited by the principle against self-incrimination. The suspect was not thereby forced to contribute actively to securing the evidence. The accused's initial refusal to take the emetics could not be relevant, as otherwise all investigative measures aimed at breaking a suspect's will to conceal evidence, such as taking blood samples by force or searching houses, would be prohibited.

93. Moreover, the Government argued that according to the Court's judgment in Saunders, cited above, drugs obtained by the forcible administration of emetics were admissible in evidence. If it was possible to use bodily fluids or cells as evidence, then a fortiori it had to be possible to use objects which were not part of the defendant's body. Furthermore, the administration of emetics, which the applicant merely had to endure passively, was not comparable to the administration of a truth serum as prohibited by Article 136a of the Code of Criminal Procedure, which broke the suspect's will not to testify.

B. The Court's assessment

1. General principles established under the Court's case-law

94. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly

committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.

95. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, inter alia, Khan v. the United Kingdom, no. 35394/97, § 34, ECHR 2000-V; and Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX).

96. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia, Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43).

97. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention.

98. As regards, in particular, the examination of the nature of the Convention violation found the Court observes that notably in the cases of Khan (cited above, §§ 25-28) and P.G. and J.H. v. the United Kingdom (§§ 37-38) it has found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

99. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction. The Court reiterates in this connection that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.

100. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court observes that these are generally recognised

international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, inter alia, Saunders, cited above, § 68; and Allan, cited above, § 44).

101. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.

102. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (see Saunders, cited above, § 69.

2. Application of those principles to the present case

103. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained "unlawfully" in breach of domestic law. It recalls in this connection that the national courts found that Article 81a of the Code of Criminal Procedure permitted the impugned measure.

104. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the Rochin case (see paragraph 50 above), to "afford brutality the cloak of law". It notes in this connection that Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair,

irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

109. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However, the Court considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

110. As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is in issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

111. However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was in issue. In Funke v. France (25 February 1993, § 44, Series A no. 256-A), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in J.B. v. Switzerland (cited above, §§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination (in its broader sense).

112. In Saunders, the Court considered that the principle against self-incrimination did not cover "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing" (cited above, § 69).

113. In the Court's view, the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the

examples listed in Saunders. Firstly, as with the impugned measures in Funke and J.B. v. Switzerland, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in Saunders concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the Saunders case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from Saunders that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences.

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out lege artis by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

123. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

(…)

CASE OF KHAN v. THE UNITED KINGDOM

Application no. 35394/97 THIRD SECTION 12 May 2000

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. On 17 September 1992 the applicant arrived at Manchester Airport on a flight from Pakistan. On the same flight was his cousin, N. Both men were stopped and searched by customs officials. N. was found to be in possession of heroin with a street value of almost 100,000 pounds sterling. He was interviewed and then arrested and charged. No drugs were found on the applicant. He too was interviewed, but made no admissions. He was released without charge. On 26 January 1993 the applicant visited a friend, B., in Sheffield. B. was under investigation for dealing in heroin. On 12 January 1993 the installation of a listening device on B.'s premises had been authorised by the Chief Constable of South Yorkshire on the grounds that the conventional methods of surveillance were unlikely to provide proof that he was dealing in drugs. It was not expected or foreseen that the applicant would visit the premises. Neither B. nor the applicant was aware of the aural surveillance equipment which had been installed by the police.

10. By means of that device the police obtained a tape recording of a conversation, in the course of which the applicant admitted that he had been a party to the importation of drugs by N. on 17 September 1992. The applicant was arrested on 11 February 1993. Again he made no admissions when interviewed, but subsequently he and N. were jointly charged with offences under the Customs and Excise Management Act 1979 and the Misuse of Drugs Act 1991 and committed for trial.

11. The trial took place in December 1993. The applicant pleaded “not guilty”. The applicant admitted that he had been present at the Sheffield address and that his voice was one of those recorded on the tape. It was admitted on behalf of the Crown that the attachment of the listening device had involved a civil trespass and had occasioned some damage to the property. Thereupon, the trial judge conducted a hearing on the *voir dire* (submissions on a point of law in the absence of the jury) as to the admissibility in evidence of the conversation recorded on the tape. The Crown accepted that without it there was no case against the applicant.

12. The trial judge ruled that the evidence was admissible. Following an amendment to the indictment, the applicant was re-arraigned and pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of heroin. On 14 March 1994 the applicant was sentenced to three years' imprisonment.

13. The applicant appealed to the Court of Appeal on the ground that the evidence ought to have been held to be inadmissible. On 27 May 1994 the Court of Appeal dismissed the applicant's appeal against conviction but also certified, as a point of law of general public importance, the question whether evidence of tape-recorded conversations, obtained by a listening device attached by the police to a private house without the knowledge of the owners or occupiers, was admissible in a criminal trial against the defendant.

14. On 4 October 1994 the Appeal Committee of the House of Lords granted the applicant leave to appeal from the decision of the Court of Appeal dismissing his appeal against conviction. On 2 July 1996 the House of Lords dismissed the applicant's appeal. The House of Lords noted that the question before it gave rise to two separate issues, the first being whether evidence of the taped conversations was admissible at all and the second whether, if admissible, it should nonetheless have been excluded by the trial judge in the exercise of his discretion at common law or under the powers conferred by section 78 of

the Police and Criminal Evidence Act 1984 ("PACE"). As to the former issue, the House of Lords held that there was no right to privacy in English law and that, even if there were such a right, the common-law rule that relevant evidence which was obtained improperly or even unlawfully remained admissible applied to evidence obtained by the use of surveillance devices which invaded a person's privacy. As to the latter issue, it was held that the fact that evidence had been obtained in circumstances which amounted to a breach of the provisions of Article 8 of the Convention was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under section 78 of PACE. The judge's discretion had to be exercised according to whether the admission of the evidence would render the trial unfair, and the use at a criminal trial of material obtained in breach of the right to privacy enshrined in Article 8 did not mean that the trial would be unfair. On the facts, the trial judge had been entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of Article 8, were not such as to require the exclusion of the evidence. Lord Nolan, giving the opinion of the majority of the House, added:

"The sole cause of this case coming to your Lordship's House is the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seems astonishing, the more so in view of the statutory framework which has governed the use of such devices by the Security Service since 1989, and the interception of communications by the police as well as by other agencies since 1985. I would refrain from other comment because counsel for the respondent was able to inform us, on instructions, that the government proposes to introduce legislation covering the matter in the next session of Parliament."

15. The applicant was discharged from prison on 11 August 1994. His release was on licence until 12 May 1995.

II. RELEVANT DOMESTIC LAW

A. The Home Office Guidelines

16. Guidelines on the use of equipment in police surveillance operations (the Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application.

2 In each case, the authorising officer should satisfy himself that the following criteria are met: (a) the investigation concerns serious crime; (b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried; (c) there must be good reason to think that the use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism; (d) the use of equipment must be operationally feasible. The authorising officer should also satisfy himself that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence.

18. The Guidelines also state that there may be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

B. The Police Complaints Authority

19. The Police Complaints Authority was created by section 89 of PACE. It is an independent body empowered to receive complaints as to the conduct of police officers. It has powers to

refer charges of criminal offences to the Director of Public Prosecutions and itself to bring disciplinary charges.

C. The Police and Criminal Evidence Act 1984

20. Section 78(1) of PACE provides as follows:
"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

D. The Police Act 1997

21. The 1997 Act provides a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, entered into force on 22 February 1999.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant alleges a violation of Article 8 of the Convention which provides, so far as relevant, as follows:
"1. Everyone has the right to respect for his private ... life, ... 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."

23. The applicant refers to the opinion of the European Commission of Human Rights in the case of Govell v. the United Kingdom (application no. 27237/95, Commission's report of 14 January 1998), in which the Commission found that no existing statutory system governed the use of covert listening devices and that the Home Office Guidelines were neither legally binding nor accessible. Consequently, there had been a breach of Article 8 of the Convention because the tape recording in that case could not be considered to be "in accordance with the law" as required by Article 8 § 2 of the Convention. He claims that the position is the same in the present case, where a covert listening device was used to overhear a private conversation he had had with B.

24. The Government, whose observations on Article 8 were submitted before the Commission adopted its above-mentioned report in the Govell case, do not dispute that the surveillance of the applicant amounted to an interference with his right to respect for private life guaranteed by Article 8 § 1 of the Convention, but contend that such interference was not in breach of the Article since it was in accordance with the law and necessary in a democratic society for the prevention of crime.
They recognise that foreseeability is a component of the concept of "in accordance with the law", but submit that foreseeability cannot be the same in the context of covert police surveillance as it is where the object of the relevant law is to place restrictions on the conduct of individuals. They argue that a law which confers a discretion as to whether or

not to undertake covert surveillance activities does not breach the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity. They submit that the Home Office Guidelines were public and accessible, even though they did not have statutory force, and provided constraints within which surveillance was limited to the investigation of serious crime.

Furthermore, the measures taken were proportionate to the criminal investigation in question. The Government refer to the judgment of the Court of Appeal, which expressly considered Article 8 of the Convention with reference to the applicant's case. Finally, the Government contend that the existence of the Police Complaints Authority demonstrates that there were adequate procedural safeguards against arbitrary interference and the abuse of powers.

25. The Court notes that it is not disputed that the surveillance carried out by the police in the present case amounted to an interference with the applicant's rights under Article 8 § 1 of the Convention. The principal issue is whether this interference was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society", for one of the purposes enumerated in that paragraph.

26. The Court recalls, with the Commission in the Govell case (see paragraphs 61 and 62 of the report cited above), that the phrase "in accordance with the law" not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law (see the Halford v. the United Kingdom judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1017, § 49). In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual's right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures (see the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 32, § 67).

27. At the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory framework. The Home Office Guidelines at the relevant time were neither legally binding nor were they directly publicly accessible. The Court also notes that Lord Nolan in the House of Lords commented that under English law there is, in general, nothing unlawful about a breach of privacy. There was, therefore, no domestic law regulating the use of covert listening devices at the relevant time.

28. It follows that the interference in the present case cannot be considered to be "in accordance with the law", as required by Article 8 § 2 of the Convention. Accordingly, there has been a violation of Article 8. In the light of this conclusion, the Court is not required to determine whether the interference was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant also alleges a breach of Article 6 § 1 of the Convention, on the ground that the use as the sole evidence in his case of the material which had been obtained in breach of Article 8 of the Convention was not compatible with the "fair hearing" requirements of Article 6. Article 6 § 1 of the Convention provides, so far as relevant, as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

30. The applicant does not submit that Article 6 requires an automatic rule of exclusion of evidence obtained in consequence of a breach of Article 8, but argues that where evidence

has been obtained in breach of a Convention right, three requirements must be fulfilled by the domestic courts:

– there must be an effective procedure during the trial by which the applicant can challenge the admissibility of evidence;
– the trial court should have regard to the nature of the violation; and
– the conviction should not be based solely on evidence obtained in consequence of a breach of a Convention right.

The applicant argues that the procedure under section 78 of PACE is not capable of affording a ground for the exclusion of evidence, given that the House of Lords' judgment indicates that a breach of Article 8 was not capable of affording a ground for the exclusion of evidence under that section. He submits that the absence of an effective procedure, by which he could challenge the use of evidence obtained in breach of Article 8, is in breach of Article 6 of the Convention.

31. The applicant further submits that the nature of the breach amounted to a fundamental violation of the Convention as there was a complete absence of a statutory scheme regulating the use of secret aural surveillance devices by the police. Finally, the applicant contends that it is contrary to the rule of law to permit a criminal conviction to be based solely on evidence obtained by illegal acts of law-enforcement agents. He maintains that he can still claim to be the victim of a violation of the right to a fair hearing even though he was in fact guilty and pleaded guilty to the offence with which he had been charged. In the present circumstances, if the evidence had been excluded as inadmissible by the trial court, the prosecution would have discontinued the proceedings. The applicant submits that the Court's role is not to determine whether or not there was a miscarriage of justice but whether or not the applicant, innocent or guilty, received a fair trial.

32. The Government note that the present case closely resembles the case of Schenk v. Switzerland (judgment of 12 July 1988, Series A no. 140), and submit that the applicant had the opportunity (which he took) to challenge the use of the tape recording in evidence at the *voir dire*. They note that, having carefully considered the applicant's arguments that the police lacked the power to use a listening device and that there was a civil trespass, a breach of Article 8 of the Convention and a breach of the Guidelines, the trial judge nevertheless considered that such arguments did not afford grounds for excluding the evidence under section 78 of PACE and he therefore admitted the tape recording as evidence. The applicant further had the opportunity of challenging the judge's ruling in the Court of Appeal and the House of Lords. The House of Lords expressly considered whether the applicant had a fair trial by analogy with Article 6 of the Convention but found that there was no breach of such right even if the obtaining of the evidence constituted a breach of Article 8 of the Convention.

33. The Government recognise that, in contrast to the position in the Schenk case, the tape recording was the only evidence against the applicant. However, in the Government's submission, where there is strong evidence to prove the involvement of a person in a serious crime, then there is a strong public interest in admitting it in criminal proceedings, even if it is the only evidence against the accused, provided that, as here, the accused has the opportunity of challenging the evidence and opposing its use, and that full consideration is given by the trial court to the fairness of admitting the evidence. Finally, the Government submit that the applicant's admission of guilt during the trial is relevant to the consideration of the fairness of the trial under Article 6.

34. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is

therefore primarily a matter for regulation under national law (see the Schenk judgment cited above, p. 29, §§ 45-46, and, for a more recent example in a different context, the Teixeira de Castro v. Portugal judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.

35. The Court recalls that in the Schenk case cited above the applicant complained, *inter alia*, that the recording of his conversation with P. in breach of Swiss law and its use as evidence at his trial contravened Article 6 § 1 of the Convention. The Court noted in its judgment that it was not disputed that the recording in issue had been obtained unlawfully as a matter of Swiss law and that this had been expressly recognised by the Swiss courts. The Court observed that it could not "exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible" (ibid., p. 29, § 46), and that it had only to ascertain whether the applicant's trial as a whole was fair. In concluding that the use of the disputed recording in evidence did not deprive the applicant of a fair trial, the Court noted, first, that the rights of the defence had not been disregarded: the applicant had been given the opportunity, which he took, of challenging the authenticity of the recording and opposing its use, as well as the opportunity of examining P. and summoning the police inspector responsible for instigating the making of the recording. The Court further "attache[d] weight to the fact that the recording of the telephone conversation was not the only evidence on which the conviction was based" (ibid., pp. 29-30, § 48).

36. The Court notes at the outset that, in contrast to the position examined in the Schenk case, the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law. In particular, as Lord Nolan observed, under English law there is in general nothing unlawful about a breach of privacy. Moreover, as was further noted, there was no suggestion that, in fixing the device, the police had operated otherwise than in accordance with the Home Office Guidelines. In addition, as the House of Lords found, the admissions made by the applicant during the conversation with B. were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions. The "unlawfulness" of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life and that, accordingly, such interference was not "in accordance with the law", as that phrase has been interpreted in Article 8 § 2 of the Convention.

37. The Court next notes that the contested material in the present case was in effect the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker. It is true that, in the case of Schenk, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. However, the Court notes in this regard that the recording in the Schenk case, although not the only evidence, was described by the Criminal Cassation Division of the Vaud Cantonal Court as having "a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal proceedings" (ibid., pp. 19-22, § 28). Moreover, this element was not the determining factor in the Court's conclusion.

38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the Schenk case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the *voir dire* and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference (ibid., p. 29, § 47).

39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.

40. In these circumstances, the Court finds that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention. (…)

CASE OF LALA v. THE NETHERLANDS

Application no. 14861/89 COURT (CHAMBER), 22 September 1994

AS TO THE FACTS

(…)

8. Mr Radjinderpersad Roy Lala is a Netherlands national born in 1961 and resident in The Hague.
It appears that in proceedings predating, and unrelated to, the events complained of he was sentenced to pay a fine, failing which he was liable to a term of detention (hechtenis).

9. On 19 November 1986, after a trial in absentia, the Hague Regional Court (arrondissementsrechtbank) convicted Mr Lala of the indictable offence (misdrijf) of forgery (valsheid in geschrifte) in that he had concealed an income from work while enjoying social- security benefits. It sentenced him to four weeks' imprisonment (gevangenisstraf), two weeks of which were suspended for a probationary period of three years on condition, inter alia, that he co-operated in repaying the excess.

10. Mr Lala filed an appeal to the Hague Court of Appeal (gerechtshof).
Summoned to the hearing of that court on 7 September 1987, he failed to appear. The official record of the hearing states that Mr Lala was declared to be in default and contains the following passage:
"Mr A. G., lawyer in The Hague, is present as counsel of the accused and states that his client will not appear at the hearing because he is still liable to pay a fine, which he is unable to do, and he therefore runs the risk of being arrested immediately to serve the term of detention to which he is liable in the event of failure to pay."

11. In its default judgment of 21 September 1987, the Court of Appeal overturned the judgment of the Regional Court on technical grounds; it again convicted Mr Lala but reduced the sentence to two weeks' imprisonment.

12. Through his lawyer, the applicant filed an appeal on points of law to the Supreme Court (Hoge Raad). Those of his complaints which are of relevance here may be summarised as follows: firstly, the Court of Appeal had not allowed the applicant's counsel to speak last, as required by law; and secondly, not only had the Court of Appeal not allowed the applicant's counsel to conduct the defence, although the latter had signalled the wish to do so by his presence, but the Court of Appeal had also failed to determine whether Mr Lala had had a compelling and legitimate reason not to appear, in which case his counsel should have been entitled to conduct the defence in his client's absence.

13. In its judgment of 27 September 1988, the Supreme Court dealt with the applicant's second complaint first in the following terms:
"In cases where the accused has not appeared but his counsel is present at the beginning of the court hearing, the court may proceed on the assumption that if counsel for the accused wishes to act as such despite the absence of his client, he will make this known to the court. As the record of the hearing of the Court of Appeal contains nothing from which it might be deduced that counsel made it known to the Court of Appeal that he wished to act in that capacity - neither his own presence nor his explanation of his client's absence will serve this purpose - it must be assumed that he has failed to do so. Under these circumstances the Court of Appeal was not obliged to allow counsel to act as such in the course of the hearing of the criminal case against his client."
As to the first complaint, the Supreme Court held that it appeared from the official record of the hearing that the lawyer had stated the reasons for his client's absence, but not that

he had acted as counsel during his client's trial. Consequently, that it had to be assumed that he had not so acted. Accordingly, the Court of Appeal had been under no obligation to allow the lawyer to speak last.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Trial in absentia

14. In general, the accused - if he is not a juvenile (section 500 h of the Code of Criminal Procedure (Wetboek van Strafvordering, CCP)) - is not under an obligation to appear at the hearing.
The court must examine of its own motion the validity of the summons (geldigheid der dagvaarding - section 348 CCP). If, in spite of having been properly summoned, the accused does not appear at the hearing, the court will declare him to be in default (verstek verlenen) and proceed with the case in his absence. This is the rule even if the accused gives prior notice of his absence and asks for the hearing to be adjourned (see, inter alia, the judgment of the Supreme Court of 26 February 1985, NJ (Nederlandse Jurisprudentie, Netherlands Law Reports) 1985, 567) or submits his defence in writing (see the judgment of the Supreme Court of 9 October 1990, NJ 1991, 133) and even if the accused cannot be blamed for his absence (see, inter alia, the judgments of the Supreme Court of 20 December 1977, NJ 1978, 226, and 10 October 1989, NJ 1990, 293). The court has the power to order the accused to appear or to be produced before them by the police (section 272 CCP) but it is rarely made use of unless the accused is a juvenile.

15. An accused who has been convicted in his absence by the first-instance court may file an objection (verzet - section 399 (1) CCP); this is an ordinary legal remedy in Netherlands law. Such an objection entitles the accused to a full retrial by the same court (section 403 CCP).
An objection may not be filed by an accused who has, or has had, the opportunity to appeal to a higher court with jurisdiction as to both fact and law (hoger beroep - section 399 (2) CCP). This means that the possibility of an objection is limited to those cases in which the law does not admit of such an appeal, i.e. where the sentence is nothing more serious than a small fine or where a regulatory offence (overtreding) has been dealt with in first instance by the Regional Court.
It follows from section 339 (1) CCP that no objection may be filed against a default judgment given on appeal.

B. Rights of the defence in the absence of the accused

1. Representation

16. In certain cases the accused may be represented in his absence. In cases which are dealt with at first instance by the Regional Court, this possibility exists if the criminal offence with which the accused is charged does not carry a prison sentence. However, the representative must be a lawyer who must state that he has been specifically empowered to act as such (bepaaldelijk daartoe gevolmachtigd - section 270 CCP).
At the hearing the procedural position of the representative is that of the accused himself, i.e. - even if the representative is a lawyer - not that of counsel (see, inter alia, the judgment of the Supreme Court of 25 April 1989, NJ 1990, 91). This means that like the accused, he may be cross-examined by the court and the prosecution and his statements may be used as evidence (see the judgment of the Supreme Court of 13 February 1951, NJ 1951, 476); he may also be assisted by a lawyer - or another lawyer - as counsel.

If representation is allowed at first instance before the Regional Court, it is also allowed on appeal before the Court of Appeal (section 415 CCP).

2. Conducting the defence

17. The question - which was in dispute among learned writers - whether the defendant, having been declared in default, is entitled to have his defence conducted for him by counsel was decided by the Supreme Court in its judgment of 23 November 1971 (NJ 1972, 293). Although the Procurator General (procureur-generaal) had suggested an answer in the affirmative, the Supreme Court came to the opposite conclusion. It reasoned that, were such an entitlement to be recognised, trial in absentia would take on an adversarial character incompatible with the basic idea of the Code of Criminal Procedure that a defendant who had been declared in default and convicted might always file an objection if he felt that he would not have been convicted had the court heard his defence. The Supreme Court went on to hold that it was true that since the introduction of the Code of Criminal Procedure the right to file an objection had been considerably curtailed, but pointed out that in so doing the legislature had not changed the character of trial in absentia. In conclusion, no section of the Code of Criminal Procedure nor any principle of unwritten law entitled a defendant who had been declared in default to have his defence conducted in his absence by counsel.

18. The Supreme Court has accepted, however, that a trial court may, at its discretion, allow counsel to speak in defence of an accused who has been declared in default. This discretion is quite frequently made use of. The Supreme Court strictly maintains the rule that if in such cases a trial court allows counsel to speak at all, it must allow him all rights available to the defence. It may not impose any limitations as to what subjects he may address (judgment of 19 May 1987, NJ 1988, 217); it may not deny him the right to speak last (judgment of 22 March 1988, NJ 1989, 13); if there are witnesses, counsel must be permitted to cross-examine them (judgment of 28 May 1991, NJ 1991, 729).

19. In principle the Supreme Court has held to its rule (see paragraph 17 above) that a defendant who has been declared in default is not entitled to have his defence conducted by counsel, but since its judgment of 26 February 1980 (NJ 1980, 246) it is its established case-law that there is one exception: in that judgment, it ruled, on the basis of, inter alia, Article 6 (art. 6) of the Convention, that a trial court is obliged to allow counsel to conduct the defence of an accused who has been declared in default if it is of the opinion that "compelling reasons" (klemmende redenen) prevent the accused from appearing at the hearing and it sees no reason to defer its examination of the case. The Supreme Court has accepted the corollary that counsel should in any case, if he so requests, be allowed the opportunity to argue that such reasons exist (judgments of 10 October 1989, NJ 1990, 293, and 19 December 1989, NJ 1990, 407).

20. The Supreme Court, in its judgment of 16 February 1988 (NJ 1988, 794), has held that a "compelling reason" exists not only if it is impossible for the accused to appear, but also if such an important interest is at stake for the accused that - in view of all circumstances that may be considered relevant - he cannot reasonably be expected to appear for trial and may therefore expect either that his trial will be adjourned until some later time when he will be able to attend or that his counsel will be allowed to conduct the defence.
The Supreme Court has consistently refused to accept the possibility of the accused being arrested as a "compelling reason" for his absence (see, inter alia, its judgments of 24 November 1988, NJ 1988, 638, of 9 February 1992, DD (Delikt en Delinkwent, Offence and Offender) 93.292, and 4 May 1993, DD 93.396, in addition to its judgment in the instant case).

21. If counsel wishes to act for the defence in the absence of his client, he should expressly ask permission to do so. His presence alone is not sufficient (see, inter alia, the judgments of the Supreme Court of 14 November 1986, NJ 1987, 862; 25 November 1986, NJ 1987, 686;

8 December 1987, NJ 1988, 704; 18 September 1989, NJ 1990, 145; 14 December 1993, DD 94.166). Nor does a request made by counsel for the hearing to be deferred suffice, as was held in, inter alia, the Supreme Court's judgment of 21 December 1993 (DD 94.176). (…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (c) (art. 6-1, art. 6-3-c)

25. Mr Lala complained that at the appeal hearing before the Court of Appeal of The Hague his counsel had not been allowed to conduct the defence in his absence. He relied on Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention, which provide:
"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... ... 3. Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing ..."
The Government rejected this submission but the Commission accepted it.

26. As the requirements of paragraph 3 of Article 6 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaints under both provisions taken together (see, as the most recent authority, the Poitrimol v. France judgment of 23 November 1993, Series A no. 277-A, p. 13, para. 29).

27. In its report, the Commission considered that the right to defend oneself through legal assistance cannot be invoked only by defendants who are themselves present at their trial. The Commission was therefore of the opinion that the position adopted in Netherlands law, namely that an accused who does not attend his trial in person loses the right to defend himself through counsel, is incompatible with the respect for the fundamental guarantees which every person charged with a criminal offence should enjoy. The need to secure the attendance of the accused at the trial could not, in their opinion, justify proceeding to judgment against him without hearing the defence he wishes to put forward through his counsel.
At the hearing before the Court the Delegate of the Commission stressed that the principle of equality of arms enshrined in Article 6 (art. 6) required the arguments of the defence to be heard as far as possible in addition to those of the prosecution. While accepting that it was important that the accused should be present at his trial, which was the view expressed by the Court in its Poitrimol judgment referred to above (ibid., p. 15, para. 35), he considered it inherently wrong that the threat of "forfeiture of human rights" should be used to compel him to attend.

28. The applicant stressed that he did not complain of having been prevented from defending himself, but from being defended by his counsel, who in fact attended the hearing of the Court of Appeal. He acknowledged the importance of the accused's attendance at trial, but contended that if, as in his case, the accused did not appear because of a reasonable fear of being arrested, it was disproportionate to penalise non-appearance by preventing his counsel, who was prepared to defend him, from doing so.
He maintained that his counsel had specifically requested the court to be allowed to conduct his defence (the official record was incomplete in this respect), while pointing out that in any case his counsel had appeared in court at the appointed time, fully robed, and, as was self-evident, for no other reason than to conduct the defence.

29. The Government contended in the first place that it did not appear from the official record of the hearing that the applicant's counsel had explicitly requested permission to conduct the defence, as he should have done under the pertinent rules of Netherlands criminal procedure (see paragraph 21 above).

Furthermore, they maintained that the rule adopted by the Supreme Court, according to which a defendant who had been declared in default was not entitled to have his defence conducted by counsel unless there appeared to be compelling reasons for his absence (see paragraph 19 above), purported to dissuade those charged with a criminal offence from not attending trial. They stressed the importance of the accused's attendance. The system was in their view well balanced and not incompatible with Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c). The latter provision in no way implied that, contrary to the relevant provisions of domestic law, the accused always had the right to be absent from the hearing while his counsel conducted the defence.

30. The Court notes at the outset that the present case does not concern the question whether trial in the absence of the accused is compatible with Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c): the applicant's complaint is not that the appeal was heard in his absence - he had not availed himself of his right to attend - but rather that the Court of Appeal decided the case without his counsel, whom he had charged to conduct the defence and who attended the trial with the clear intention of doing so, being allowed to defend him.

31. In addition, the Court notes that, like the Poitrimol case, the present case concerns a criminal appeal by way of rehearing, which is the last instance where, under domestic law, the case could be fully examined as to questions of both fact and law.

32. The present case differs in several respects from the Poitrimol case, one important difference being that under Netherlands law the accused is, as a rule, not under an obligation to attend his trial, the exception to that rule being immaterial in the present context (see paragraph 14 above).

Accordingly, when the Netherlands Supreme Court gave its ruling that a defendant who has been declared in default is not entitled to have his defence conducted by counsel unless there appear to be compelling reasons for his absence, it did not suggest that this doctrine sought to discourage unjustified absences of the accused, but based it - initially at least - strictly on the drafting history of the Code of Criminal Procedure (see paragraphs 17 and 19 above).

33. The case-law in question may however - as the Government argued - well be understood to serve the above purpose, because, as this Court pointed out in its Poitrimol judgment (loc. cit., p. 15, para. 35), in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial. As a general rule, this is equally true for an appeal by way of rehearing. However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal, the more so if, as is the case under Netherlands law, no objection may be filed against a default judgment given on appeal.

In the Court's view the latter interest prevails. Consequently, the fact that the defendant, in spite of having been properly summoned, does not appear, cannot - even in the absence of an excuse - justify depriving him of his right under Article 6 para. 3 (art. 6-3) of the Convention to be defended by counsel.

34. Nor can the Court accept the Government's argument that the applicant cannot claim to be a victim of an interference with his rights under the said provisions because his counsel failed to ask the court's permission, in accordance with the relevant rule of Netherlands criminal procedure, to defend the accused (see paragraph 21 above). Everyone charged with a criminal offence has the right to be defended by counsel. For this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so.

35. In conclusion, there has been a violation of Article 6 para. 1 taken together with Article 6 para. 3 (c) (art. 6-1, art. 6-3-c).

(…)

CASE OF LETELLIER v. FRANCE

(Application no. 12369/86) COURT (CHAMBER), 26 June 1991

AS TO THE FACTS (...)

8. Mrs Monique Merdy, née Letellier, a French national residing at La Varenne Saint-Hilaire (Val-de-Marne), took over a bar-restaurant in March 1985. The mother of eight children from two marriages, she was separated from her second husband, Mr Merdy, a petrol pump attendant, and at the material time was living with a third man.

9. On 6 July 1985 Mr Merdy was killed by a shot fired from a car. A witness had taken down the registration number of the vehicle and on the same day the police detained Mr Gérard Moysan, who was found to be in possession of a pump-action shotgun. He admitted that he had fired the shot, but stated that he had acted on the applicant's instructions. He claimed that she had agreed to pay him, and one of his friends, Mr Michel Bredon - who also accused the applicant -, the sum of 40,000 French francs for killing her husband and that she had advanced him 2,000 francs for the purchase of the weapon.
Mrs Letellier denied these accusations although she admitted having seen the murder weapon, having declared in public that she wished to get rid of her husband and having given her agreement "without thinking too much about it" to Mr Moysan who had proposed to carry out the deed. She maintained, moreover, that she had given 2,000 francs to Mr Moysan, whom she described as "a poor kid", so that he could buy a motor car.

10. On 8 July 1985, in the course of the first examination, the investigating judge of the tribunal de grande instance (Regional Court) of Créteil charged the applicant with being an accessory to murder and remanded her in custody.

A. The investigation proceedings

1. The first application for release of 20 December 1985

11. On 20 December 1985 the applicant sought her release arguing that there was no serious evidence of her guilt. She claimed in addition that she possessed all the necessary guarantees that she would appear for trial: her home, the business, which she ran single-handed, and her eight children, some of whom were still dependent on her.

12. On 24 December 1985 the investigating judge ordered her release subject to court supervision; she gave the following grounds for her decision:
"... at this stage of the proceedings detention is no longer necessary for the process of establishing the truth; ... although the accused provides guarantees that she will appear for trial which are sufficient to warrant her release, court supervision would seem appropriate."
He ordered the applicant not to go outside certain territorial limits without prior authorisation, to report to him once a week on a fixed day and at a fixed time, to appear before him when summoned, to comply with restrictions concerning her business activities and to refrain from receiving visits from or meeting four named persons and from entering into contact with them in any way whatsoever.
Thereupon the guardianship judge (juge des tutelles) returned custody of her four minor children to Mrs Letellier.

13. On appeal by the Créteil public prosecutor, the indictments division (chambre d'accusation) of the Paris Court of Appeal set aside the order on 22 January 1986, declaring

that it would thereafter exercise sole jurisdiction on questions concerning the detention. It noted in particular as follows:

"...

The file contains ... considerable evidence suggesting that the accused was an accessory to murder, which is an exceptionally serious criminal offence having caused a major disturbance to public order, the gravity of which cannot diminish in the short lapse of time of six months.

The investigations are continuing and it is necessary to prevent any manoeuvre capable of impeding the establishment of the truth.

In addition, in view of the severity of the sentence to which she is liable at law, there are grounds for fearing that she may seek to evade the prosecution brought against her.

No measure of court supervision would be effective in these various respects.

Ultimately detention on remand remains the sole means of preventing pressure being brought to bear on the witnesses.

It is necessary in order to protect public order from the disturbance caused by the offence and to ensure that the accused remains at the disposal of the judicial authorities.

... ."

As a result, the applicant, who had been released on 24 December 1985, returned to prison on 22 January 1986.

14. At the hearing on 16 January 1986 Mrs Letellier had filed a defence memorial. In it she stressed that she had waited until the main phase of the investigation had been concluded before lodging her application for release; thus all the witnesses had been heard by the police or by the investigating judge, two series of confrontations with Mr Moysan had taken place and all the commissions rogatoires had been executed. She noted in addition that Article 144 et seq. of the Code of Criminal Procedure in no way regarded the gravity of the alleged offences as one of the conditions for placing and keeping an accused in pre-trial detention and that the parties seeking damages (parties civiles) had not filed any observations on learning of her release. She urged the indictments division to confirm the order of 24 December 1985 releasing her subject to court supervision and stated that she had no intention whatsoever of evading the prosecution, that she would comply scrupulously with the court supervision, that she could provide firm guarantees that she would appear in court and that further imprisonment would destroy, both financially and emotionally, a whole family, whose sole head she remained.

15. Mrs Letellier filed an appeal which the Criminal Division of the Court of Cassation dismissed on 21 April 1986 on the following grounds:

"...

In setting aside the order for the release subject to court supervision of Monique Merdy, née Letellier, accused of being an accessory to the murder of her husband, the indictments division, after having set out the facts and noted the existence of divergences between her statements and the various testimonies obtained, observed that the offence had caused a disturbance to public order which had not yet diminished, that, as the investigation was continuing, it was important to prevent any manoeuvre likely to impede the establishment of the truth and bring pressure to bear on the witnesses, and that the severity of the sentence to which the accused was liable at law raised doubts as to whether she would appear for trial if she were released; the indictments division considered that no measure of court supervision could be effective in these various respects;

That being so the Court of Cassation is able to satisfy itself that the indictments division ordered the continued detention of Monique Merdy, née Letellier, by a decision stating specific grounds with reference to the particular circumstances and for cases provided for in Articles 144 and 145 of the Code of Criminal Procedure;."

2. The second application for release of 24 January 1986

16. On 24 January 1986 the applicant again requested her release; the indictments division of the Paris Court of Appeal dismissed her application by a decision of 12 February 1986, similar to its earlier decision (see paragraph 13 above).

17. On an appeal by Mrs Letellier, the Court of Cassation set aside this decision on 13 May 1986 on the ground that the rights of the defence had been infringed as neither the applicant nor her counsel had been notified of the date of the hearing fixed for the examination of the application. It remitted the case to the indictments division of the Paris Court of Appeal, composed differently.

18. The latter indictments division dismissed the application on 17 September 1986. It considered that there were "in the light of the evidence ..., serious grounds for suspecting that the accused had been an accessory to murder". It took the view that "under these circumstances ..., the accused's detention [was] necessary, having regard to the seriousness of the offence ... and the length of the sentence [which she risked], in order to ensure that she remain[ed] at the disposal of the judicial authorities and to maintain public order".

It also dismissed the complaints based on a violation of Article 5 §§ 3 and 4 (art. 5-3, art. 5-4) of the Convention, stressing that these complaints were not based on any provision of the Code of Criminal Procedure and that it had taken its decision with due dispatch in accordance with that code.

19. At the hearing on 16 September 1986, Mrs Letellier had submitted a defence memorial. In it she requested the indictments division to order her release "because her application for release had not been heard within a reasonable time" within the meaning of Article 5 § 3 (art. 5-3) of the Convention and to take formal note that she did not object to being placed under court supervision.

20. On an appeal by Mrs Letellier, the Court of Cassation overturned this decision on 23 December 1986. It found that the Court of Appeal had not answered the submissions concerning the failure to respect the "reasonable time" referred to in Article 5 § 3 (art. 5-3).

21. On 17 March 1987 the indictments division of the Amiens Court of Appeal dismissed the application, which had been remitted to it, on the following grounds:

"...

... the charges are indeed based on sufficient, relevant and objective evidence despite the accused's claim to the contrary;

Having regard to the complexity of the case and to the investigative measures which it necessitates, the time taken to conduct the investigation remains reasonable for the purposes of the European Convention, with reference to the dates on which Mrs Letellier was placed in detention and had her detention extended; the proceedings have never been neglected, as examination of the file shows;

Mrs Letellier's complaint that a reasonable time has been exceeded is also directed against the time taken to hear her application for release ... and she infers therefrom, by analogy with Articles 194 and 574-1 of the French Code of Criminal Procedure, that such a decision should have been taken within a period of between thirty days and three months;

However, none of the provisions of that code which are expressly applicable to the present dispute has been infringed and it must be recognised that the period of time which elapsed between the date of the application and that of the present judgment is only the inevitable result of the various appeals filed;

Finally the applicant's continued detention on remand remains necessary to preserve public order from the disturbance caused by such a - according to the present state of the investigation - decisive act of incitement to the murder of Mr Merdy; the extent of such

disturbance, to the whole community, is not determined only on the basis of the reactions of the victim's entourage, contrary to what the defence claims ... . "

22. The applicant filed an appeal on points of law. She relied inter alia on Article 5 § 3 (art. 5-3) of the Convention, claiming that the indictments division had "failed to consider whether detention lasting more than twenty-two months, when the investigation [was] not yet concluded, exceeded a reasonable time". She also alleged violation of Article 5 § 4 (art. 5-4) inasmuch as the eighty-three days which had elapsed between the judgment of the Court of Cassation on 23 December 1986 and the judgment of the court to which the application was remitted could not be regarded as satisfying the requirement of speediness.

The Court of Cassation dismissed the appeal on 15 June 1987 on the following grounds:

"...

In order to reply to the accused's submissions based on the provisions of Article 5 § 3 (art. 5-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which she had claimed had been infringed, the court to which the application was remitted found that, in relation to the dates on which Monique Letellier had been placed in detention on remand and had her detention extended, having regard to the complexity of the case and the necessary investigative measures, the proceedings had been conducted within a reasonable time within the meaning of the above-mentioned Convention; it found that the time which had elapsed between the date of her application for release of 24 January 1986 and that of the present judgment was only the inevitable result of the various appeals filed, cited in the judgment;

Moreover, in dismissing this application for release and ordering the accused's continued detention on remand, the indictments division, after having referred to the grounds for suspicion against Monique Letellier, noted that the latter denied having been an accessory in any way although the declarations in turn of the two main witnesses conflict with the accused's version. According to the indictments division, it remains necessary to keep the accused in detention on remand in order to protect public order from the disturbance to which incitement to the murder of a husband gives rise;

In the light of the foregoing statements, the Court of Cassation is able to satisfy itself that the indictments division, before which no submissions based on the provisions of Article 5 § 4 (art. 5-4) of the European Convention were raised and which was not bound by the requirements of Article 145-1, sub-paragraph 3, of the Code of Criminal Procedure, which do not apply in proceedings concerning more serious criminal offences (matière criminelle), did, without infringing the provisions referred to in the defence submissions, give its ruling stating specific grounds with reference to the particular circumstances of the case, under the conditions and for the cases exhaustively listed in Articles 144 and 145 of the Code of Criminal Procedure;."

3. The other applications for release

23. During the investigation, the applicant submitted six other applications for release: on 14 February, 21 March, 19 November and 15 December 1986 and then on 31 March and 5 August 1987. The indictments division of the Paris Court of Appeal dismissed them on 5 March, 10 April, 5 December and 23 December 1986 and on 10 April and 24 August 1987 respectively. It based its decisions on the following grounds:

Judgment of 5 March 1986

"The file thus contains considerable evidence suggesting that the accused was an accessory to murder, which is an exceptionally serious criminal offence having caused a major disturbance to public order, the gravity of which cannot diminish in the short lapse of time of seven months.

The investigations are continuing and it is necessary to prevent any manoeuvre capable of impeding the establishment of the truth.

In addition, in view of the severity of the sentence to which she is liable at law, there are grounds for fearing that she may seek to evade the prosecution brought against her.
No measure of court supervision would be effective in these various respects.
Ultimately, detention on remand remains the sole means of preventing pressure being brought to bear on the witnesses.
It is necessary to protect public order from the disturbance caused by the offence and to ensure that the accused remains at the disposal of the judicial authorities ."

Judgments of 10 April and 5 December 1986
Identical to the preceding decision - itself very similar to that of 22 January 1986 (see paragraph 13 above) - except that the sixth paragraph was not included and that the first paragraph ended at the word "accessory".
Judgment of 23 December 1986
"...
In these circumstances there are strong indications of Mrs Merdy's guilt, indications which were moreover noted most recently by a judgment of this indictments division dated 5 December 1986.
The acts which Mrs Merdy is alleged to have carried out seriously disturbed public order and this disturbance persists. In addition there is a risk that, if she were to be freed, she would, in view of the severity of the sentence to which she is liable, seek to evade the criminal proceedings brought against her.
The constraints of court supervision would be inadequate in this instance.
The detention on remand of Mrs Merdy is necessary to preserve public order from the disturbance caused by the offence and to ensure that she remains at the disposal of the judicial authorities.."

Judgment of 10 April 1987
"... There are strong indications of Monique Letellier's guilt, having regard to the consistency of Mr Moysan's statements.
No new item of evidence has as yet been brought to the court's attention such as would be capable of altering the situation as regards Monique Letellier's incarceration.
The continuation of her detention on remand remains necessary to preserve public order from the serious disturbance caused by the offence and to ensure that she will appear for trial.
The constraints of court supervision would clearly be inadequate to attain these objectives.."

Judgment of 24 August 1987
"In the present state of the proceedings, Monique Letellier is the subject of an order for the forwarding of documents to the principal public prosecutor dated 8 July 1987 made by the Créteil investigating judge, which gives grounds for supposing that the investigation is close to conclusion so that the competent court will be able to give judgment within a reasonable time.
In consequence the detention on remand is absolutely necessary on account of the particularly serious disturbance caused by the offence.
It is to be feared that Mrs Letellier will seek to evade trial, having regard to the severity of the sentence which she risks.
It is consequently essential that the accused remains in detention in order to ensure that she is at the disposal of the trial court.
The guarantees of court supervision would clearly be inadequate to attain these objectives."

24. In the defence memorials which she submitted at the hearings on 23 December 1986, 3 March 1987 and 10 April 1987, Mrs Letellier stressed the contradictions in the investigation and the statements of the witnesses. Moreover, she contested the arguments put forward to justify the extension of her detention. She maintained that, once released, she would remain at the disposal of the judicial authorities and that public order would in no way be threatened; she would comply scrupulously with any court supervision; she would provide very firm guarantees for her appearance in court and her continued detention would destroy emotionally and financially a whole family, whose sole head she remained. She claimed the benefit of the presumption of innocence, a fundamental and inviolable principle of French law.

In her memorial of 3 March 1987, the applicant also invoked Article 5 § 3 (art. 5-3) of the Convention. She noted that "... in accordance with the case-law of the European Court of Human Rights, the grounds given in the decision(s) concerning the application(s) for release, on the one hand, taken together with the true facts indicated by [her] in her applications, on the other, [made] it possible [for her] to affirm that those grounds contained both in the judgment ... of 12 February 1986 and in the preceding judgment of 22 January 1986 and in the subsequent judgments [were] neither relevant nor sufficient". She added that the parties seeking damages, the victim's mother and sister, had not formulated any observations when she had filed her applications for release of December 1985, January, February, March, November and December 1986, whereas they had energetically opposed those of Mr Moysan; she reiterated this last argument in her memorial of 10 April 1987.

25. The case followed its course. On 26 May 1987 the investigating judge made an order terminating the investigation and transmitting the papers to the public prosecutor's office. On 1 July the Créteil public prosecutor lodged his final submissions calling for the file to be transmitted to the principal public prosecutor's office of the Court of Appeal. This was ordered by the investigating judge on 8 July.

B. The trial proceedings

26. On 26 August 1987 the indictments division committed the applicant for trial on a charge of

"having, in the course of 1985 in Val-de-Marne, being less than ten years ago, been an accessory to the premeditated murder of Bernard Merdy committed on 6 July 1985 by Gérard Moysan, inasmuch as she had by gifts, promises, threats, misuse of authority or power, incited the commission of this deed or given instructions for its commission".

27. On 9 September 1987 the Créteil public prosecutor's office advised Mrs Letellier's counsel that "the case [was] liable to be heard during the first quarter of 1988". By a letter of 21 October 1987, however, the lawyer in question gave notice that he would be unavailable from 1 February to 15 March 1988 on account of his participation in another trial before the Assize Court of the Vienne département.

28. On 23 March 1988 the public prosecutor informed the accused's lawyer that the case would be heard on 9 and 10 May 1988. On 10 May 1988 the Val-de-Marne Assize Court sentenced Mrs Letellier to three years' imprisonment for being an accessory to murder. It sentenced Mr Moysan to fifteen years' imprisonment for murder and acquitted Mr Bredon. The applicant did not file an appeal on points of law; she was released on 17 May 1988, the pre-trial detention being automatically deducted from the sentence (Article 24 of the Criminal Code).

II. THE RELEVANT LEGISLATION

29. The provisions of the Code of Criminal Procedure concerning detention on remand, as applicable at the material time, are as follows:

Article 144

"In cases involving less serious criminal offences (matière correctionnelle), if the sentence risked is equal to or exceeds one year's imprisonment in cases of flagrante delicto, or two years' imprisonment in other cases, and if the constraints of court supervision are inadequate in regard to the functions set out in Article 137, the detention on remand may be ordered or continued:

1° where the detention on remand of the accused is the sole means of preserving evidence or material clues or of preventing either pressure being brought to bear on the witnesses or the victims, or collusion between the accused and accomplices;

2° where this detention is necessary to preserve public order from the disturbance caused by the offence or to protect the accused, to put an end to the offence or to prevent its repetition or to ensure that the accused remains at the disposal of the judicial authorities. ... ."

(An Act of 6 July 1989 expressly provided that Article 144 was to be applicable to more serious criminal cases (matière criminelle).)

Article 145

"In cases involving less serious criminal offences, an accused shall be placed in detention on remand by virtue of an order which may be made at any stage of the investigation and which must give specific reasons with reference to the particular circumstances of the case in relation to the provisions of Article 144; this order shall be notified orally to the accused who shall receive a full copy of it; receipt thereof shall be acknowleged by the accused's signature in the file of the proceedings.

As regards more serious criminal offences, detention is prescribed by warrant, without a prior order. ...

The investigating judge shall give his decision in chambers, after an adversarial hearing in the course of which he shall hear the submissions of the public prosecutor, then the observations of the accused and, if appropriate, of his counsel.... ."

Article 148

"Whatever the classification of the offence, the accused or his lawyer may lodge at any time with the investigating judge an application for release, subject to the obligations laid down in the preceding Article [namely: the undertaking of the person concerned "to appear whenever his presence is required at the different stages of the procedure and to keep the investigating judge informed as to all his movements"].

The investigating judge shall communicate the file immediately to the public prosecutor for his submissions. He shall at the same time, by whatever means, inform the party seeking damages who may submit observations. ...

The investigating judge shall rule, by an order giving specific grounds under the conditions laid down in Article 145-1, not later than five days following the communication to the public prosecutor. ...

Where an order is made releasing the accused, it may be accompanied by an order placing him under court supervision.... ."

Article 194

" [The indictments division] shall, when dealing with the question of detention, give its decision as speedily as possible and not later than thirty days [fifteen since 1 October

1988] after the appeal provided for in Article 186, failing which the accused shall automatically be released, except where verifications concerning his application have been ordered or where unforeseeable and insurmountable circumstances prevent the matter from being decided within the time-limit laid down in the present Article."

Article 567-2

"The criminal division hearing an appeal on a point of law against a judgment of the indictments division concerning detention on remand shall rule within three months of the file's reception at the Court of Cassation, failing which the accused shall automatically be released.

The appellant or his lawyer shall, on pain of having his application dismissed, file his memorial setting out the appeal submissions within one month of the file's reception, save where exceptionally the president of the criminal division has decided to extend the time-limit for a period of eight days. After the expiry of this time-limit, no new submission may be raised by him and memorials may no longer be filed." (…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 (art. 5-3)

33. The applicant claimed that the length of her detention on remand had violated Article 5 § 3 (art. 5-3), which is worded as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c), ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Government contested this view. The Commission considered that after 22 January 1986 (see paragraph 13 above) the grounds for Mrs Letellier's detention had no longer been reasonable.

A. Period to be taken into consideration

34. The period to be taken into consideration began on 8 July 1985, the date on which the applicant was remanded in custody, and ended on 10 May 1988, with the judgment of the Assize Court, less the period, from 24 December 1985 to 22 January 1986, during which she was released subject to court supervision (see paragraph 12 above). It therefore lasted two years and nine months.

B. Reasonableness of the length of detention

35. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (art. 5-3) of the Convention (see, inter alia, the Neumeister judgment of 27 June 1968, Series A no. 8, p. 37, §§ 4-5).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention (see the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 40, § 4), but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty (ibid., and see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 24-25, § 12, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 42, § 104). Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see the Matznetter judgment of 10 November 1969, Series A no. 10, p. 34, § 12, and the B. v. Austria judgment of 28 March 1990, Series A no. 175, p. 16, § 42).

36. In order to justify their refusal to release Mrs Letellier, the indictments divisions of the Paris and Amiens Courts of Appeal stressed in particular that it was necessary to prevent her from bringing pressure to bear on the witnesses, that there was a risk of her absconding which had to be countered, that court supervision was not sufficient to achieve these objectives and that her release would gravely disturb public order.

1. The risk of pressure being brought to bear on the witnesses

37. The Government pointed out that the charges against Mrs Letellier were based essentially on the statements of Mr Moysan and Mr Bredon (see paragraph 9 above). The latter, who was examined by the investigating judge on 25 November 1985, could not, on account of his failure to appear, be confronted with the accused on 17 December 1985. The need to avoid pressure being brought to bear such as was liable to lead to changes in the statements of witnesses at confrontations which were envisaged was one of the grounds given in the decision of 22 January 1986 of the Paris indictments division (see paragraph 13 above).

38. According to the Commission, although such a fear was conceivable at the beginning of the investigation, it was no longer decisive after the numerous examinations of witnesses. Moreover, nothing showed that the applicant had engaged in intimidatory actions during her release subject to court supervision (see paragraphs 12-13 above).

39. The Court accepts that a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but takes the view that it diminished and indeed disappeared with the passing of time. In fact, after 5 December 1986 the courts no longer referred to such a risk: only the decisions of the Paris indictments division of 22 January, 5 March, 10 April and 5 December 1986 (see paragraphs 13 and 23 above) regarded detention on remand as the sole means of countering it.
After 23 December 1986 in any event (see paragraph 23 above), the continued detention was therefore no longer justified under this head.

2. The danger of absconding

40. The various decisions of the Paris indictments division (see paragraphs 13, 16, 18 and 23 above) were based on the fear of the applicant's evading trial because of "the severity of the sentence to which she was liable at law" and on the need to ensure that she remained at the disposal of the judicial authorities.

41. The Commission observed that during the four weeks for which she had been released - from 24 December 1985 to 22 January 1986 - the applicant had complied with the obligations of court supervision and had not sought to abscond. To do so would, moreover, have been difficult for her, as the mother of minor children and the manager of a business representing her sole source of income. As the danger of absconding had not been

apparent from the outset, the decisions given had contained inadequate statements of reasons in so far as they had mentioned no circumstance capable of establishing it.

42. The Government considered that there was indeed a danger of the accused's absconding. They referred to the severity of the sentence which Mrs Letellier risked and the evidence against her. They also put forward additional considerations which were not however invoked in the judicial decisions in question.

43. The Court points out that such a danger cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see, mutatis mutandis, the Neumeister judgment cited above, Series A no. 8, p. 39, § 10). In this case the decisions of the indictments divisions do not give the reasons why, notwithstanding the arguments put forward by the applicant in support of her applications for release, they considered the risk of her absconding to be decisive (see paragraphs 14, 19 and 24 above).

3. The inadequacy of court supervision

44. According to the applicant, court supervision would have made it possible to attain the objectives pursued. Furthermore, she had been under such supervision without any problems arising for nearly one month, from 24 December 1985 to 22 January 1986 (see paragraphs 12-13 above), and had declared her readiness to accept it on each occasion that she sought her release (see paragraphs 14, 19 and 24 above).

45. The Government considered on the other hand that court supervision would not have been sufficient to avert the consequences and risks of the alleged offence.

46. When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security (see the Wemhoff judgment, cited above, Series A no. 7, p. 25, § 15). The Court notes, in agreement with the Commission, that the indictments divisions did not establish that this was not the case in this instance.

4. The preservation of public order

47. The decisions of the Paris indictments division of 22 January, 5 March and 23 December 1986 and of 10 April and 24 August 1987 (see paragraphs 13 and 23 above), like that of the Amiens indictments division of 17 March 1987 (see paragraph 21 above), emphasized the need to protect public order from the disturbance caused by Mr Merdy's murder.

48. The applicant argued that disturbance to public order could not result from the mere commission of an offence.

49. According to the Commission, the danger of such a disturbance, which it understood to mean disturbance of public opinion, following the release of a suspect, cannot derive solely from the gravity of a crime or the charges pending against the person concerned. In order to determine whether there was a danger of this nature, it was in its view necessary to take account of other factors, such as the possible attitude and conduct of the accused once released; the French courts had not done this in the present case.

50. For the Government, on the other hand, the disturbance to public order is generated by the offence itself and the circumstances in which it has been perpetrated. Representing an irreparable attack on the person of a human being, any murder greatly disturbs the public order of a society concerned to guarantee human rights, of which respect for human life represents an essential value, as is shown by Article 2 (art. 2) of the Convention. The

resulting disturbance is even more profound and lasting in the case of premeditated and organised murder. There were grave and corroborating indications to suggest that Mrs Letellier had conceived the scheme of murdering her husband and instructed third parties to carry it out in return for payment.

51. The Court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises - as in Article 144 of the Code of Criminal Procedure - the notion of disturbance to public order caused by an offence.
However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.
In this case, these conditions were not satisfied. The indictments divisions assessed the need to continue the deprivation of liberty from a purely abstract point of view, taking into consideration only the gravity of the offence. This was despite the fact that the applicant had stressed in her memorials of 16 January 1986 and of 3 March and 10 April 1987 that the mother and sister of the victim had not submitted any observations when she filed her applications for release, whereas they had energetically contested those filed by Mr Moysan (see paragraphs 14 and 24 in fine above); the French courts did not dispute this.

5. Conclusion

52. The Court therefore arrives at the conclusion that, at least from 23 December 1986 (see paragraph 39 above), the contested detention ceased to be based on relevant and sufficient grounds.
The decision of 24 December 1985 to release the accused was taken by the judicial officer in the best position to know the evidence and to assess the circumstances and personality of Mrs Letellier; accordingly the indictments divisions ought in their subsequent judgments to have stated in a more clear and specific, not to say less stereotyped, manner why they considered it necessary to continue the pre-trial detention.

53. There has consequently been a violation of Article 5 § 3 (art. 5-3).

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

54. The applicant also alleged a breach of the requirements of Article 5 § 4 (art. 5-4), according to which:
"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."
She claimed that the final decision concerning her application for release of 24 January 1986, namely the Court of Cassation's dismissal on 15 June 1987 of her appeal against the decision of the indictments division of the Amiens Court of Appeal of 17 March 1987 (see paragraphs 16, 21 and 22 above), was not given "speedily". The Commission agreed.

55. The Government contested this view. They argued that the length of the lapse of time in question was to be explained by the large number of appeals filed by Mrs Letellier herself on procedural issues: in thirteen months and three weeks the indictments divisions gave three decisions and the Court of Cassation two; the time which it took for these decisions

to be delivered was in no way excessive and could not be criticised because it was in fact the result of the systematic use of remedies available under French law.

56. The Court has certain doubts about the overall length of the examination of the second application for release, in particular before the indictments divisions called upon to rule after a previous decision had been quashed in the Court of Cassation; it should however be borne in mind that the applicant retained the right to submit a further application at any time. Indeed from 14 February 1986 to 5 August 1987 she lodged six other applications, which were all dealt with in periods of from eight to twenty days (see paragraph 23 above).

57. There has therefore been no violation of Article 5 § 4 (art. 5-4). (…)

CASE OF NATSVLISHVILI AND TOGONIDZE v. GEORGIA

Application no. 9043/05 THIRD SECTION, 29 April 2014

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first and second applicants (...) are husband and wife.

A. Background

9. The first applicant was the deputy mayor of Kutaisi, the second largest city in Georgia, from 1993 to 1995 and the managing director of the company operating the Kutaisi Automotive Plant ("the factory"), one of the most important public companies in the country, from 1995 to 2000. On 29 December 2000 he was appointed chairman of the factory's supervisory committee at the shareholders' general meeting.
10. The first applicant owned 12.95% of the shares through purchases made in 1998 and 2002 and was the principal shareholder in the factory after the State (78.61% of the shares). The second applicant owned 2.6% of the shares, purchased in 2002, so together the couple owned a total of 15.55% of the shares.
11. The first applicant was kidnapped in December 2002. After being severely ill-treated by his abductors, he was released in exchange for a large ransom paid by his family.

B. Criminal proceedings against the first applicant

12. On 12 March 2004 the first applicant was accused of illegally reducing the share capital of the factory, for which he had first been responsible as managing director and then as chairman of the supervisory committee. He was charged with making fictitious sales, transfers and write offs, and spending the proceeds without regard to the company's interests (Article 182 of the Criminal Code – "abuse of authority by embezzling and misappropriating the property of others").
13. On 15 March 2004 the police and the Kutaisi prosecutor went to the first applicant's workplace to arrest him. The arrest was filmed by journalists and broadcast on a local private television station the same night. The broadcast consisted of an interview with the prosecutor following footage showing the first applicant's arrest and escort down a flight of stairs, with his arms held by policemen and surrounded by journalists. The prosecutor made two comments in respect of the matter: that the documents seized during a search of the first applicant's office "were relevant to an ongoing criminal investigation and would be assessed and analysed", and that the charge which the first applicant faced carried up to twelve years' imprisonment.
14. The prosecutor's interview was followed by that of the Governor of the Region. The Governor, without making any reference to the first applicant or the criminal proceedings against him, declared, among other things, that the State, which was "experiencing difficult times [due to a political crisis], would not stray from the path that it had chosen in pursuit of the identification of those who had devoured public money ... which was exactly why pensions and salaries had not been able to be paid on time".
15. On 16 March 2004 the first applicant appointed a lawyer to protect his interests.

16. When questioned for the first time as a suspect on 17 March 2004, the first applicant, assisted by his lawyer, protested his innocence and exercised his right to silence.
17. On the same day the prosecuting authority brought an application before the Kutaisi City Court to have the first applicant detained pending trial arguing that the first applicant, who was accused of a crime of a serious nature, might try to evade justice, prevent the discovery of the truth and pursue his criminal activities. Ruling on this request on an unspecified date, the City Court decided to place the first applicant in detention for three months. Applying Article 243 of the Code of Criminal Procedure ("the CCP"), the first applicant challenged that decision before the Kutaisi Regional Court, which dismissed his appeal on an unspecified date.
18. On 25 March 2004 the first applicant sent a letter to the prosecuting authority, which read as follows: "Since I am not indifferent to the future of the automobile factory and consider it possible to settle the problems [I am having] with the State, I express my readiness to forfeit the shares in the factory which are currently in my and my wife's possession to the State."
19. On 14 June 2004 the first applicant's detention pending trial was extended by the Kutaisi Regional Court until 15 July 2004, and in July 2004 it was extended until 15 September 2004.
20. During the first four months of his detention the first applicant was detained in the same cell as the person charged with his kidnapping in 2002 (see paragraph 11 above) and another person serving a sentence for murder. After the Public Defender's Office complained of that fact on the ground that it put the applicant's physical and psychological well-being at risk, the prison authorities transferred the applicant to another cell.
21. On 1 August 2004 the first applicant and his lawyer were given access to the criminal case materials. On 6 August 2004 the first applicant appointed a second lawyer to protect his interests in the proceedings.
22. On 6 September 2004 the investigation was terminated, and the first applicant was indicted on the aforementioned charges. Having acquainted himself, with the assistance of his two lawyers, with the case file in its entirety, he again protested his innocence but confirmed his intention to cooperate with the investigation.
23. On the same day both applicants transferred their shares free of charge, representing an overall total of 15.55% of the factory's share capital, to the State.
24. According to a written statement in the case file from Mr G.T., a worker in the factory, on 6 September 2004 he and nine other employees of the factory transferred their shares to the State ex gratia, at the request of the prosecuting authority, in connection with the criminal proceedings against the first applicant and in exchange for the latter's release from detention. The case file contains a copy of the relevant ex gratia agreements dated 6 September 2004.
25. The file also contains a witness statement by Mrs M.I., the second applicant's sister-in-law, that the public prosecutor had also demanded that the first applicant's family pay 50,000 laris (GEL) (about 21,000 euros (EUR)) to the Fund for the Development of State Bodies ensuring the Protection of the Law ("the Development Fund") in order to conclude a "procedural agreement" releasing the first applicant from detention. Thus, the public prosecutor had supplied them with the documents necessary for the transfer, adding that the first applicant's name must not appear as the one paying the money. The public prosecutor insisted that the money not be paid to the Development Fund directly by the applicants. Mrs M.I. therefore agreed to pay the required amount in her own name.
26. As confirmed by the relevant bank-transfer receipt, that payment was made on 8 September 2004, with Mrs M.I.'s name duly appearing on the document as the source of the transfer.
27. On the following day, 9 September 2004, the first applicant filed a written statement with the public prosecutor, requesting him to arrange a "procedural agreement" (hereinafter a

"plea bargain"), which procedure had been introduced into the Georgian judicial system in February 2004. The applicant specified that, whilst considering himself to be innocent, he was willing to reach an agreement as regards the sentence and to repair the damage caused to the State; he stated that he would pay GEL 35,000 (EUR 14,700) to the State budget in that connection. He added that he fully understood the contents of the agreement.

28. On the same day the public prosecutor of Kutaisi offered and the first applicant accepted a plea bargain regarding sentence (Article 679 § 2 of the CCP). The written record of the plea agreement mentioned that, whilst the applicant refused to confess to the charges, he had "actively cooperated with the investigation by voluntarily paying compensation in the amount of GEL 4,201,663 (approximately EUR 1,765,000) for the damage caused by his criminal activity by returning 22.5% of the shares in the factory to the State". The prosecutor further noted that, notwithstanding the fact that the applicant was charged with a particularly serious offence liable to a term of imprisonment of six to twelve years, it was still possible, having due regard to the full compensation of the damage and in the interest of the efficient use of State resources, to offer him a plea bargain. Notably, the prosecutor promised that he would request the trial court to convict the applicant without an examination of the merits, seeking a reduced sentence in the form of a GEL 35,000 (EUR 14,700) fine. It was explained to the applicant that the proposed plea bargain would not exempt him from civil liability. The first applicant stated that he fully understood the content of the bargain and was ready to accept it and that his decision was not the result of any duress, pressure or any kind of undue promise. The record of the plea agreement was duly signed by the prosecutor, the applicant and one of his two lawyers.

29. Also on the same day the public prosecutor filed a brief with the Kutaisi City Court, requesting approval of the aforementioned plea bargain consisting of no examination of the merits of the case, of finding the first applicant guilty of the charges brought against him and of reducing the sentence to which the offences were liable by fining the accused GEL 35,000 (EUR 14,700). It was mentioned in the prosecutorial brief that it was accompanied by the written record of the plea agreement and twelve volumes of the criminal case materials.

30. Also on the same day Mrs M.I. effected a bank transfer to the State in payment of the fine of GEL 35,000 (EUR 14,700) as per the above-mentioned plea bargain between the first applicant and the public prosecutor.

31. At an oral hearing on 10 September 2004, the Kutaisi City Court, sitting in a single-judge formation, examined the prosecutor's request of 9 September 2004. As disclosed by the record of the hearing, the judge explained to the first applicant, who was assisted by one of the two lawyers who had countersigned the plea bargain (see paragraph 28 above), his rights under Article 679-3 of the CCP. In reply, the applicant acknowledged that he was well aware of his rights and that he had agreed to the bargain voluntarily, without having being subjected to any kind of undue pressure during the negotiations with the prosecutor. That was confirmed by the lawyer as well. The first applicant and his lawyer then asked the judge to endorse the plea bargain, as submitted by the prosecutor, confirming that they fully accepted its consequences. The lawyer added that he had assisted in the plea-bargaining negotiations between his client and the prosecution, that it was his client who had insisted on reaching a settlement, and that he, as a lawyer, had provided all the necessary counselling to the applicant.

32. Relying on the documentary evidence and the testimony of various witnesses acquired during the investigative stage, the Kutaisi Court found that the charges brought against the first applicant were well-founded. The court also noted that, when he was charged on 6 September 2004 with crimes under Article 182 §§ 2 (a), (b) and (c) and 3 (b) of the Criminal Code, the applicant "did not plead guilty and exercised his right to silence. However, having actively cooperated with the investigation, he had voluntarily repaired

the damage of GEL 4,201,663 [EUR 1,765,000] caused by his criminal activity by returning 22.5% of the shares in the factory to the State".

33. The City Court further held that, following the judicial examination, it reached the conclusion that the plea bargain had been concluded in accordance with the law, that the first applicant had signed it in full knowledge of the facts and that it was not the result of any duress, pressure or any kind of promise which went beyond what was permitted in plea bargaining. The court thus sanctioned the agreement by declaring the first applicant guilty of the charges brought against him and sentencing him to a GEL 35,000 (EUR 14,700) fine. The first applicant was then immediately released from the courtroom.

34. As mentioned in its operative part, the Kutaisi City Court's decision of 10 September 2004 was final and not subject to appeal. A request could be made to have the decision quashed and the case reopened though, if newly discovered circumstances justified such a course of action.

35. According to the case file, after the termination of the criminal proceedings and his consequent release from detention, the first applicant left Georgia and has since been residing in Moscow, Russia.

C. The proceedings before the Court

36. After notice of the application had been given to the respondent Government on 21 September 2006 and the parties had exchanged their observations, the applicants complained to the Court, on 12 November 2007, that the General Prosecutor's Office ("the GPO") was continuing to exert pressure on them, this time with the aim of having them withdraw their application from the Court.

37. In support of that assertion, the applicants submitted a written statement given by their daughter, Ms A. Natsvlishvili, dated 6 November 2007.

38. According to that statement, after having been told by her parents that pressure was being brought to bear on them, in September 2004 Ms Natsvlishvili, who was a student at the Central European University in Budapest at the time, decided to approach an acquaintance of hers who was working at the GPO, Ms T.B. Subsequently, Ms Natsvlishvili exchanged several e-mails with her acquaintance in which the latter, claiming to act on behalf of the GPO, expressed that authority's position on the applicants' case. The case file contains a copy of the relevant e-mail exchange.

39. In the e-mail exchange, Ms Natsvlishvili and Ms T.B. addressed each other on friendly terms, using shortened, pet names and familiar instead of formal forms of address.

40. Ms Natsvlishvili was the first to contact Ms T.B., on 14 September 2006, asking her, as a friend and an experienced lawyer, to give her some advice about her master's thesis and a forthcoming examination in law.

41. On 29 November 2006 Ms T.B. advised the applicants' daughter, whom she considered to be "a friend", that she had been "personally" working on her father's case and thus possessed important information emanating from the Prosecutor General. Inviting the applicants' daughter to express her parents' position on the matter, Ms T.B. promised to share her hierarchical superiors' views with them.

42. On 11 December 2006 Ms T.B. informed the applicants' daughter that the GPO would be ready to reopen the first applicant's criminal case and then terminate it again, this time in his favour, and to return the GEL 35,000 (EUR 14,700) which had been paid by him as a fine. Ms T.B. encouraged the applicants to think about that proposal quickly and to accept it, otherwise, she stated, "the prosecution authority would defend its position in Strasbourg and might even unilaterally annul the plea bargain and reopen the criminal proceedings against the first applicant".

43. On 16 December 2006 Ms Natsvlishvili informed Ms T.B. that her father was ready to reach a friendly settlement, as provided for "by the Convention" and under the scrutiny of the Court. Ms Natsvlishvili then asked a number of procedural questions and also enquired whether it was possible, having due regard to the substantial pecuniary and non-pecuniary damage which had been inflicted on her family by the State, to review the conditions of the proposed settlement.

44. On the same date, 16 December 2006, Ms T.B. replied that "her personal involvement in the case was a guarantee that the applicants' family would not find itself in an inauspicious situation again". Ms T.B. then stated that the first applicant should file an application with the GPO, complaining that the plea bargain in question had been reached without a full consideration of his interests. The GPO would then treat that application as a request for the reopening of the case on the basis of newly discovered circumstances. Ms T.B. assured the applicants' daughter that, after the reopening of the case, the first applicant would, as a matter of fact, be rehabilitated by having obtained the deletion of the conviction from his criminal record.

45. Ms T.B. then stated that the State would be ready to return the money which had been paid by the first applicant as a fine and the shares in the factory forfeited by the second applicant; she explained that the first applicant's shares could not be returned as they had already been assigned to a third party. The GPO employee also assured Ms Natsvlishvili that the first applicant would become eligible to return to Georgia and to start business afresh there, in which entrepreneurial activity the prosecution authority would even assist him. Ms T.B. then continued:
"We all know that errors have been committed, but it has become a particularly vital issue, in the interests of the country, to set aside personal experience and trauma now, notwithstanding the painfulness of those [experiences]. I know that this is difficult, but if you can manage it, I am confident that after years have passed you would then be in a position to tell yourself that you were successful in differentiating Georgia, as your own country, from individual State agents, and to tell yourself that you made your own small sacrifice for your country."

46. Ms T.B. specified that "they", the GPO, were not telling the applicants to first withdraw their application from the Court and to settle the issue at the domestic level afterwards. On the contrary, the State was ready to start working on the settlement of the issue at the domestic level first. However, Ms T.B. then reminded the applicants' daughter that "they had only a month left for [filing observations with] Strasbourg".

47. On an unspecified date, but apparently subsequent to the above mentioned e-mail exchange, Ms T.B. informed Ms Natsvlishvili that the State would be ready to pay to the first applicant, in compensation, GEL 50,000 (EUR 22,000) and to take procedural measures to have the conviction deleted from his criminal record. She specified as follows:
"As regards the issue of rehabilitation and compensation, the decision will apparently belong, according to the applicable rules of jurisdiction, to the Kutaisi Court of Appeal. It will therefore be indicated in this court's decision that, given the fact that the remainder of [the applicants'] shares have been assigned and that the factory has become indebted, it is factually impossible to return the shares in their entirety, which would then lead to the award of GEL 50,000 [(EUR 22,000)] in pecuniary and non-pecuniary damages."

48. Ms T.B. then assured the applicants' daughter that they could trust the GPO, as, in any event, should there be any improper conduct by the authorities, the applicants could always then complain to the Court about the alleged hindrance of the right of individual petition under Article 34 of the Convention, which allegation would be of particular harm for the respondent State's international image. Ms T.B. mentioned, lastly, that the State might be ready to increase the amount of compensation to a maximum of GEL 85,000 (EUR 35,700).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 2 OF PROTOCOL No. 7

76. The first applicant complained under Article 6 § 1 of the Convention and Article 2 of Protocol No. 7 that the plea-bargaining process employed in his case had been an abuse of process and that no appeal to a higher court against the judicial endorsement of the plea-bargaining agreement, which he considered to have been unreasonable, had been possible.

77. The relevant parts of Article 6 § 1 of the Convention and Article 2 of Protocol No. 7 read as follows:

Article 6

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ..."

Article 2 of Protocol No. 7

"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."

A. The Government's submissions

78. The Government submitted that plea bargaining, a form of consensual and abbreviated criminal justice, had been successfully incorporated into the legislation and practice of various European States and worldwide in harmony with the fundamental fair-trial guarantees. The emergence and spread of plea bargaining had been driven by the increased interests of procedural economy. The Government highlighted that as early as 1987 the member States of the Council of Europe had been advised by the Committee of Ministers to develop means of simplifying and expediting trial procedures, which included summary judgments, out-of-court negotiations and guilty pleas (see paragraph 54 above). They further emphasised that the plea-bargaining process represented one of the most practical and successful tools against corruption and organised crime. The introduction of plea bargaining in Georgia in 2004 could not possibly be fully understood without appreciating the context of endemic criminality and corruption pervading in the country at that time. The use of plea bargaining had been intended as an urgent response to those systemic problems.

79. The Government submitted that plea bargaining in Georgia implied a waiver of certain procedural rights in exchange for a more lenient sentence and an expedited trial. Nevertheless, the most substantive guarantees of a fair trial had still been retained under the domestic law, and they had been duly put into practice in the first applicant's criminal case. Thus, first of all, the first applicant had been represented by qualified legal counsel, had given his prior approval before negotiations with the public prosecutor were started, and had provided the requisite written acceptance, countersigned by his lawyer, of the terms of the agreement reached. Subsequently, the trial court had examined the plea bargain at an oral and public hearing, during which it had enquired as to whether the plea bargain had been reached without duress and under otherwise fair conditions and whether the first applicant was willing to accept it in full awareness of the nature of the charges and the potential sentence. As further guarantees, the Government referred to the fact that not only had the first applicant been entitled to reject the agreed plea bargain during the court's review, but also the judge, who had been required to assess the validity

of the accusations, had been empowered to block the plea bargain in the event of any doubt as to the first applicant's criminal liability.

80. In support of the claim that the first applicant had been fully aware of the contents of the plea bargain and had consented to it voluntarily, the Government referred to the following factual circumstances of the case. Firstly, the first applicant had been represented by a qualified lawyer of his choosing as early as 16 March 2004, the very next day after his arrest (see paragraph 15 above). On 25 March 2004 he had sent a letter to the public prosecutor, expressing his intention to cooperate with the authorities and reach a settlement (see paragraph 18 above). On 1 August 2004 the first applicant was given access to the criminal case materials, and on 6 August 2004 he appointed a second qualified lawyer of his choosing (see paragraph 21 above). By 6 September 2004 the investigation had been terminated, the evidence against the first applicant had been added to the case file and an indictment accusing the first applicant of large-scale misappropriation of public funds had been issued by the public prosecutor. Having duly acquainted himself with the indictment and the evidence collected, the first applicant, represented by his two lawyers, had again confirmed his readiness to cooperate with the authorities and had transferred on the same day, 6 September 2004, his shares in the factory to the State in compensation for the damage caused by his conduct (see paragraphs 22-23 above).

81. On 9 September 2004 the first applicant had filed another written statement with the public prosecutor. He had expressed his wish to reach a plea bargain as regards the sentence and to pay GEL 35,000 as a fine. In that statement, he had explicitly confirmed that he fully understood the concept of plea bargaining. On the same date, the public prosecutor had visited the first applicant in prison, where, in the presence of his two lawyers, a written record of the agreement had been drawn up and signed by all persons concerned. Subsequently, that record had been duly examined by the court (see paragraphs 27-29 above).

82. As regards the adequacy of the judicial review of the plea bargain between the first applicant and the prosecuting authority, the Government submitted that during the hearing of 10 September 2004 the judge had ensured that the agreement had been reached on the basis of the first applicant's free will and informed consent. In support, the Government referred to the relevant excerpts from the record of the hearing. The Government stressed that the Kutaisi City Court had been fully able to verify whether the guarantees of due process had been respected by the parties during the plea-bargaining negotiations, given that it had had the complete file before it, including: the first applicant's statement of 9 September 2004 expressing his willingness to enter into a plea bargain; the agreement itself, signed by both the first applicant and his lawyer and by the public prosecutor; and the prosecutor's application for the court to approve that agreement.

83. Furthermore, as confirmed by the record of the hearing of 10 September 2004, the City Court had questioned the first applicant, who had unambiguously maintained his willingness to terminate the proceedings by means of the plea bargain. The same had been confirmed by his lawyer. In other words, the City Court had done everything possible to ensure that the first applicant had freely and knowingly entered into the plea bargain. Otherwise, the City Court would have rejected the bargain, as it had the power to do by virtue of the applicable domestic law. The Government further submitted that, even though the plea bargain had been protected by a confidentiality clause (Article 679-2 § 4 of the CCP), which was conditioned by a number of legitimate considerations, the hearing on 10 September 2004 had been open to the public. In support of that contention, the Government submitted written statements taken from the first applicant's lawyer, the prosecutor and a member of the registry of the Kutaisi City Court, dated 10 and 11 July 2007, all of whom had attended the hearing in question. Those witnesses had confirmed

that the hearing had been public and that the court administration had not prevented any interested person from entering the courtroom.

84. Lastly, as regards the first applicant's inability to lodge an appeal against the Kutaisi City Court's decision of 10 September 2004, the Government argued that by accepting the plea bargain he had unambiguously waived, similarly to some other fair-trial rights, his right to appeal. All in all, the Government argued that the plea-bargaining process which had resulted in the first applicant's conviction through an abridged form of trial had not infringed either Article 6 § 1 of the Convention or Article 2 of Protocol No. 7.

B. The first applicant's submissions

85. The first applicant maintained that the termination of the criminal proceedings against him through the use of the plea bargain had amounted to a breach of Article 6 § 1 of the Convention and Article 2 of Protocol No. 7 to the Convention, in so far as the charges against him had been determined without a fair trial and with no possibility of lodging an appeal. Whilst the acceptance of the bargain had entailed a waiver of certain procedural rights, that waiver had not been accompanied by effective safeguards against the abuse of due process by the prosecuting authority. To demonstrate the deficiencies of the Georgian model of plea bargaining in general, the first applicant gave his own comparative overview of how similar plea bargaining mechanisms functioned in a number of other European countries (notably in Germany, the United Kingdom, Italy, France and Russia). On the basis of that comparison, he claimed that, unlike the legal systems of the aforementioned countries, the Georgian model of plea bargaining had not allowed him to be represented by an advocate from the beginning of the investigation and had not allowed a judge to undertake a sufficient review of the fairness of the circumstances in which the plea bargain had been reached.

86. Referring to the relevant international observations concerning the Georgian model of plea bargaining, the first applicant submitted that such a process could not fairly operate in a criminal-justice system with a 99% conviction rate (see paragraphs 57-60 above). He also referred to the results of an empirical study, according to which even in those criminal-justice systems in which the acquittal rate amounted to 15-20%, accused persons who considered themselves innocent often chose to plead guilty. In other words, it could not be said that his decision to accept a plea bargain had been truly voluntary. Consequently, the only real opportunity for him to avoid a lengthy term of imprisonment had been entering into a plea bargain. The first applicant emphasised in that connection that, at the time of accepting the plea bargain, he had been detained in particularly intolerable and highly stressful conditions, sharing a cell with a murderer and a person who had abducted and ill-treated him in December 2002. He also referred in that connection to the systemic problem of poor physical conditions of detention in all of the post-conviction custodial institutions of Georgia at the material time.

87. The first applicant complained that the Georgian model of plea bargaining gave unrestricted rights and privileges to the prosecuting authority, a legislative deficiency which excluded any possibility of an agreement being reached between the parties on a more or less equal footing. In that connection the first applicant again referred to the conclusions of the study conducted by TI Georgia (see paragraphs 58-61 above). He also criticised the fact that only the prosecutor and not the defendant was entitled, under the domestic law, to apply to the court with a plea-bargain request at the material time and that it was the prosecutor and not the judge who had been empowered to choose what kind of punishment was to be imposed pursuant to the plea bargain. The first applicant also criticised the absence of a clear definition of the notion of "cooperation with the

investigation" under domestic law, a legislative lacuna which increased the risk of procedural abuses.

88. The first applicant asserted that neither the public prosecutor nor the judge had warned him about the waiver of all his procedural rights in the event of entering into a plea bargain. He also complained that the domestic court's powers in the plea-bargaining process had not represented a sufficient system of checks and balances on potential abuses of power by the prosecutor. The domestic court had only been able to review the plea agreement itself, and had been unable to enquire as to how the relevant negotiations had been conducted and whether any abuses had been committed during those negotiations, as there had been no written or audio record of them. Thus, even if the Kutaisi City Court had formally asked the first applicant during the hearing of 10 September 2004 whether he had been subjected to any form of pressure during the preceding negotiations, that enquiry could not have been an effective check, as it was clear that the first applicant, who had been detained at that time under the control of the executive branch of the State, would not have dared to confide in the court about such duress. Furthermore, the domestic court had not attempted to ensure that the applicant, an accused person, had fully understood the facts which had given rise to the charges against him.

89. The first applicant complained that the Kutaisi City Court had endorsed the plea bargain in a single day, whereas it had been objectively impossible to study the case materials in such a short period. His guilt and punishment had, in reality, been established by the prosecutor, and the domestic court had formally endorsed the prosecutor's findings without carrying out its own judicial inquiry. Furthermore, observing that the transfer of the shares and the payments had taken place on 6, 8 and 9 September 2004, that is, prior to the approval of the plea bargain by the Kutaisi City Court on 10 September 2004, he submitted that if he had refused to accept the proposed plea bargain before the Kutaisi City Court on 10 September 2004, that would only have led to the continued deprivation of his liberty, in addition to the loss of all the previously forfeited assets, without receiving anything in exchange. In that connection the first applicant emphasised that he had never pleaded guilty to the offences he had been accused of. Lastly, the first applicant maintained his complaint regarding his inability to lodge an appeal against the City Court's decision of 10 September 2004 convicting him on the basis of the plea bargain, claiming that the relevant criminal procedural legislation had not provided him with any legal avenue through which to contest the coercion applied to him during the plea-bargaining negotiations.

C. The Court's assessment

90. At the outset and in reply to the first applicant's empirical arguments about the viability of the early Georgian model of plea bargaining, the Court reiterates that it cannot be its task to review whether the relevant domestic legal framework was, per se, incompatible with the Convention standards. Rather, this matter must be assessed by taking into consideration the specific circumstances of the first applicant's criminal case. The Court further notes that it can be considered a common feature of European criminal-justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty or nolo contendere plea in advance of trial or for providing substantial cooperation with the investigative authority. There cannot be anything improper in the process of charge or sentence bargaining in itself. In this connection the Court subscribes to the idea that plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in

combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.

91. The Court considers that where the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, this amounts, in substance, to the waiver of a number of procedural rights. This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards of his or her own free will. The Court observes in this connection that as early as 1987 the Committee of Ministers of the Council of Europe called upon the member States to take measures aimed at the simplification of ordinary judicial procedures by resorting, for instance, to abridged, summary trials (see paragraph 54 above). However, it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest.

92. The Court thus observes that by striking a bargain with the prosecuting authority over the sentence and pleading no contest as regards the charges, the first applicant waived his right to have the criminal case against him examined on the merits. However, by analogy with the above mentioned principles concerning the validity of such waivers, the Court considers that the first applicant's decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.

93. In this connection, the Court notes , firstly, that it was the first applicant himself who asked the prosecuting authority to arrange a plea bargain. In other words, the initiative emanated from him personally and, as the case file discloses, could not be said to have been imposed by the prosecution; the first applicant unequivocally expressed his willingness to repair the damage caused to the State (see paragraphs 14, 18, 22 and 27 above). He was granted access to the criminal case materials as early as 1 August 2004 (see paragraph 21 above). The Court also observes that the first applicant was duly represented by two qualified lawyers of his choosing (compare Hermi, cited above, § 79). One of them met with the first applicant at the very beginning of the criminal proceedings, and represented him during the first investigative interview of 17 March 2004 (see paragraphs 15-16). The two lawyers ensured that the first applicant received advice throughout the plea-bargaining negotiations with the prosecution, and one of them also represented him during the judicial examination of the agreement. Of further importance is the fact that the judge of the Kutaisi City Court, who was called upon to examine the lawfulness of the plea bargain during the hearing of 10 September 2004, enquired of the first applicant and his lawyer as to whether he had been subjected to any kind of undue pressure during the negotiations with the prosecutor. The Court notes that the first applicant explicitly confirmed on several occasions, both before the prosecuting authority and the judge, that he had fully understood the content of the agreement, had had his procedural rights and the legal consequences of the agreement explained to him, and that his decision to accept it was not the result of any duress or false promises (see paragraphs 27, 28 and 31 above).

94. The Court also notes that a written record of the agreement reached between the prosecutor and the first applicant was drawn up. The document was then signed by the prosecutor and by both the first applicant and his lawyer, and submitted to the Kutaisi City Court for consideration. The Court finds this factor to be important, as it made it possible to have the exact terms of the agreement, as well as of the preceding negotiations, set out for judicial review in a clear and incontrovertible manner.

95. As a further guarantee of the adequacy of the judicial review of the fairness of the plea bargain, the Court attaches significance to the fact that the Kutaisi City Court was not, according to applicable domestic law, bound by the agreement reached between the first applicant and the prosecutor. On the contrary, the City Court was entitled to reject that agreement depending upon its own assessment of the fairness of the terms contained in it and the process by which it had been entered into. Not only did the court have the power to assess the appropriateness of the sentence recommended by the prosecutor in relation to the offences charged, it had the power to reduce it (Article 679-4 §§ 1, 3, 4 and 6). The Court is further mindful of the fact that the Kutaisi City Court enquired, for the purposes of effective judicial review of the prosecuting authority's role in plea bargaining, whether the accusations against the first applicant were well founded and supported by prima facie evidence (Article 679-4 § 5). The fact that the City Court examined and approved the plea bargain during a public hearing, in compliance with the requirement contained in Article 679-3 § 1 of the CCP, additionally contributed, in the Court's view, to the overall quality of the judicial review in question.

96. Lastly, as regards the first applicant's complaint under Article 2 of Protocol No. 7, the Court considers that it is normal for the scope of the exercise of the right to appellate review to be more limited with respect to a conviction based on a plea bargain, which represents a waiver of the right to have the criminal case against the accused examined on the merits, than it is with respect to a conviction based on an ordinary criminal trial. It reiterates in this connection that the Contracting States enjoy a wide margin of appreciation under Article 2 of Protocol No. 7. The Court is of the opinion that by accepting the plea bargain, the first applicant, as well as relinquishing his right to an ordinary trial, waived his right to ordinary appellate review. That particular legal consequence of the plea bargain, which followed from the clearly worded domestic legal provision (Article 679-7 § 2), was or should have been explained to him by his lawyers. By analogy with its earlier findings as to the compatibility of the first applicant's plea bargain with the fairness principle enshrined in Article 6 § 1 of the Convention (see paragraphs 92-95 above), the Court considers that the waiver of the right to ordinary appellate review did not represent an arbitrary restriction falling foul of the analogous requirement of reasonableness contained in Article 2 of Protocol No. 7 either.

97. In the light of the foregoing, the Court concludes that the first applicant's acceptance of the plea bargain, which entailed the waiver of his rights to an ordinary examination of his case on the merits and to ordinary appellate review, was undoubtedly a conscious and voluntary decision. Based on the circumstances of the case, that decision could not be said to have resulted from any duress or false promises made by the prosecution, but, on the contrary, was accompanied by sufficient safeguards against possible abuse of process. Nor can the Court establish from the available case materials that that waiver ran counter to any major public interest.

98. It follows that there has been no violation of either Article 6 § 1 of the Convention or Article 2 of Protocol No. 7.

(...)

CASE OF NIEMIETZ v. GERMANY

Application no. 13710/88 COURT (CHAMBER), 16 December 1992

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Niemietz lives in Freiburg im Breisgau, Germany, where he practises as a lawyer (Rechtsanwalt).

7. On 9 December 1985 a letter was sent by telefax from the Freiburg post office to Judge Miosga of the Freising District Court (Amtsgericht). It related to criminal proceedings for insulting behaviour (Beleidigung) pending before that court against Mr J., an employer who refused to deduct from his employees' salaries and pay over to the tax office the Church tax to which they were liable. The letter bore the signature of one Klaus Wegner - possibly a fictitious person -, followed by the words "on behalf of the Anti-clerical Working Group (Antiklerikaler Arbeitskreis) of the Freiburg Bunte Liste (multi-coloured group)" and a post-office box number. It read as follows:

"On 10.12.1985 the trial against Mr [J.] will take place before you. We, the Anti-clerical Working Group of the Freiburg Bunte Liste, protest most strongly about these proceedings.

In the FRG, the Church, on the basis of the Hitler concordat and in violation of the State's duty to maintain neutrality, enjoys most extensive privileges. As a result, every non-Christian citizen of this State has to suffer disadvantages and daily annoyance. Among other things, the FRG is the only State which acts as Church-tax collector. It requires employers, whether they be Christians or not, to pay over Church tax for their Christian employees and thus relieve the Church of financial administrative work. [J.] has, for years, courageously and consistently refused to support the financing of the Church in this way and has made an appropriate arrangement whereby the Church tax of his Christian employees is paid without his own involvement.

This attempt - in a State which counts the separation of State and Church among its basic principles - to insist upon just such a separation has not only exposed [J.] to persistent vexation and interferences on the part of State authorities, culminating in the tax office employing coercive measures, such as attachment, to collect from him Church tax which his employees had already paid a long time previously. It has in addition involved him - when he called these underhand methods by their name - in the present proceedings for alleged insulting behaviour.

Were it your task as the competent judge to conduct an unbiased examination of this 'case of insulting behaviour', then it must be said that you have not only failed to carry out this task, but also abused your office in order to try - by means which give a warning and a reminder of the darkest chapters of German legal history - to break the backbone of an unloved opponent of the Church. It was with extreme indignation that we learned of the compulsory psychiatric examination which was conducted on your instructions, and to which [J.] has had to submit in the meantime. We shall use every avenue open to us, in particular our international contacts, to bring to public notice this action of yours, which is incompatible with the principles of a democratic State subscribing to the rule of law.

We shall follow the further course of the proceedings against [J.] and expect you to abandon the path of terrorisation which you have embarked upon, and to reach the only decision appropriate in this case - an acquittal."

8. The applicant had, as a city councillor, been chairman for some years of the Freiburg Bunte Liste, which is a local political party. He had also played a particularly committed role in,

although he had never been a member of, its Anti-clerical Working Group, which sought to curtail the influence of the Church.

Until the end of 1985 certain of the mail for the Bunte Liste, which had as its address for correspondence only the post-office box number that had been given in the letter to Judge Miosga, had been delivered to the office (Bürogemeinschaft) of the applicant and a colleague of his; the latter had also been active on behalf of the party and had acted for it professionally.

9. On 13 January 1986 the Director of the Munich I Regional Court (Landgericht) requested the Munich public prosecutor's office (Staatsanwaltschaft) to institute criminal proceedings against Klaus Wegner for the offence of insulting behaviour, contrary to Article 185 of the Criminal Code. Attempts to serve a summons on him were unsuccessful. The applicant's colleague refused to give any information about Klaus Wegner or his whereabouts and other attempts to identify him failed.

10. In the context of the above-mentioned proceedings the Munich District Court issued, on 8 August 1986, a warrant to search the law office of the applicant and his colleague and the homes of Ms D. and Ms G. The warrant read as follows:

"Preliminary investigations against Klaus Wegner concerning Article 185 of the Criminal Code Decision

The search of the following residential and business premises for documents which reveal the identity of 'Klaus Wegener' [sic] and the seizure of such documents is ordered.

1. Office premises shared by the lawyers Gottfried Niemietz and ...,
2. Home (including adjoining rooms and cars) of Ms [D.] ...,
3. Home (including adjoining rooms and cars) of Ms [G.]

Reasons

On 9 December 1985 a letter insulting Judge Miosga of the Freising District Court was sent by telefax from the Freiburg post office. It was sent by the Anti-clerical Working Group of the Freiburg Bunte Liste. The letter was signed by one Klaus Wegener.

Until now it has not been possible to identify the signatory. The Freiburg Bunte Liste could not be contacted by mail otherwise than through a box number. Until the end of 1985 such mail was forwarded to the office of Niemietz and ..., and since the start of 1986 to Ms [D.]. It has therefore to be assumed that documents throwing light on the identity of Klaus Wegener can be found at the premises of the above-mentioned persons.

Furthermore, it is to be assumed that there are such documents in the home of Ms [G.], the Chairwoman of the Freiburg Bunte Liste.

For these reasons, it is to be expected that evidence will be found in the course of a search of the premises indicated in this decision."

11. The search of the law office, the need for which the investigating authorities had first tried to obviate by questioning a witness, was effected by representatives of the Freiburg public prosecutor's office and the police on 13 November 1986. According to a police officer's report drawn up on the following day, the premises were entered at about 9.00 a.m. and inspected in the presence of two office assistants. The actual search began at about 9.15 a.m., when the applicant's colleague arrived, and lasted until about 10.30 a.m. The applicant himself arrived at 9.30 a.m. He declined to give any information as to the identity of Klaus Wegner, on the ground that he might thereby expose himself to the risk of criminal prosecution.

Those conducting the search examined four filing cabinets with data concerning clients, three files marked respectively "BL", "C.W. -Freiburg District Court ..." and "G. - Hamburg Regional Court" and three defence files marked respectively "K.W. - Karlsruhe District Court ...", "Niemietz et al. - Freiburg District Court ..." and "D. - Freiburg District Court". According to the applicant, the office's client index was also looked at and one of the files in question was its "Wegner defence file". Those searching neither found the documents they were seeking nor seized any materials. In the proceedings before the Commission,

the applicant stated that he had been able to put aside in time documents pointing to the identity of Klaus Wegner and had subsequently destroyed them.

12. The homes of Ms D. and Ms G. were also searched; documents were found that gave rise to a suspicion that the letter to Judge Miosga had been sent by Ms D. under an assumed name.

13. On 10 December 1986 the Chairman of the Freiburg Bar Association, who had been informed about the search by the applicant's colleague, addressed a formal protest to the President of the Munich District Court. The Chairman sent copies to the Bavarian Minister of Justice and the Munich Bar Association and invited the latter to associate itself with the protest.

In a reply of 27 January 1987, the President of the Munich District Court stated that the search was proportionate because the letter in question constituted a serious interference with a pending case; hence no legal action on the protest was necessary.

14. The criminal proceedings against "Klaus Wegner" were later discontinued for lack of evidence.

15. On 27 March 1987 the Munich I Regional Court declared an appeal (Beschwerde) lodged by the applicant, pursuant to Article 304 of the Code of Criminal Procedure, against the search warrant to be inadmissible, on the ground that it had already been executed ("wegen prozessualer Überholung"). It considered that in the circumstances there was no legal interest in having the warrant declared unlawful. It had not been arbitrary, since there had been concrete indications that specified material would be found. There was no ground for holding that Article 97 of the Code of Criminal Procedure (see paragraph 21 below) had been circumvented: the warrant had been based on the fact that mail for the Freiburg Bunte Liste had for some time been delivered to the applicant's office and it could not be assumed that that mail could concern a lawyer-client relationship. In addition, personal honour was not so minor a legal interest as to render the search disproportionate. There could be no question in the present case of preventing a lawyer from freely exercising his profession.

16. On 28 April 1987 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) against the search warrant of 8 August 1986 and the Munich I Regional Court's decision of 27 March 1987. On 18 August a panel of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) declined to accept the complaint for adjudication, on the ground that it did not offer sufficient prospects of success.

The Federal Constitutional Court also found that the Munich I Regional Court's decision of 27 March 1987 that the applicant's appeal was inadmissible was not objectionable in terms of constitutional law. Furthermore, as regards the actual execution of the warrant, Mr Niemietz had not exhausted the remedy available to him under section 23(1) of the Introductory Act to the Courts Organisation Act (Einführungsgesetz zum Gerichtsverfassungsgesetz).

II. RELEVANT DOMESTIC LAW

17. The search complained of was ordered in the context of criminal proceedings for insulting behaviour, an offence punishable by imprisonment for a maximum, where no physical violence is involved, of one year or a fine (Article 185 of the Criminal Code).

18. Article 13 para. 1 of the Basic Law (Grundgesetz) guarantees the inviolability of the home (Wohnung); this provision has been consistently interpreted by the German courts in a wide sense, to include business premises (see, in particular, the Federal Constitutional Court's judgment of 13 October 1971 - Entscheidungssammlung des Bundesverfassungsgerichts, vol. 32, p. 54).

19. Article 103 of the Code of Criminal Procedure provides that the home and other premises (Wohnung und andere Räume) of a person who is not suspected of a criminal offence may

be searched only in order to arrest a person charged with an offence, to investigate indications of an offence or to seize specific objects and provided always that there are facts to suggest that such a person, indications or objects is or are to be found on the premises to be searched.

20. Search warrants may be challenged, as regards their lawfulness, in proceedings instituted under Article 304 of the Code of Criminal Procedure and, as regards their manner of execution, in proceedings instituted under section 23(1) of the Introductory Act to the Courts Organisation Act.

21. In Germany a lawyer is an independent organ in the administration of justice and an independent counsel and representative in all legal matters.
An unauthorised breach of secrecy by a lawyer is punishable by imprisonment for a maximum of one year or a fine (Article 203 para. 1(3) of the Criminal Code). A lawyer is entitled to refuse to give testimony concerning any matter confided to him in a professional capacity (Article 53 para. 1(2) and (3) of the Code of Criminal Procedure). The last-mentioned provisions, in conjunction with Article 97, prohibit, with certain exceptions, the seizure of correspondence between lawyer and client. (…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

26. Mr Niemietz alleged that the search of his law office had given rise to a breach of Article 8 (art. 8) of the Convention, which reads as follows:
"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."
This submission was accepted by the Commission, on the basis that the search constituted an unjustified interference with the applicant's private life and home.

A. Was there an "interference"?

27. In contesting the Commission's conclusion, the Government maintained that Article 8 (art. 8) did not afford protection against the search of a lawyer's office. In their view, the Convention drew a clear distinction between private life and home, on the one hand, and professional and business life and premises, on the other.

28. In arriving at its opinion that there had been an interference with Mr Niemietz's "private life" and "home", the Commission attached particular significance to the confidential relationship that exists between lawyer and client. The Court shares the Government's doubts as to whether this factor can serve as a workable criterion for the purposes of delimiting the scope of the protection afforded by Article 8 (art. 8). Virtually all professional and business activities may involve, to a greater or lesser degree, matters that are confidential, with the result that, if that criterion were adopted, disputes would frequently arise as to where the line should be drawn.

29. The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to

exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.

To deny the protection of Article 8 (art. 8) on the ground that the measure complained of related only to professional activities - as the Government suggested should be done in the present case - could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them. In fact, the Court has not heretofore drawn such distinctions: it concluded that there had been an interference with private life even where telephone tapping covered both business and private calls (see the Huvig v. France judgment of 24 April 1990, Series A no. 176-B, p. 41, para. 8, and p. 52, para. 25); and, where a search was directed solely against business activities, it did not rely on that fact as a ground for excluding the applicability of Article 8 (art. 8) under the head of "private life" (see the Chappell v. the United Kingdom judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, para. 26, and pp. 21-22, para. 51.)

30. As regards the word "home", appearing in the English text of Article 8 (art. 8), the Court observes that in certain Contracting States, notably Germany (see paragraph 18 above), it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word "domicile" has a broader connotation than the word "home" and may extend, for example, to a professional person's office.

In this context also, it may not always be possible to draw precise distinctions, since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises. A narrow interpretation of the words "home" and "domicile" could therefore give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of "private life" (see paragraph 29 above).

31. More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by the public authorities (see, for example, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 (art. 8-2); that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.

32. To the above-mentioned general considerations, which militate against the view that Article 8 (art. 8) is not applicable, must be added a further factor pertaining to the particular circumstances of the case. The warrant issued by the Munich District Court ordered a search for, and seizure of, "documents" - without qualification or limitation - revealing the identity of Klaus Wegner (see paragraph 10 above). Furthermore, those conducting the search examined four cabinets with data concerning clients as well as six individual files (see paragraph 11 above); their operations must perforce have covered

"correspondence" and materials that can properly be regarded as such for the purposes of Article 8 (art. 8). In this connection, it is sufficient to note that that provision does not use, as it does for the word "life", any adjective to qualify the word "correspondence". And, indeed, the Court has already held that, in the context of correspondence in the form of telephone calls, no such qualification is to be made (see the above-mentioned Huvig judgment, Series A no. 176-B, p. 41, para. 8, and p. 52, para. 25). Again, in a number of cases relating to correspondence with a lawyer (see, for example, the Schönenberger and Durmaz v. Switzerland judgment of 20 June 1988, Series A no. 137, and the Campbell v. the United Kingdom judgment of 25 March 1992, Series A no. 233), the Court did not even advert to the possibility that Article 8 (art. 8) might be inapplicable on the ground that the correspondence was of a professional nature.

33. Taken together, the foregoing reasons lead the Court to find that the search of the applicant's office constituted an interference with his rights under Article 8 (art. 8).

B. Was the interference "in accordance with the law"?

34. The applicant submitted that the interference in question was not "in accordance with the law", since it was based on suspicions rather than facts and so did not meet the conditions laid down by Article 103 of the Code of Criminal Procedure (see paragraph 19 above) and since it was intended to circumvent the legal provisions safeguarding professional secrecy.

35. The Court agrees with the Commission and the Government that that submission must be rejected. It notes that both the Munich I Regional Court and the Federal Constitutional Court considered that the search was lawful in terms of Article 103 of the aforesaid Code (see paragraphs 15-16 and 19 above) and sees no reason to differ from the views which those courts expressed.

C. Did the interference have a legitimate aim or aims?

36. Like the Commission, the Court finds that, as was not contested by the applicant, the interference pursued aims that were legitimate under paragraph 2 of Article 8 (art. 8-2), namely the prevention of crime and the protection of the rights of others, that is the honour of Judge Miosga.

D. Was the interference "necessary in a democratic society"?

37. As to whether the interference was "necessary in a democratic society", the Court inclines to the view that the reasons given therefor by the Munich District Court (see paragraph 10 above) can be regarded as relevant in terms of the legitimate aims pursued. It does not, however, consider it essential to pursue this point since it has formed the opinion that, as was contended by the applicant and as was found by the Commission, the measure complained of was not proportionate to those aims.

It is true that the offence in connection with which the search was effected, involving as it did not only an insult to but also an attempt to bring pressure on a judge, cannot be classified as no more than minor. On the other hand, the warrant was drawn in broad terms, in that it ordered a search for and seizure of "documents", without any limitation, revealing the identity of the author of the offensive letter; this point is of special significance where, as in Germany, the search of a lawyer's office is not accompanied by any special procedural safeguards, such as the presence of an independent observer. More importantly, having regard to the materials that were in fact inspected, the search

impinged on professional secrecy to an extent that appears disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention. In addition, the attendant publicity must have been capable of affecting adversely the applicant's professional reputation, in the eyes both of his existing clients and of the public at large.

E. Conclusion

38. The Court thus concludes that there was a breach of Article 8 (art. 8).(…)

CASE OF ÖZTÜRK v. GERMANY

(Application no. 8544/79) COURT (PLENARY) 21 February 1984

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr. Öztürk, a Turkish citizen born in 1934, is resident at Bad Rappenau-Heinsheim in the Federal Republic of Germany. He arrived in the Federal Republic in 1964 and works in the motor-car industry. After passing the nec essary test, he was issued with a German driving licence on 7 May 1969. In 1978, he estimated his net monthly income at approximately DM 2,000.

10. On 27 January 1978 in Bad Wimfen, the applicant drove his car into another car which was parked, causing about DM 5,000's worth of damage to both vehicles. The owner of the other car reported the accident to the Neckarsulm police.
On arriving at the scene of the accident, the police, by means of a notice written in Turkish, informed the applicant, amongst other things, of his rights to refuse to make any statement and to consult a lawyer. He availed himself of these rights, and a report (Verkehrs-Ordnungswidrigkeiten-Anzeige) was thereupon transmitted by the police to the Heilbronn administrative authorities (Landratsamt).

11. By decision of 6 April 1978, the Heilbronn administrative authorities imposed on Mr. Öztürk a fine (Bussgeld) of DM 60 for causing a traffic accident by colliding with another vehicle as a result of careless driving ("Ausserachtlassen der erforderlichen Sorgfalt im Strassenverkehr"); in addition he was required to pay DM 13 in respect of fees (Gebühr) and costs (Auslagen).
The decision was based on section 17 of the Regulatory Offences Act of 24 May 1968, in its consolidated version of 1 January 1975 (Gesetz über Ordnungswidrigkeiten - "the 1968/1975 Act"; see paragraph 18 below), on section 24 of the Road Traffic Act (Strassenverkehrsgesetz) and on Regulations 1 § 2 and 49 § 1, no. 1, of the Road Traffic Regulations (Strassenverkehrs-Ordnung). Regulation 1 § 2 reads as follows:
"Every road-user (Verkehrsteilnehmer) must conduct himself in such a way as to ensure that other persons are not harmed or endangered and are not hindered or inconvenienced more than is unavoidable in the circumstances."
Regulation 49 § 1, no. 1, specifies that anyone who contravenes Regulation 1 § 2 is guilty of a "regulatory offence" (Ordnungswidrigkeit). Under section 24 sub-section 2 of the Road Traffic Act, such an offence gives rise to liability to a fine.

12. On 11 April 1978, the applicant, who was represented by Mr. Wingerter, lodged an objection (Einspruch) against the above-mentioned decision (section 67 of the 1968/1975 Act); he stated that he was not waiving his right to a public hearing before a court (section 72).
The public prosecutor's office (Staatsanwaltschaft) attached to the Heilbronn Regional Court (Landgericht), to which the file had been transmitted on 5 May, indicated six days later that it had no objection to a purely written procedure; it further stated that it would not be attending the hearings (sections 69 and 75).

13. Sitting in public on 3 August 1978, the Heilbronn District Court (Amtsgericht) heard Mr. Öztürk, who was assisted by an interpreter, and then three witnesses. Immediately thereafter, the applicant withdrew his objection. The Heilbronn administrative authorities' decision of 6 April 1978 accordingly became final (rechtskräftig).

14. The District Court directed that the applicant should bear the court costs and his own expenses. On 12 September 1978, the District Court Cashier's Office (Gerichtskasse) fixed

the costs to be paid by Mr. Öztürk at DM 184.70, of which DM 63.90 represented interpreter's fees.

15. On 4 October, the applicant entered an appeal (Erinnerung) against the bill of costs with regard to the interpreter's fees. He relied on Article 6 (art. 6) of the Convention and referred to the Commission's report of 18 May 1977 in the case of Luedicke, Belkacem and Koç. At the time, that case was pending before the Court, which delivered its judgment on the merits on 28 November 1978 (Series A no. 29).
The District Court dismissed the appeal on 25 October. It noted that the obligation to bear the interpreter's fees was grounded on Article 464 (a) of the Code of Criminal Procedure (Strafprozessordnung) and section 46 of the 1968/1975 Act (see paragraphs 21 and 35 below). Relying on a 1975 decision by the Cologne Court of Appeal, it held that this obligation was compatible with Article 6 § 3 (e) (art. 6-3-e) of the Convention. According to the District Court, the above-mentioned opinion of the Commission did not alter matters since, unlike a judgment of the Court; it was not binding on the States.

16. According to undisputed evidence adduced by the Government, the court costs, including the interpreter's fees, were paid by an insurance company with which Mr. Öztürk had taken out a policy.

II. THE RELEVANT LEGISLATION

A. The 1968/1975 Act

17. The purpose of the 1968/1975 Act was to remove petty offences from the sphere of the criminal law. Included in this category were contraventions of the Road Traffic Act. Under section 21 of the Road Traffic Act (in its former version), commission of such contraventions had given rise to liability to a fine (Geldstrafe) or imprisonment (Haft). Section 3 no. 6 of the Act of 24 May 1968 (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten) classified them as "Ordnungswidrigkeiten" and henceforth made them punishable only by fines not considered to be criminal by the legislature (Geldbussen).
The 1968/1975 Act had been foreshadowed in the Federal Republic by two enactments: the Act of 25 March 1952 on "regulatory offences" (Gesetz über Ordnungswidrigkeiten) and, to a certain extent, the Economic Crime Act of 26 July 1949 (Wirtschaftsstrafgesetz).

1. General provisions

18. Section 1 sub-section 1 of the 1968/1975 Act defines a "regulatory offence" (Ordnungswidrigkeit) as an unlawful (rechtswidrig) and reprehensible (vorwerfbar) act, contravening a legal provision which makes the offender liable to a fine (Geldbusse). The fine cannot be less than DM 5 or, as a general rule, more than DM 1,000 (section 17 sub-section 1). The amount of the fine is fixed in each case by reference to the seriousness of the offence, the degree of misconduct attributable to the offender and, save for minor (geringfügig) offences, the offender's financial circumstances (section 17 sub-section 3).
If the act constitutes both a "regulatory" and a criminal offence, only the criminal law is applicable; however, if no criminal penalty is imposed, the act may be punished as a "regulatory offence" (section 21).

2. The prosecuting authorities

19. Ordnungswidrigkeiten are to be dealt with by the administrative authorities (Verwaltungsbehörde) designated by law, save in so far as the 1968/1975 Act confers the power of prosecution of such offences on the public prosecutor and their judgment and sentencing on the courts (sections 35 and 36). Where an act has come before him as a criminal matter, the public prosecutor may also treat the act as a "regulatory offence" (section 40).

20. The administrative authorities will remit the matter to the public prosecutor if there is reason to suppose that a criminal offence has been committed; he will refer the matter back to them if he does not take proceedings (section 41). In the case of a "regulatory offence" having a close connection with a criminal offence in respect of which the public prosecutor has instituted proceedings, the prosecutor may extend the criminal proceedings to cover the "regulatory offence" as long as the administrative authorities have not fixed any fine (section 42).
The public prosecutor's decision to treat or not to treat an act as a criminal offence is binding on the administrative authorities (section 44).

3. Procedure in general

21. Subject to the exceptions laid down in the 1968/1975 Act, the provisions of the ordinary law governing criminal procedure, and in particular the Code of Criminal Procedure, the Judicature Act (Gerichtsverfassungsgesetz) and the Juvenile Courts Act (Jugendgerichtsgesetz), are applicable by analogy (sinngemäss) to the procedure in respect of "regulatory offences" (section 46 sub-section 1). The prosecuting authorities (see paragraph 19 above) have the same rights and duties as the public prosecutor in a criminal matter unless the 1968/1975 Act itself states otherwise (section 46 sub-section 2). Nevertheless, various measures permissible in criminal matters may not be ordered in respect of "regulatory offences", notably arrest, interim police custody (vorläufige Festnahme) or seizure of mail or telegrams (section 46 sub-section 3). The taking of blood samples and other minor measures, within the meaning of Article 81 (a) § 1 of the Code of Criminal Procedure, remain possible.

22. The prosecution of "regulatory offences" lies within the discretion (pflichtgemässes Ermessen) of the competent authority; so long as the case is pending before it, the competent authority may terminate the prosecution at any time (section 47 sub-section 1).
Once the case has been brought before a court (see paragraphs 27-28 below), power to decide on a stay of proceedings rests with the court; any such decision requires the agreement of the public prosecutor and is final (section 47 sub-section 2).

23. As regards the judicial stage (if any) of the proceedings (see paragraphs 28-30 below), section 46 sub-section 7 of the 1968/1975 Act attributes jurisdiction in the matter to divisions (Abteilungen) of the District Courts and to chambers (Kammern; Senate) of the Courts of Appeal (Oberlandesgerichte) and of the Federal Court of Justice (Bundesgerichtshof).

4. Preliminary procedure

24. Investigations (Erforschung) into "regulatory offences" are a matter for the police authorities. In this connection, the police authorities enjoy discretionary powers (pflichtgemässes Ermessen); save in so far as the 1968/1975 Act provides otherwise, they

have the same rights and duties as in the prosecution of criminal offences (section 53 sub-section 1).

25. Prior to any decision being taken, the person concerned (Betroffener) has to be given the opportunity of commenting, before the competent authorities, on the allegation made against him (section 55).
In the case of a minor (geringfügig) offence, the administrative authorities may give the person concerned a warning (Verwarnung) and impose on him an admonitory fine (Verwarnungsgeld) which, save for any exception laid down under the applicable law, may range from DM 2 to 20 (section 56 sub-section 1). However, sanctions of this kind are possible only if the person concerned consents and pays the fine immediately or within one week (section 56 sub-section 2).

26. If necessary, the administrative authorities will designate an officially appointed lawyer to act for the person concerned in the proceedings before them (section 60).
Measures taken by the administrative authorities during the preliminary procedure can in principle be challenged before the courts (section 62).

5. The administrative decision imposing a fine

27. Save in so far as the 1968/1975 Act provides otherwise - as in the case of the matter being settled by payment of an admonitory fine -, a "regulatory offence" is punishable by an administrative decision imposing a fine (Bussgeldbescheid; section 65).
The person concerned may lodge an objection (Einspruch) within one week (section 67). Unless they withdraw their decision, the administrative authorities will then forward the file to the public prosecutor who will submit it to the competent District Court (sections 69 sub-section 1 and 68) and thereupon assume the function of prosecuting authority (section 69 sub-section 2).

6. Judicial stage (if any) of the procedure

28. Under section 71, if the District Court finds the objection admissible (section 70) it will, unless the 1968/1975 Act states otherwise, examine the objection in accordance with the provisions applicable to an "Einspruch" against a penal order (Strafbefehl): in principle, it will hold a hearing and deliver a judgment (Urteil) which may impose a heavier sentence (Article 411 of the Code of Criminal Procedure).
However, its ruling may take the form of an order (Beschluss) if the District Court considers that a hearing is not necessary and provided the public prosecutor or the person concerned does not object (section 72 sub-section 1). In that event, it may, inter alia, acquit the person concerned, settle the amount of a fine or terminate the prosecution, but not increase the penalty (section 72 sub-section 2).

29. The person concerned has the option of attending hearings but is not bound to do so unless the District Court so directs (section 73 sub-sections 1 and 2); he may be represented by a lawyer (section 73 sub-section 4).
The public prosecutor's office may attend the hearing; if the District Court considers the presence of an official from that office to be appropriate, it will inform the latter accordingly (section 75 sub-section 1).
The District Court will give the administrative authorities the opportunity to set out the matters which, in their view, are of importance for the decision to be given; they may address the Court at the hearing, if they so wish (section 76 sub-section 1).

30. Subject to certain exceptions, section 79 allows an appeal on points of law (Rechtsbeschwerde) to be brought against a judgment or an order issued pursuant to

section 72; save in so far as the 1968/1975 Act states otherwise, in determining the appeal the court concerned will follow, by analogy, the provisions of the Code of Criminal Procedure relating to cassation proceedings (Revision).

7. Administrative procedure and criminal procedure

31. The administrative authorities' classification of an act as a "regulatory offence" is not binding on the court ruling on the objection (Einspruch); however, it can apply the criminal law only if the person concerned has been informed of the change of classification and enabled to prepare his defence (section 81 sub-section 1). Once this condition has been satisfied, either by the court of its own motion or at the public prosecutor's request, the person concerned acquires the formal status of an accused (Angeklagter, section 81 sub-section 2) and the subsequent proceedings fall outside the scope of the 1968/1975 Act (section 81 sub-section 3).

8. Enforcement of decisions imposing a fine

32. A decision imposing a fine is enforceable once it has become final (sections 89 and 84). Unless the 1968/1975 Act states otherwise, enforcement of a decision taken by the administrative authorities is governed by the Federal Act or the Land Act, as the case may be, on enforcement in administrative matters (Verwaltungs-Vollstreckungsgesetze) (section 90 sub-section 1). When the decision is one taken by a court, certain relevant provisions of, inter alia, the Code of Criminal Procedure are applicable (section 91).

33. If, without having established (dargetan) his inability to pay, the person concerned has not paid the fine in due time, the court may, at the request of the administrative authorities or, where the fine was imposed by a court decision, of its own motion order coercive imprisonment (Erzwingungshaft - section 96 sub-section 1). The resultant detention does not replace payment of the fine in the manner of an Ersatzfreiheitsstrafe under the criminal law, but is intended to compel payment. The period of detention may not exceed six weeks for one fine and three months for several fines (section 96 sub-section 3). Implementation of the detention order is governed, inter alia, by the Code of Criminal Procedure (section 97).

9. Interpretation and other costs

34. As far as the costs of the administrative procedure are concerned, the competent authorities apply by analogy certain provisions of the Code of Criminal Procedure (section 105).

35. Under section 109, the person concerned has to bear the costs of the court proceedings if he withdraws his "Einspruch" or if the competent court rejects it.
The costs in question are made up of the expenses and fees of the Treasury (Article 464 (a) § 1, first sentence, of the Code of Criminal Procedure). These fees and expenses are listed in the Court Costs Act (Gerichtskostengesetz) which in turn refers, inter alia, to the Witnesses and Experts (Expenses) Act (Gesetz über die Entschädigung von Zeugen und Sachverständigen). Section 17 sub-section 2 of the last-mentioned Act provides that "for the purposes of compensation, interpreters shall be treated as experts".
Interpretation costs (Dolmetscherkosten) are thus included in the costs of judicial proceedings. However, as far as criminal proceedings - and criminal proceedings alone - are concerned, the German legislature amended the schedule (Kostenverzeichnis) to the

Court Costs Act following the Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraph 15 above; see also Resolution DH (83) 4 of 23 March 1983 of the Committee of Ministers of the Council of Europe). According to no. 1904 in this schedule, henceforth no charge is to be made for "the sums due to interpreters and translators engaged in criminal proceedings in order to translate, for an accused who is deaf or dumb or not conversant with the German language, the statements or documents which the accused needs to understand for his defence" (Act of 18 August 1980).

36. Under the terms of section 109 of the 1968/1975 Act, the question of payment of the costs of the proceedings, including the interpretation costs, only arises once the withdrawal or dismissal of the objection has become final. The person concerned may never be required to make an advance payment in respect of the costs concerned.

B. Road traffic fines

37. The Road Traffic Act, the Road Traffic Regulations and the Road Traffic Licence and Vehicle Conformity Regulations (Strassenverkehrs-Zulassungs-Ordnung) contain lists of "regulatory offences" punishable by fine (section 24 of the Road Traffic Act).
In the case of a "regulatory offence" committed in gross (grob) and persistent (beharrlich) violation of the duties incumbent on a driver, the administrative authorities or, where an objection has been lodged, the court may at the same time disqualify the person concerned from holding a driving licence (Fahrverbot) for a period of one to three months (section 25 of the Road Traffic Act). According to the Government, in 1982 such a measure was taken in 0.5 per cent of cases.

38. The Länder have co-operated together to adopt rules (Verwaltungsvorschriften) establishing a uniform scale of fines (Bussgeldkatalog) for the various road traffic "regulatory offences"; legally, these rules are binding on the administrative authorities empowered to impose fines but not on the courts.
Section 26 (a) of the Road Traffic Act, which was inserted in the Act of 28 December 1982 but which has not yet been implemented, provides that the Minister of Transport shall issue such rules with the agreement of the Bundesrat and in the form of a Decree (Rechtsverordnung).

39. Under section 28 of the Road Traffic Act, a fine imposed for contravention of the road traffic regulations may in some specified cases be entered on a central traffic register (Verkehrszentralregister) if it exceeds a certain level (DM 39 at the time of the facts in issue, DM 79 as from 1 July 1982); on the other hand, no mention of it is included in the judicial criminal records (Bundeszentralregister). The entry must be deleted after a maximum of two years, unless further entries have been made in the meantime (section 29).
Only certain authorities have access to this register, notably for the purposes of a criminal prosecution or a prosecution for a road traffic "regulatory offence" (section 30).

40. According to undisputed evidence supplied by the Government, the 1968/1975 Act in practice plays a particularly important role in the area of road traffic; thus, it was said that 90 per cent of the fines imposed in 1982 concerned road traffic offences.
The Government stated that each year in the Federal Republic of Germany there were 4,700,000 to 5,200,000 decisions imposing a fine (Geldbusse) and 15,500,000 to 16,000,000 warnings accompanied by a fine (Verwarnungsgelder). The statistics of the Länder on Road Traffic Act offences were said to show that in 1982 fines exceeding DM 200 and DM 500 came to 1.5 per cent and 0.1 per cent respectively of the total, as compared with 10.8 per cent for fines of between DM 101 and DM 200, 39.4 per cent for fines of between DM 41 and DM 100 and 48.2 per cent for fines of DM 40 or less.

43.4 per cent of road traffic offences consisted of contraventions of a prohibition on stopping or parking, approximately 17.1 per cent of speeding, 6.5 per cent of non-observance of traffic lights and 5.9 per cent of illegal overtaking. Other offences totalled less than 4 per cent by category. The offences covered by Regulation 1 § 2 of the Road Traffic Regulations, the provision applied in Mr. Öztürk's case (see paragraph 11 above), amounted to approximately 2.8 per cent.

41. Despite the absence of statistics in this connection, the Government estimated that 10 to 13 per cent of the five million or so fines imposed each year concerned foreigners. Of the 4,670,000 foreigners living in the Federal Republic, approximately 2,000,000 possessed a motor vehicle. (...)

AS TO THE LAW

45. Under the terms of Article 6 (art. 6) of the Convention:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by an independent and impartial tribunal ...

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:

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In the applicant's submission, the Heilbronn District Court had acted in breach of Article 6 § 3 (e) (art. 6-3-e) in ordering him to pay the costs incurred through recourse to the services of an interpreter at the hearing on 3 August 1978.

I. APPLICABILITY OF ARTICLE 6 § 3 (e) (art. 6-3-e)

46. According to the Government, Article 6 § 3 (e) (art. 6-3-e) is not applicable in the circumstances since Mr. Öztürk was not "charged with a criminal offence". Under the 1968/1975 Act, which "decriminalised" petty offences, notably in the road traffic sphere, the facts alleged against Mr. Öztürk constituted a mere "regulatory offence" (Ordnungswidrigkeit). Such offences were said to be distinguishable from criminal offences not only by the procedure laid down for their prosecution and punishment but also by their juridical characteristics and consequences.

The applicant disputed the correctness of this analysis. Neither was it shared by the Commission, which considered that the offence of which Mr. Öztürk was accused was indeed a "criminal offence" for the purposes of Article 6 (art. 6).

47. According to the French version of Article 6 § 3 (e) (art. 6-3-e), the right guaranteed is applicable only to an "accusé". The corresponding English expression (person "charged with a criminal offence") and paragraph 1 of Article 6 (art. 6-1) ("criminal charge"/"accusation en matière pénale") - this being the basic text of which paragraphs 2 and 3 (art. 6-2, art. 6-3) represent specific applications (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, § 56) - make it quite clear that the "accusation" ("charge") referred to in the French wording of Article 6 § 3 (e) (art. 6-3-e) must concern a "criminal offence" (see, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

Under German law, the misconduct committed by Mr. Öztürk is not treated as a criminal offence (Straftat) but as a "regulatory offence" (Ordnungswidrigkeit). The question arises whether this classification is the determining factor in terms of the Convention.

48. The Court was confronted with a similar issue in the case of Engel and others, which was cited in argument by the representatives. The facts of that case admittedly concerned penalties imposed on conscript servicemen and treated as disciplinary according to Netherlands law. In its judgment delivered on 8 June 1976 in that case, the Court was careful to state that it was confining its attention to the sphere of military service (Series A no. 22, p. 34, § 82). The Court nevertheless considers that the principles set forth in that judgment (ibid., pp. 33-35, §§ 80-82) are also relevant, mutatis mutandis, in the instant case.

49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, mutatis mutandis, the above-mentioned Engel and others judgment, ibid., p. 33, § 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

50. Having thus reaffirmed the "autonomy" of the notion of "criminal" as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the "regulatory offence" committed by the applicant was a "criminal" one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, § 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.

51. Under German law, the facts alleged against Mr. Öztürk - non-observance of Regulation 1 § 2 of the Road Traffic Regulations - amounted to a "regulatory offence" (Regulation 49 § 1, no. 1, of the same Regulations). They did not fall within the ambit of the criminal law, but of section 17 of the Ordnungswidrigkeitengesetz and of section 24 sub-section 2 of the Road Traffic Act (see paragraph 11 above). The 1968/1975 legislation marks an important step in the process of "decriminalisation" of petty offences in the Federal Republic of Germany. Although legal commentators in Germany do not seem unanimous in considering that the law on "regulatory offences" no longer belongs in reality to criminal law, the drafting history of the 1968/1975 Act nonetheless makes it clear that the offences in question have been removed from the criminal law sphere by that Act (see Deutscher Bundestag, Drucksache V/1269 and, inter alia, the judgment of 16 July 1969 by the Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 27, pp. 18-36). Whilst the Court thus accepts the Government's arguments on this point, it has nonetheless not lost sight of the fact that no absolute partition separates German criminal

law from the law on "regulatory offences", in particular where there exists a close connection between a criminal offence and a "regulatory offence" (see paragraph 20 above). Nor has the Court overlooked that the provisions of the ordinary law governing criminal procedure apply by analogy to "regulatory" proceedings (see paragraph 21 above), notably in relation to the judicial stage, if any, of such proceedings.

52. In any event, the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight.

In the opinion of the Commission - with the exception of five of its members - and of Mr. Öztürk, the offence committed by the latter was criminal in character.

For the Government in contrast, the offence in question was beyond doubt one of those contraventions of minor importance - numbering approximately five million each year in the Federal Republic of Germany - which came within a category of quite a different order from that of criminal offences. The Government's submissions can be summarised as follows. By means of criminal law, society endeavoured to safeguard its very foundations as well as the rights and interests essential for the life of the community. The law on Ordnungswidrigkeiten, on the other hand, sought above all to maintain public order. As a general rule and in any event in the instant case, commission of a "regulatory offence" did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach (Unwerturteil) that characterised penal punishment (Strafe). The difference between "regulatory offences" and criminal offences found expression both in procedural terms and in relation to the attendant penalties and other legal consequences.

In the first place, so the Government's argument continued, in removing "regulatory offences" from the criminal law the German legislature had introduced a simplified procedure of prosecution and punishment conducted before administrative authorities save in the event of subsequent appeal to a court. Although general laws on criminal procedure were in principle applicable by analogy, the procedure laid down under the 1968/1975 Act was distinguishable in many respects from criminal procedure. For example, prosecution of Ordnungswidrigkeiten fell within the discretionary power of the competent authorities and the 1968/1975 Act greatly limited the possibilities of restricting the personal liberty of the individual at the stage of the preliminary investigations (see paragraphs 21, 22 and 24 above).

In the second place, instead of a penal fine (Geldstrafe) and imprisonment the legislature had substituted a mere "regulatory" fine (Geldbusse - see paragraph 17 above). Imprisonment was not an alternative (Ersatzfreiheitsstrafe) to the latter type of fine as it was to the former and no coercive imprisonment (Erzwingungshaft) could be ordered unless the person concerned had failed to pay the sum due without having established his inability to pay (see paragraph 33 above). Furthermore, a "regulatory offence" was not entered in the judicial criminal records but solely, in certain circumstances, on the central traffic register (see paragraph 39 above).

The reforms accomplished in 1968/1975 thus, so the Government concluded, reflected a concern to "decriminalise" minor offences to the benefit not only of the individual, who would no longer be answerable in criminal terms for his act and who could even avoid all court proceedings, but also of the effective functioning of the courts, henceforth relieved in principle of the task of dealing with the great majority of such offences.

53. The Court does not underestimate the cogency of this argument. The Court recognises that the legislation in question marks an important stage in the history of the reform of German criminal law and that the innovations introduced in 1968/1975 represent more than a simple change of terminology.

Nonetheless, the Court would firstly note that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.

In addition, misconduct of the kind committed by Mr. Öztürk continues to be classified as part of the criminal law in the vast majority of the Contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation; in those other States, such misconduct, being regarded as illegal and reprehensible, is punishable by criminal penalties.

Moreover, the changes resulting from the 1968/1975 legislation relate essentially to procedural matters and to the range of sanctions, henceforth limited to Geldbussen. Whilst the latter penalty appears less burdensome in some respects than Geldstrafen, it has nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties. The rule of law infringed by the applicant has, for its part, undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law -, but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature.

The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 (art. 6). There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. In this connection, a number of Contracting States still draw a distinction, as did the Federal Republic at the time when the Convention was opened for the signature of the Governments, between the most serious offences (crimes), lesser offences (délits) and petty offences (contraventions), whilst qualifying them all as criminal offences. Furthermore, it would be contrary to the object and purpose of Article 6 (art. 6), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole category of offences merely on the ground of regarding them as petty. Nor does the Federal Republic deprive the presumed perpetrators of Ordnungswidrigkeiten of this right since it grants them the faculty - of which the applicant availed himself - of appealing to a court against the administrative decision.

54. As the contravention committed by Mr. Öztürk was criminal for the purposes of Article 6 (art. 6) of the Convention, there is no need to examine it also in the light of the final criterion stated above (at paragraph 50). The relative lack of seriousness of the penalty at stake (see paragraph 18 above) cannot divest an offence of its inherently criminal character.

55. The Government further appeared to consider that the applicant did not have the status of a person "charged with a criminal offence" because the 1968/1975 Act does not provide for any "Beschuldigung" ("charge") and does not employ the terms "Angeschuldigter" ("person charged") or "Angeklagter" ("the accused"). On this point, the Court would simply refer back to its well-established case-law holding that "charge", for the purposes of Article 6 (art. 6), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation

of the suspect" (see, as the most recent authorities, the Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, § 52, and the Corigliano judgment of the same date, Series A no. 57, p. 13, § 34). In the present case, the applicant was "charged" at the latest as from the beginning of April 1978 when the decision of the Heilbronn administrative authorities was communicated to him (see paragraph 11 above).

56. Article 6 § 3 (e) (art. 6-3-e) was thus applicable in the instant case. It in no wise follows from this, the Court would want to make clear, that the very principle of the system adopted in the matter by the German legislature is being put in question. Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6) (see, mutatis mutandis, the above-mentioned Deweer judgment, Series A no. 35, p. 25, § 49, and the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 23, first sub-paragraph).

II. COMPLIANCE WITH ARTICLE 6 § 3 (e) (art. 6-3-e)

57. Invoking the above-cited Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraphs 15 and 35 above), the applicant submitted that the decision whereby the Heilbronn District Court had made him bear the costs incurred in having recourse to the services of an interpreter at the hearing on 3 August 1978 was in breach of Article 6 § 3 (e) (art. 6-3-e).

The Commission's opinion was to the same effect. The Government, for their part, maintained that there had been no violation, but concentrated their arguments on the issue of the applicability of Article 6 § 3 (e) (art. 6-3-e), without discussing the manner in which the Court had construed this text in 1978.

58. On the basis of the above-cited judgment, the Court finds that the impugned decision of the Heilbronn District Court violated the Convention: "the right protected by Article 6 § 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him the payment of the costs thereby incurred" (Series A no. 29, p. 19, § 46). (…)

CASE OF PÉLISSIER AND SASSI v. FRANCE

(Application no. 25444/94) JUDGMENT STRASBOURG 25 March 1999

AS TO THE FACTS
(…)

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

8. On 16 October 1975 Mr Fernand Cortez and Mr Claude Cortez formed a private limited company (société à responsabilité limitée – Sàrl), Bleu Marine, whose object was the sale of pleasure craft. Fernand Cortez was appointed manager. In 1976 Bleu Marine started to trade with a public company, Chantiers Beneteau S.A., whose object was boat-building. On 8 October 1981, Bleu Marine became Chantiers Beneteau's exclusive distributor for the Var département coast.
9. On 31 March 1980 both applicants became shareholders in Bleu Marine, each holding 250 of a total of 1,000 shares (the remaining 500 belonged to the promoters, Fernand and Claude Cortez).
10. On 29 September 1982 Fernand Cortez, the applicants and Mr Dominique Stizi formed a private limited company, Station Service du Bateau Sàrl, which was run by Fernand Cortez and Dominique Stizi. Its objects were the development of port infrastructures, harbour building and the sale and outfitting of boats. The share capital was held by Fernand Cortez (48 shares), the applicants (24 shares), and Dominique Stizi (104 shares). On 29 February 1984 the Toulon Commercial Court declared the company insolvent and ordered its judicial reorganisation.
11. By agreements made with Station Service du Bateau and another company, Cortez et Cie, Bleu Marine was granted a licence allowing it to launch its boats on the sea front.
12. In 1983 relations between Bleu Marine and Chantiers Beneteau started to deteriorate, the former owing the latter nearly three million French francs (FRF). Chantiers Beneteau then terminated the distribution agreement with Bleu Marine.
13. On 30 May 1983 Bleu Marine filed for insolvency. On 1 June 1983 the Toulon Commercial Court held that the company was insolvent and ordered its judicial reorganisation.
14. On 4 July 1984 the Toulon Commercial Court, finding that Bleu Marine had debts of almost FRF 10 million, ordered its liquidation under the supervision of the court.

B. The investigation

15. On 20 June 1983 Chantiers Beneteau lodged a complaint with the senior Toulon investigating judge against a person or persons unknown for forgery of commercial documents and fraud by the falsification of a balance sheet and its use with a view to obtaining a rescheduling of debt which would never be honoured. On 16 December 1983 the investigating judge sent instructions to the Marseilles Regional Police Department.
16. On 27 June 1984 Fernand Cortez, the manager of Bleu Marine, was charged by the Toulon investigating judge assigned to the case. On 8 October an additional charge of negligent and fraudulent bankruptcy was brought against him. On 22 January 1985 the investigating judge's instructions of 16 December 1983 were carried out. The results revealed in particular the existence of a property holding company (société civile immobilière), SCI Le

Ponant, which had been set up by Fernand Cortez, Mr Pélissier and Mr Sassi's wife, in order to acquire land for letting to Bleu Marine.

17. On 15 October 1984 Mr and Mrs Grouzet lodged a complaint against Fernand Cortez and any other person having managerial responsibility for Bleu Marine, alleging misappropriation and, subsequently, fraud, in connection with the purchase and payment for a boat that was never delivered. On 4 October 1985 a Mr Louis Dreyer lodged a complaint against Fernand Cortez for misappropriation and applied to be joined to the proceedings as a civil party claiming damages.

18. On 14 September 1984, after appearing before the investigating judge on 20 and 21 August and 13 September 1984, the first applicant was charged with the offences set out in the complaint of 20 June 1983 and with negligent and fraudulent bankruptcy and misappropriation.

19. On 12 June 1985 the second applicant was charged with the same offences.

20. After Law no. 85-98 of 25 January 1985, which reformed insolvency law, came into force, the public prosecutor, considering there to be "strong evidence of criminal bankruptcy", lodged an additional application to have Fernand Cortez, Dominique Stizi and the applicants charged with that offence under the new law. In so doing, he relied on the provisions relating to criminal bankruptcy and aiding and abetting criminal bankruptcy.

21. In a letter of 14 November 1985 to the investigating judge, the lawyer acting for Chantiers Beneteau argued that a charge of aiding and abetting criminal bankruptcy might lie against the applicants. On 17 July 1986 Chantiers Beneteau applied to be joined to the criminal bankruptcy proceedings as a civil party claiming damages.

22. On 1 December 1986 the investigating judge preferred an additional charge of "criminal bankruptcy" against Fernand Cortez under sections 196 and 197 of the Law of 25 January 1985 and Articles 402 and 403 of the Criminal Code. On 4, 16 and 19 December 1986 he preferred identical additional charges of "criminal bankruptcy" against the first applicant, the second applicant and Dominique Stizi respectively.

23. On 15 June 1987 the investigating judge appointed two accounting experts to audit the accounts.

24. On 30 June 1988 they submitted their report to the investigating judge.

25. On 10 January 1989 the investigating judge made an order transmitting the file to the public prosecutor for submissions (ordonnance de soit-communiqué).

26. On 27 June 1990 the investigating judge made a discharge order on the charges of forgery and using forged commercial documents, negligent and fraudulent bankruptcy and fraud; ultimately, the only charge on which the applicants were committed to stand trial at the Criminal Court was that of criminal bankruptcy under the Law of 25 January 1985. A discharge order was also made in the case of Fernand Cortez on the same charges and on the complaint lodged by Mr and Mrs Grouzet. He was committed to stand trial at the Criminal Court alone (on certain charges for which he was the sole defendant), with Dominique Stizi (on charges relating to the management of Station Service du Bateau), and with the applicants. In his order, the investigating judge cited Articles 402, 406 and 408 of the Criminal Code and sections 196 and 197 of the Law of 25 January 1985.

C. Judgment of the Toulon Criminal Court of 12 March 1991

27. On 12 March 1991 the Toulon Criminal Court sentenced Fernand Cortez to one year's imprisonment and a fine of FRF 20,000 for fraudulent bankruptcy, concealment of assets and misappropriation. It acquitted Dominique Stizi of the charges against him. Of the civil parties, Chantiers Beneteau's application to be joined to the criminal bankruptcy proceedings was declared inadmissible and the court noted that Mr and Mrs Grouzet had

withdrawn their application to be joined as civil parties; the only person to be awarded compensation was Louis Dreyer (in respect of the misappropriation by Fernand Cortez).

28. In the same judgment, the Toulon Criminal Court held with regard to the bankruptcy charges against the applicants:

"It should firstly be noted that under the Law only de jure or de facto managers, not, as suggested by the prosecution, members, can commit the offence.

Without it being necessary to consider whether the indictment is bad for failure to allege that the members [the applicants] were de facto managers, that being an essential element of the offence, it need only be observed that [the applicants] have not performed any acts of management, the de jure manager cannot be regarded as having been a 'replaceable', compliant manager and it does not appear that he gave the other two the right to sign on his behalf.

...

Thus, as they cannot properly be described as de jure managers, the defendants Sassi and Pélissier must be acquitted of these offences."

29. On 14 March 1991 Chantiers Beneteau appealed against that judgment. The public prosecutor and Fernand Cortez did likewise on 22 March 1991. On 2 April 1992 Chantiers Beneteau lodged additional submissions with the registry of the Court of Appeal in which they proposed, in the alternative, recharacterising the acts the applicants were alleged to have committed as "aiding and abetting" criminal bankruptcy.

D. Judgment of 26 November 1992 of the Aix-en-Provence Court of Appeal

30. On 26 November 1992, after hearings on 16 April and 25 June 1992, the Aix-en-Provence Court of Appeal held that although the applicants could not be regarded as having been de facto managers of the company, they had nonetheless been informed of the serious difficulties it was in and had "wilfully performed positive, material acts that had facilitated, aided or abetted Cortez in the concealment of assets to the detriment of Bleu Marine". It appears from the judgment that the applicants were regarded as appearing before the Court of Appeal as "defendants on criminal bankruptcy charges".

31. The Court of Appeal consequently held that the applicants were guilty, not of the offences charged, but of the separate offence of aiding and abetting criminal bankruptcy through the concealment of assets. As regards the first applicant in particular, the Court of Appeal found, inter alia, that he had furnished a false certificate in order to justify the payment of a sum of money in a suspect operation. It referred in its judgment to Chantiers Beneteau's main submissions requesting the applicants' conviction for criminal bankruptcy, but made no mention of the additional submissions lodged on 2 April 1992 concerning the accusation that they had aided and abetted criminal bankruptcy. There is a dispute as to whether that request was brought to the attention of the applicants; however, it is common ground that it was mentioned, as an ancillary point, by the civil party at the hearing.

32. The Aix-en-Provence Court of Appeal sentenced each of the applicants to a suspended term of eighteen months' imprisonment and to a fine of FRF 30,000. While upholding the conviction of Fernand Cortez and the partial discharge order made in his favour by the Toulon Criminal Court, it nonetheless increased the term of imprisonment to eighteen months, while suspending it, and the fine to FRF 30,000. Lastly, the Court of Appeal upheld Dominique Stizi's acquittal, the award of damages to Louis Dreyer and the declaration that Chantiers Beneteau's application to be joined as a civil party was inadmissible.

E. Proceedings in the Court of Cassation

33. On 26 and 27 November 1992 the applicants appealed against that decision to the Court of Cassation on points of law. In their pleadings they denied the offence and contended on the basis of Article 6 of the Convention that the Court of Appeal's decision to convict them of an offence different from that charged had not been the subject of adversarial argument and had infringed the rights of the defence. In addition, the first applicant submitted that when referring to alleged irregularities on his account the Court of Appeal had relied on allegations that had never been put to him and were incapable of showing that he had aided and abetted criminal bankruptcy.

34. In a judgment of 14 February 1994 the Court of Cassation dismissed the applicants' appeal on the grounds that:

"... the reasons given in the impugned judgment enable the Court of Cassation to satisfy itself that the court below sufficiently made out, within the limits of its jurisdiction, all the constitutive elements of the actus reus and mens rea of both the principal offence of criminal bankruptcy committed by Fernand Cortez through the concealment of assets and the offence committed by Philippe Sassi and François Pélissier of aiding and abetting criminal bankruptcy through the concealment of assets. The grounds of appeal, which merely contest the findings which the court below, in its unfettered discretion, came to on the facts and circumstances of the case after hearing the parties' submissions, cannot be upheld."

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure

35. The relevant provisions of the Code of Criminal Procedure provide:

Article 388

"The Criminal Court shall be seised of offences within its jurisdiction on the voluntary appearance of the parties, a summons accompanied by a statement of the charges, an immediate summary trial or, lastly, a committal by the investigating judge or judges."

Article 509

"The case is transferred to the Court of Appeal to the extent determined in the notice of appeal ..."

B. Former Criminal Code (provisions in force at the material time)

36. The relevant provisions of the Criminal Code in force at the material time were as follows:

Article 59

"Accessories to a serious crime (crime) or other major offence (délit) shall be liable to the same penalties as the principals, except where statute provides otherwise."

Article 60

"A person who, by gifts, promises, threats, abuse of authority or power, scheming or contrivance, has incited the commission of a serious crime (crime) or other major offence (délit) or given instructions for its commission;

has procured weapons, implements or any other means of assisting in the commission of an offence knowing that such weapons, implements or other means were intended for that purpose; or

has knowingly aided or abetted the principal or principals in acts preparatory to the commission of the offence or facilitating its commission or in carrying out the offence, shall

be guilty of an offence as accessories, without prejudice to the penalties specially imposed by this Code on persons conspiring to commit or inciting breaches of State security, even if the crime intended by those conspiring or inciting is not committed."

Article 402

"Persons found guilty of criminal bankruptcy shall be liable on conviction to between three months' and five years' imprisonment and a fine of between FRF 10,000 and FRF 200,000 or to either of those penalties.

In addition, an order may be made barring them from exercising the rights referred to in Article 42."

Article 403

"Accessories to criminal bankruptcy shall be liable to the same penalties as those laid down in the preceding Article, even if they are not merchants, craftsmen or farmers and do not directly or indirectly, de facto or de jure, manage a private-law legal entity having an economic activity."

B. Law no. 85-98 of 25 January 1985 on the judicial reorganisation and liquidation of undertakings

37. The relevant provisions of this law read as follows:

Section 196

"The provisions of this Chapter are applicable to:

(1) all traders and craftsmen;

(2) anyone who has directly or indirectly, whether de jure or de facto, managed or liquidated a private-law entity having an economic activity; and

(3) individuals who are permanent representatives of entities managing entities as defined in subsection 2 above."

Section 197

"Where judicial reorganisation proceedings are commenced, the persons referred to in section 196 shall be guilty of criminal bankruptcy if they are found to have done any of the following:

(1) with the intention of avoiding or delaying the commencement of judicial reorganisation proceedings, made purchases with a view to resale at less than market value or used ruinous means to procure funding;

(2) misappropriated or concealed all or part of the debtor's assets;

(3) fraudulently increased the debtor's liabilities; or

(4) held fictitious accounts or caused accounting documents of the undertaking or entity to disappear or failed to keep any accounts."

PROCEEDINGS BEFORE THE COMMISSION (...)

FINAL SUBMISSIONS TO THE COURT (...)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a) AND (b) OF THE CONVENTION AS REGARDS THE FAIRNESS OF THE PROCEEDINGS

42. The applicants submitted that the fact that they had been convicted of an offence different from the one charged and the use against the first applicant of a document whose

admissibility was contested gave rise to a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention, the relevant part of which provides:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

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;

..."

43. The Government contested those submissions. The Commission agreed with the submission concerning the conviction of an offence different from the one charged.

44. The first applicant complained, firstly, about the use of a "false certificate", which was a document that had not been referred to in the order committing him for trial before the Criminal Court.

45. The Court observes that the Convention does not lay down rules on evidence as such. It cannot therefore exclude as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 § 1 (see the Mantovanelli v. France judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, pp. 436-37, § 34; and, mutatis mutandis, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 46).

46. The fairness of proceedings is assessed with regard to the proceedings as a whole (see, inter alia, the following judgments: Delta v. France of 19 December 1990, Series A no. 191-A, p. 15, § 35; Imbrioscia v.

Switzerland of 24 November 1993, Series A no. 275, pp. 13-14, § 38; Miailhe v. France (no. 2) of 26 September 1996, Reports 1996-IV, p. 1338, § 43).

47. In the instant case, the Court finds on the basis of all the evidence in its possession that the document in issue and the Aix-en-Provence Court of Appeal's reliance on it (see paragraph 31 above) were not decisive in the conviction or sentence of Mr Pélissier. Thus, the fact that the document in issue was admitted in evidence did not impair the fairness of the proceedings. Consequently, the use by the Court of Appeal of the document in issue did not entail a violation of Article 6 § 1 of the Convention.

The Court now turns to the decision of the Aix-en-Provence Court of Appeal to convict the applicants of a different offence.

48. The applicants did not dispute the French courts' right to return an alternative verdict, only the manner in which that right was exercised in the course of their trial. In that connection, they stressed the importance of the adversarial principle.

Returning an alternative verdict entailed an obligation for argument to be heard not only on the facts but also on whether such a verdict was justified. The rights of the defence could be effectively exercised only if the trial court heard argument on the proposed alternative charge. As they had not been able to contest that charge, since it was not decided on until deliberations, the applicants had not had adequate time and facilities for the preparation of their defence. They submitted that theirs was a similar position to that considered by the Convention institutions in the case of Chichlian and Ekindjian v. France (judgment of 28 November 1989, Series A no. 162-B, opinion of the Commission, p. 52, § 65).

The applicants maintained that the special nature of the concept of "aiding and abetting" in French law meant that, had they been charged with aiding and abetting criminal

bankruptcy rather than with the principal offence, they would have had to adopt a fresh defence strategy and put forward different arguments. As regards the extent to which they had been aware that an alternative verdict might be returned, the applicants stated that while it was true that aiding and abetting had been referred to at the investigation stage, it had subsequently been intentionally discounted by the investigating judge and disregarded by both the Criminal Court and the Court of Appeal at the hearings. They were adamant that the additional submissions lodged by Chantiers Beneteau with the Court of Appeal had not been served on them. They had only become aware of the request for their conviction of aiding and abetting when it was made – as a purely ancillary point – at the end of the oral submissions on behalf of that civil party.

The applicants argued that the alternative charge had necessarily changed the "nature of the accusation" against them, as the difference between criminal bankruptcy and aiding and abetting criminal bankruptcy was not,

as the Government maintained, merely a question of degree of participation (see paragraph 50 below).

As to the information required by paragraph 3 (a) of Article 6 of the Convention, the applicants contended that it had to be detailed and direct and provided by the judicial authorities, not a civil party.

49. The Commission agreed in substance with those arguments.

50. In the Government's submission, provided that no reliance was placed on new facts, alternative verdicts could be returned by virtue of the principle that the trial courts exercise jurisdiction in rem. Under that principle, a trial court had jurisdiction to hear the facts and was not bound by the legal characterisation set out in the summons or indictment. In the instant case, the Aix-en-Provence Court of Appeal's decision to convict of a separate offence in law had not altered the basis of the criminal charge, but simply constituted a different assessment of the degree to which the applicants had participated in the criminal bankruptcy offence.

The Government contended that the notion of aiding and abetting, despite requiring three constitutive elements to be proved, was not really an autonomous one and was applied very flexibly by the courts. In particular, this was due to the difficulties that sometimes arose in distinguishing acts of aiding and abetting from acts committed jointly (coaction). The wording of former Article 60 of the Criminal Code, which had been in force at the material time, had contained deficiencies that the courts had sought to remedy through judicial interpretation in which aiding and abetting had on occasion been equated with acts committed jointly.

Accordingly, aiding and abetting constituted an element that was intrinsic to the initial charge (see the De Salvador Torres v. Spain judgment of 24 October 1996, Reports 1996-V), especially as the offence the applicants were convicted of was among those mentioned in the order committing them for trial before the Criminal Court. The alternative verdict, which the applicants could have foreseen, had not fundamentally changed the nature of the accusation against them, involving as it did no more than a revised assessment of the degree of their participation.

The Government argued that the requirements of Article 6 § 3 (a) and (b) should not be applied too formally and noted that the applicants had been informed that the offence might be considered to be one of aiding and abetting criminal bankruptcy when they were charged with the additional offence after the new law on 25 January 1985 entered into force. The fact that the investigating judge had not mentioned it in the committal order was not decisive for the purposes of Article 6 § 3 (a) of the Convention, as it had been referred to on at least one occasion during the course of the proceedings, and the Criminal Court and the Court of Appeal had jurisdiction in rem. Furthermore, as the additional submissions of the civil party, Chantiers Beneteau, had been lodged before the hearing of the appeal in the Court of Appeal, the applicants could easily have apprised themselves of

them. The applicants, who acknowledged that the issue of aiding and abetting had been mentioned by Chantiers Beneteau's counsel during his oral submissions, had, moreover, been assisted by experienced lawyers.

51. The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed.

52. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention (see, mutatis mutandis, the following judgments: Deweer v. Belgium of 27 February 1980, Series A no. 35, pp. 30-31, § 56; Artico v. Italy of 13 May 1980, Series A no. 37, p. 15, § 32; Goddi v. Italy of 9 April 1984, Series A no. 76, p. 11, § 28; and Colozza v. Italy of 12 February 1985, Series A no. 89, p. 14, § 26). The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.

53. Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (see, mutatis mutandis, the Kamasinski judgment cited above).

54. Lastly, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.

55. The Court notes, firstly, that the only charge set out in the order of 27 June 1990 committing the applicants for trial before the Criminal Court was criminal bankruptcy (see paragraph 26 above). Although reference was made in the additional charges preferred on 4 and 16 December 1986 to provisions on both criminal bankruptcy and aiding and abetting criminal bankruptcy (see paragraph 22 above) – without specific reasons being stated – the Court finds that the investigation conducted by the investigating judge was clearly confined to the offence of criminal bankruptcy. There is nothing to suggest that a charge of aiding and abetting criminal bankruptcy, to which counsel acting for Chantiers Beneteau referred in a letter to the investigating judge (see paragraph 21 above), was considered to be a genuine possibility during the investigation.

Argument before the Criminal Court was confined to the offence of criminal bankruptcy (see paragraph 28 above). The wording of the court's judgment confirms that the issue of "aiding and abetting" was not aired at the trial (ibid.).

On the public prosecutor's appeal to the Aix-en-Provence Court of Appeal the applicants were at no stage, whether in the summons to appear or at the hearing (see paragraph 30 above), accused by the judicial authorities of having aided and abetted criminal bankruptcy. Admittedly, the Court notes that Chantiers Beneteau lodged additional submissions with the registry on 2 April 1992, that is to say before the hearing in the Court of Appeal (see paragraph 29 above). However, the Government have not provided any information to show that those submissions were effectively communicated to the applicants or their counsel when lodged with the registry or, indeed, subsequently. The Court considers that the mere fact that the civil party's additional submissions were made

available at the Court of Appeal's registry could not suffice, by itself, to satisfy the requirements of paragraph 3 (a) of Article 6 of the Convention.

The applicants have acknowledged that they heard counsel acting for Chantiers Beneteau raise as an ancillary point the possibility of their being convicted of aiding and abetting criminal bankruptcy (see paragraph 31 above). The Court notes, however, that it does not appear that either the judges of the Court of Appeal or the public prosecutor referred to that possibility at the hearing or even addressed the civil party's submission. On this point, the Court finds in particular that the arguments put forward by Chantiers Beneteau in its main submissions are referred to in the judgment of the Aix-en-Provence Court of Appeal, but there is no reference to that party's additional submissions (see paragraph 31 above).

56. Having regard to these factors, the Court finds that it has not been established that the applicants were aware that the Court of Appeal might return an alternative verdict of "aiding and abetting" criminal bankruptcy. In any event, having regard to the "need for special attention to be paid to the notification of the accusation to the defendant" and to the crucial role played by written particulars of the offence in the criminal process (see the Kamasinski judgment cited above), the Court considers that none of the Government's arguments, whether taken together or in isolation, could suffice to guarantee compliance with the provisions of Article 6 § 3 (a) of the Convention.

57. The Court must now determine whether the notion of aiding and abetting under French law meant that the applicants ought to have been

aware of the possibility that a verdict of aiding and abetting criminal bankruptcy might be returned instead of one of criminal bankruptcy.

58. The Court notes that the provisions of Articles 59 and 60 of the Criminal Code as applicable at the material time expressly provided that aiding and abetting could only be made out on proof of a number of special elements, subject to strict, cumulative conditions (see paragraph 36 above). Admittedly, aiding and abetting, by its nature, is related to the substantive offence committed by the principal. Acts of accessories only become criminal by reference to offences committed by the principal, which explains the notion of "related criminality" (emprunt de criminalité). However, in addition to this first constituent element, aiding and abetting also requires a factual element, that is to say the commission of one of the specific acts referred to in former Article 60 of the Criminal Code, and an element of intent: the awareness by the accessory that he was assisting in the commission of the offence (see paragraph 36 above).

59. The Court cannot, therefore, accept the Government's submission that aiding and abetting differs from the principal offence only as to the degree of participation. The Criminal Code provided otherwise at the material time and, moreover, a clear distinction is drawn in Articles 402 and 403 between accessories and principals: for a defendant to be convicted as a principal, it has to be shown that he acted in one of the capacities set out in section 196 of the Law of 25 January 1985, and referred to in former Article 403 of the Criminal Code (see paragraphs 36-37 above).

60. It is not for the Court to assess the merits of the defences the applicants could have relied on had they had an opportunity to make submissions on the charge of aiding and abetting criminal bankruptcy. The Court merely notes that it is plausible to argue that the defence would have been different from the defence to the substantive charge. On a charge of aiding and abetting, Mr Pélissier and Mr Sassi would have had to persuade the court, firstly, that they had not committed any of the statutorily defined acts of aiding and abetting and, secondly, if they were accused of specific acts of aiding and abetting, that they had been unaware that they were assisting in the commission of an offence. Further, the principle that criminal statutes must be strictly construed means that it is not possible to avoid having to make out the specific elements of aiding and abetting (see paragraph 36 above). The Court notes, too, that the notion of joint offending (coaction) referred to by the Government, as indeed that of joint enterprise (complicité corespective), concern

special situations unrelated to the present case. In the instant case, the Court confines itself to noting that both the Toulon Criminal Court and the Aix-en-Provence Court of Appeal expressly discounted the possibility that the applicants were principals or, therefore, joint principals. The Government's argument that aiding and abetting an offence had on occasion been equated by the courts with acts committed jointly by principals cannot therefore be accepted in the present case.

61. In the light of the foregoing, the Court also finds that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings (see the De Salvador Torres judgment cited above, p. 1587, § 33).

62. The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was snot adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late.

63. In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.

Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, which provides for a fair trial.

CASE OF RANTSEV v. CYPRUS AND RUSSIA

(Application no. 25444/94) JUDGMENT STRASBOURG 7 January 2010

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicant, Mr Nikolay Mikhaylovich Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980.
14. The facts of the case, as established by the submissions of the parties and the material submitted by them, in particular the witness statements taken by the Cypriot police, may be summarised as follows.

A. The background facts

15. Oxana Rantseva arrived in Cyprus on 5 March 2001. On 13 February 2001, X.A., the owner of a cabaret in Limassol, had applied for an "artiste" visa and work permit for Ms Rantseva to allow her to work as an artiste in his cabaret (see further paragraph 115 below). The application was accompanied by a copy of Ms Rantseva's passport, a medical certificate, a copy of an employment contract (apparently not yet signed by Ms Rantseva) and a bond, signed by [X.A.] Agencies, in the following terms (original in English):
"KNOW ALL MEN BY THESE PRESENTS that I [X.A.] of L/SSOL Am bound to the Minister of the Interior of the Republic of Cyprus in the sum of £150 to be paid to the said Minister of the Interior or other the [sic] Minister of Interior for the time being or his attorney or attorneys.
Sealed with my seal.
Dated the 13th day of February 2001
WHEREAS Ms Oxana Rantseva of RUSSIA
Hereinafter called the immigrant, (which expression shall where the context so admits be deemed to include his heirs, executors, administrators and assigns) is entering Cyprus and I have undertaken that the immigrant shall not become in need of relief in Cyprus during a period of five years from the date hereof and I have undertaken to replay [sic] to the Republic of Cyprus any sum which the Republic of Cyprus may pay for the relief or support of the immigrant (the necessity for which relief and support the Minister shall be the sole judge) or for the axpenses [sic] of repatriating the immigrant from Cyprus within a period of five years from the date hereof.
NOW THE CONDITION OF THE ABOVE WRITTEN BOND is such that if the immigrant or myself, my heirs, executors, administrators and assigns shall repay to the Republic of Cyprus on demand any sum which the Republic of Cyprus may have paid as aforesaid for the relief or Support of the immigrant or for the expenses of repatriation of the immigrant from Cyprus then the above written bond shall be void but otherwise shall remain in full force."
16. Ms Rantseva was granted a temporary residence permit as a visitor until 9 March 2001. She stayed in an apartment with other young women working in X.A.'s cabaret. On 12 March 2001 she was granted a permit to work until 8 June 2001 as an artiste in a cabaret owned by X.A. and managed by his brother, M.A. She began work on 16 March 2001.
17. On 19 March 2001, at around 11a.m., M.A. was informed by the other women living with Ms Rantseva that she had left the apartment and taken all her belongings with her. The

women told him that she had left a note in Russian saying that she was tired and wanted to return to Russia. On the same date M.A. informed the Immigration Office in Limassol that Ms Rantseva had abandoned her place of work and residence. According to M.A.'s subsequent witness statement, he wanted Ms Rantseva to be arrested and expelled from Cyprus so that he could bring another girl to work in the cabaret. However, Ms Rantseva's name was not entered on the list of persons wanted by the police.

B. The events of 28 March 2001

18. On 28 March 2001, at around 4 a.m., Ms Rantseva was seen in a discotheque in Limassol by another cabaret artiste. Upon being advised by the cabaret artiste that Ms Rantseva was in the discotheque, M.A. called the police and asked them to arrest her. He then went to the discotheque together with a security guard from his cabaret. An employee of the discotheque brought Ms Rantseva to him. In his subsequent witness statement, M.A. said (translation):
"When [Ms Rantseva] got in to my car, she did not complain at all or do anything else. She looked drunk and I just told her to come with me. Because of the fact that she looked drunk, we didn't have a conversation and she didn't talk to me at all."

19. M.A. took Ms Rantseva to Limassol Central Police Station, where two police officers were on duty. He made a brief statement in which he set out the circumstances of Ms Rantseva's arrival in Cyprus, her employment and her subsequent disappearance from the apartment on 19 March 2001. According to the statement of the police officer in charge when they arrived (translation):
"On 28 March 2001, slightly before 4a.m., [M.A.] found [Ms Rantseva] in the nightclub Titanic ... he took her and led her to the police station stating that Ms Rantseva was illegal and that we should place her in the cells. He ([M.A.]) then left the place (police station)."

20. The police officers then contacted the duty passport officer at his home and asked him to look into whether Ms Rantseva was illegal. After investigating, he advised them that her name was not in the database of wanted persons. He further advised that there was no record of M.A.'s complaint of 19 March 2001 and that, in any case, a person did not become illegal until 15 days after a complaint was made. The passport officer contacted the person in charge of the AIS (Police Aliens and Immigration Service), who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and take her to their Limassol Office for further investigation at 7 a.m. that day. The police officers contacted M.A. to ask him to collect Ms Rantseva. M.A. was upset that the police would not detain her and refused to come and collect her. The police officers told him that their instructions were that if he did not take her they were to allow her to leave. M.A. became angry and asked to speak to their superior. The police officers provided a telephone number to M.A. The officers were subsequently advised by their superior that M.A. would come and collect Ms Rantseva. Both officers, in their witness statements, said that Ms Rantseva did not appear drunk. The officer in charge said (translation):
"Ms Rantseva remained with us ... She was applying her make-up and did not look drunk ... At around 5.20a.m. ... I was ... informed that [M.A.] had come and picked her up..."

21. According to M.A.'s witness statement, when he collected Ms Rantseva from the police station, he also collected her passport and the other documents which he had handed to the police when they had arrived. He then took Ms Rantseva to the apartment of M.P., a male employee at his cabaret. The apartment M.P. lived in with his wife, D.P., was a split-level apartment with the entrance located on the fifth floor of a block of flats. According to M.A., they placed Ms Rantseva in a room on the second floor of the apartment. In his police statement, he said:

"She just looked drunk and did not seem to have any intention to do anything. I did not do anything to prevent her from leaving the room in [the] flat where I had taken her."

22. M.A. said that M.P. and his wife went to sleep in their bedroom on the second floor and that he stayed in the living room of the apartment where he fell asleep. The apartment was arranged in such a way that in order to leave the apartment by the front door, it would be necessary to pass through the living room.

23. M.P. stated that he left his work at the cabaret "Zygos" in Limassol at around 3.30 a.m. and went to the "Titanic" discotheque for a drink. Upon his arrival there he was informed that the girl they had been looking for, of Russian origin, was in the discotheque. Then M.A. arrived, accompanied by a security guard from the cabaret, and asked the employees of "Titanic" to bring the girl to the entrance. M.A., Ms Rantseva and the security guard then all got into M.A.'s car and left. At around 4.30 a.m. M.P. returned to his house and went to sleep. At around 6 a.m. his wife woke him up and informed him that M.A. had arrived together with Ms Rantseva and that they would stay until the Immigration Office opened. He then fell asleep.

24. D.P. stated that M.A. brought Ms Rantseva to the apartment at around 5.45 a.m.. She made coffee and M.A. spoke with her husband in the living room. M.A. then asked D.P. to provide Ms Rantseva with a bedroom so that she could get some rest. D.P. stated that Ms Rantseva looked drunk and did not want to drink or eat anything. According to D.P., she and her husband went to sleep at around 6 a.m. while M.A. stayed in the living room. Having made her statement, D.P. revised her initial description of events, now asserting that her husband had been asleep when M.A. arrived at their apartment with Ms Rantseva. She stated that she had been scared to admit that she had opened the door of the apartment on her own and had had coffee with M.A..

25. At around 6.30 a.m. on 28 March 2001, Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony adjoining the room in which Ms Rantseva had been staying on the upper floor of the apartment, below which the larger balcony on the fifth floor was located.

26. M.A. claimed that he woke at 7 a.m. in order to take Ms Rantseva to the Immigration Office. He called to D.P. and M.P. and heard D.P. saying that the police were in the street in front of the apartment building. They looked in the bedroom but Ms Rantseva was not there. They looked out from the balcony and saw a body in the street. He later discovered that it was Ms Rantseva.

27. D.P. claimed that she was woken by M.A. knocking on her door to tell her that Ms Rantseva was not in her room and that they should look for her. She looked for her all over the apartment and then noticed that the balcony door in the bedroom was open. She went out onto the balcony and saw the bedspread and realised what Ms Rantseva had done. She went onto another balcony and saw a body lying on the street, covered by a white sheet and surrounded by police officers.

28. M.P. stated that he was woken up by noise at around 7 a.m. and saw his wife in a state of shock; she told him that Ms Rantseva had fallen from the balcony. He went into the living room where he saw M.A. and some police officers.

29. In his testimony of 28 March 2001, G.A. stated that on 28 March 2001, around 6.30 a.m., he was smoking on his balcony, located on the first floor of M.P. and D.P.'s building. He said:

"I saw something resembling a shadow fall from above and pass directly in front of me. Immediately afterwards I heard a noise like something was breaking ... I told my wife to call the police ... I had heard nothing before the fall and immediately afterwards I did not hear any voices. She did not scream during the fall. She just fell as if she were unconscious ... Even if there had been a fight (in the apartment on the fifth floor) I would not have been able to hear it."

C. The investigation and inquest in Cyprus

30. The Cypriot Government advised the Court that the original investigation file had been destroyed in light of the internal policy to destroy files after a period of five years in cases where it was concluded that death was not attributable to a criminal act. A duplicate file, containing all the relevant documents with the exception of memo sheets, has been provided to the Court by the Government.

31. The file contains a report by the officer in charge of the investigation. The report sets out the background facts, as ascertained by forensic and crime scene evidence, and identifies 17 witnesses: M.A., M.P. D.P., G.A., the two police officers on duty at Limassol Police Station, the duty passport officer, eight police officers who attended the scene after Ms Rantseva's fall, the forensic examiner and the laboratory technician who analysed blood and urine samples.

32. The report indicates that minutes after receiving the call from G.A.'s wife, shortly after 6.30 a.m., the police arrived at the apartment building. They sealed off the scene at 6.40 a.m. and began an investigation into the cause of Ms Rantseva's fall. They took photographs of the scene, including photographs of the room in the apartment where Ms Rantseva had stayed and photographs of the balconies. The forensic examiner arrived at 9.30 a.m. and certified death. An initial forensic examination took place at the scene

33. On the same day, the police interviewed M.A., M.P. and D.P. as well as G.A.. They also interviewed the two police officers who had seen M.A. and Ms Rantseva at Limassol Police Station shortly before Ms Rantseva's death and the duty passport officer (relevant extracts and summaries of the statements given is included in the facts set out above at paragraphs 17 to 29). Of the eight police officers who attended the scene, the investigation file includes statements made by six of them, including the officer placed in charge of the investigation. There is no record of any statements being taken either from other employees of the cabaret where Ms Rantseva worked or from the women with whom she briefly shared an apartment.

34. When he made his witness statement on 28 March 2001, M.A. handed Ms Rantseva's passport and other documents to the police. After the conclusion and signature of his statement, he added a clarification regarding the passport, indicating that Ms Rantseva had taken her passport and documents when she left the apartment on 19 March 2001.

35. On 29 March 2001 an autopsy was carried out by the Cypriot authorities. The autopsy found a number of injuries on Ms Rantseva's body and to her internal organs. It concluded that these injuries resulted from her fall and that the fall was the cause of her death. It is not clear when the applicant was informed of the results of the autopsy. According to the applicant, he was not provided with a copy of the autopsy report and it is unclear whether he was informed in any detail of the conclusions of the report, which were briefly summarised in the findings of the subsequent inquest.

36. On 5 August 2001 the applicant visited Limassol Police Station together with a lawyer and spoke to the police officer who had received Ms Rantseva and M.A. on 28 March 2001. The applicant asked to attend the inquest. According to a later statement by the police officer, dated 8 July 2002, the applicant was told by the police during the visit that his lawyer would be informed of the date of the inquest hearing before the District Court of Limassol.

37. On 10 October 2001 the applicant sent an application to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus. He referred to a request of 8 October 2001 of the Procurator's Office of the Chelyabinsk region concerning legal assistance (see paragraph 48 below) and asked to exercise his right to familiarise himself with the materials of the case before the inquest hearing, to be present at the hearing and to be notified in due time of the date of the hearing. He also advised that he wished to present additional documents to the court in due course.

38. The inquest proceedings were fixed for 30 October 2001 and, according to the police officer's statement of 8 July 2002 (see paragraph 36 above), the applicant's lawyer was promptly informed. However, neither she nor the applicant appeared before the District Court. The case was adjourned to 11 December 2001 and an order was made that the Russian Embassy be notified of the new date so as to inform the applicant.

39. In a facsimile dated 20 October 2001 and sent on 31 October 2001 to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus, the applicant asked for information regarding the inquest date to be sent to his new place of residence.

40. On 11 December 2001 the applicant did not appear before the District Court and the inquest was adjourned until 27 December 2001.

41. On 27 December 2001 the inquest took place before the Limassol District Court in the absence of the applicant. The court's verdict of the same date stated, *inter alia* (translation):

"At around 6.30 a.m. on [28 March 2001] the deceased, in an attempt to escape from the afore-mentioned apartment and in strange circumstances, jumped into the void as a result of which she was fatally injured...

My verdict is that MS OXANA Rantseva died on 28 March 2001, in circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest (*εφιλοξενείτο*).

There is no evidence before me that suggests criminal liability of a third person for her death".

D. Subsequent proceedings in Cyprus and Russia

42. Ms Rantseva's body was transferred to Russia on 8 April 2001.

43. On 9 April 2001 the applicant requested the Chelyabinsk Regional Bureau of Medical Examinations ("the Chelyabinsk Bureau") to perform an autopsy of the body. He further requested the Federal Security Service of the Russian Federation and the General Prosecutor's Office to investigate Ms Rantseva's death in Cyprus. On 10 May 2001 the Chelyabinsk Bureau issued its report on the autopsy.

44. In particular the following was reported in the forensic diagnosis (translation provided):

"It is a trauma from falling down from a large height, the falling on a plane of various levels, politrauma of the body, open cranial trauma: multiple fragmentary comminuted fracture of the facial and brain skull, multiple breeches of the brain membrane on the side of the brain vault and the base of the skull in the front brain pit, haemorrhages under the soft brain membranes, haemorrhages into the soft tissues, multiple bruises, large bruises and wounds on the skin, expressed deformation of the head in the front-to-back direction, closed dull trauma of the thorax with injuries of the thorax organs..., contusion of the lungs along the back surface, fracture of the spine in the thorax section with the complete breach of the marrow and its displacement along and across ...

Alcohol intoxication of the medium degree: the presence of ethyl alcohol in the blood 1,8%, in the urine -2,5%."

45. The report's conclusions included the following:

"The color and the look of bruises, breaches and wounds as well as hemorrhages with the morphological changes of the same type in the injured tissues indicates, without any doubt, that the traumas happened while she was alive, as well as the fact, that they happened not very long before death, within a very short time period, one after another.

During the forensic examination of the corpse of Rantseva O.N. no injuries resulting from external violence, connected with the use of various firearms, various sharp objects and weapons, influence of physical and chemical reagents or natural factors have been

established. ... During the forensic chemical examination of the blood and urine, internal organs of the corpse no narcotic, strong or toxic substances are found. Said circumstances exclude the possibility of the death of Rantseva O.N. from firearms, cold steel, physical, chemical and natural factors as well as poisoning and diseases of various organs and systems. ...

Considering the location of the injuries, their morphological peculiarities, as well as certain differences, discovered during the morphological and histological analysis and the response of the injured tissues we believe that in this particular case a trauma from falling down from the great height took place, and it was the result of the so-called staged/bi-moment fall on the planes of various levels during which the primary contact of the body with an obstacle in the final phase of the fall from the great height was by the back surface of the body with a possible sliding and secondary contact by the front surface of the body, mainly the face with the expressed deformation of the head in the front-to-back direction due to shock-compressive impact...

During the forensic chemical examination of the corpse of Rantseva O.N. in her blood and urine we found ethyl spirits 1,8 and 2,5 correspondingly, which during her life might correspond to medium alcohol intoxication which is clinically characterized by a considerable emotional instability, breaches in mentality and orientation in space in time."

46. On 9 August 2001 the Russian Embassy in Cyprus requested from the chief of Limassol police station copies of the investigation files relating to Ms Rantseva's death.

47. On 13 September 2001 the applicant applied to the Public Prosecutor of the Chelyabinsk region requesting the Prosecutor to apply on his behalf to the Public Prosecutor of Cyprus for legal assistance free of charge as well as an exemption from court expenses for additional investigation into the death of his daughter on the territory of Cyprus.

48. By letter dated 11 December 2001 the Deputy General Prosecutor of the Russian Federation advised the Minister of Justice of the Republic of Cyprus that the Public Prosecutor's Office of the Chelyabinsk region had conducted an examination in respect of Ms Rantseva's death, including a forensic medical examination. He forwarded a request, dated 8 October 2001, under the European Convention on Mutual Assistance in Criminal Matters ("the Mutual Assistance Convention" – see paragraphs 175 to 178 below) and the Treaty between the USSR and the Republic of Cyprus on Civil and Criminal Matters 1984 ("the Legal Assistance Treaty" – see paragraphs 179 to 185 below), for legal assistance for the purposes of establishing all the circumstances of Ms Rantseva's death and bringing to justice guilty parties, under Cypriot legislation. The request included the findings of the Russian authorities as to the background circumstances; it is not clear how the findings were reached and what, if any, investigation was conducted independently by the Russian authorities.

49. The findings stated, *inter alia*, as follows (translation provided):

"The police officers refused to arrest Rantseva O.N. due to her right to stay on the territory of Cyprus without the right to work for 14 days, i.e. until April 2, 2001. Then Mr [M.A.] suggested to detain Rantseva O.N. till the morning as a drunken person. He was refused, since, following the explanations provided by the police officers Rantseva O.N. looked like a sober person, behaved decently, was calm, was laying make-up. M.A., together with an unestablished person, at 5.30a.m. on March 28, 2001 took Rantseva O.N. from the regional police precinct and brought her to the apartment of [D.P.] ... where [they] organised a meal, and then, at 6.30a.m. locked Rantseva O.N. in a room of the attic of the 7th floor of said house."

50. The request highlighted the conclusion of the experts at the Chelyabinsk Bureau of Forensic Medicine that there had been two stages in Ms Rantseva's fall, first on her back and then on her front. The request noted that this conclusion contradicted the findings made in the Cypriot forensic examination that Ms Rantseva's death had resulted from a fall face-down. It further noted:

"It is possible to suppose, that at the moment of her falling down the victim could cry from horror. However, it contradicts the materials of the investigation, which contain the evidence of an inhabitant of the 2nd floor of this row of loggias, saying that a silent body fell down on the asphalt ..."

51. The report concluded:
"Judging by the report of the investigator to Mr Rantsev N.M., the investigation ends with the conclusion that the death of Rantseva O.N. took place under strange and un-established circumstances, demanding additional investigation."

52. The Prosecutor of the Chelyabinsk region therefore requested, in accordance with the Legal Assistance Treaty, that further investigation be carried out into the circumstances of Ms Rantseva's death in order to identify the cause of death and eliminate the contradictions in the available evidence; that persons having any information concerning the circumstances of the death be identified and interviewed; that the conduct of the various parties be considered from the perspective of bringing murder and/or kidnapping and unlawful deprivation of freedom charges, and in particular that M.A. be investigated; that the applicant be informed of the materials of the investigation; that the Russian authorities be provided with a copy of the final decisions of judicial authorities as regards Ms Rantseva's death; and that the applicant be granted legal assistance free of charge and be exempted from paying court expenses.

53. On 27 December 2001 the Russian Federation wrote to the Cypriot Ministry of Justice requesting, on behalf of the applicant, that criminal proceedings be instituted in respect of Ms Rantseva's death, that the applicant be joined as a victim in the proceedings and that he be granted free legal assistance.

54. On 16 April 2002 the Russian Embassy in Cyprus conveyed to the Cypriot Ministry of Justice and Public Order the requests dated 11 December and 27 December 2001 of the General Prosecutor's Office of the Russian Federation, made under the Legal Assistance Treaty, for legal assistance concerning Ms Rantseva's death.

55. On 25 April 2002 the Office of the Prosecutor General of the Russian Federation reiterated its request for the institution of criminal proceedings in connection with Ms Rantseva's death and the applicant's request to be added as a victim to the proceedings in order to submit his further evidence, as well as his request for legal aid. It requested the Cypriot Government to provide an update and advise of any decisions that had been taken.

56. On 25 November 2002, the applicant applied to the Russian authorities to be recognised as a victim in the proceedings concerning his daughter's death and reiterated his request for legal assistance. The request was forwarded by the Office of the Prosecutor General of the Russian Federation to the Cypriot Ministry of Justice.

57. By letter of 27 December 2002 the Assistant to the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice referring to the detailed request made by the applicant for the initiation of criminal proceedings in connection with the death of his daughter and for legal aid in Cyprus, which had previously been forwarded to the Cypriot authorities pursuant to the Mutual Assistance Convention and the Legal Assistance Treaty. The letter noted that no information had been received and requested that a response be provided.

58. On 13 January 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

59. By letters of 17 and 31 January 2003 the Office of the Prosecutor General of the Russian Federation noted that it had received no response from the Cypriot authorities in relation to its requests for legal assistance, the contents of which it repeated.

60. On 4 March 2003 the Cypriot Ministry of Justice informed the Prosecutor General of the Russian Federation that its request had been duly executed by the Cypriot police. A letter

from the Chief of Police, and the police report of 8 July 2002 recording the applicant's visit to Limassol Police Station in August 2001 were enclosed.

61. On 19 May 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

62. On 5 June 2003 the Office of the Prosecutor General of the Russian Federation submitted a further request pursuant to the Legal Assistance Treaty. It requested that a further investigation be conducted into the circumstances of Ms Rantseva's death as the verdict of 27 December 2001 was unsatisfactory. In particular, it noted that despite the strange circumstances of the incident and the acknowledgment that Ms Rantseva was trying to escape from the flat where she was held, the verdict did not make any reference to the inconsistent testimonies of the relevant witnesses or contain any detailed description of the findings of the autopsy carried out by the Cypriot authorities.

63. On 8 July 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting a reply to its previous requests as a matter of urgency.

64. On 4 December 2003 the Commissioner for Human Rights of the Russian Federation forwarded the applicant's complaint about the inadequate reply from the Cypriot authorities to the Cypriot Ombudsman.

65. On 17 December 2003, in reply to the Russian authorities' request (see paragraph 52 above), the Cypriot Ministry of Justice forwarded to the Prosecutor General of the Russian Federation a further report prepared by the Cypriot police and dated 17 November 2003. The report was prepared by one of the officers who had attended the scene on 28 March 2001 and provided brief responses to the questions posed by the Russian authorities. The report reiterated that witnesses had been interviewed and statements taken. It emphasised that all the evidence was taken into consideration by the inquest. It continued as follows (translation):

"At about 6.30a.m. on 28 March 2001 the deceased went out onto the balcony of her room through the balcony door, climbed down to the balcony of the first floor of the apartment with the assistance of a bedspread which she tied to the protective railing of the balcony. She carried on her shoulder her personal bag. From that point, she clung to the aluminium protective railing of the balcony so as to climb down to the balcony of the apartment on the floor below in order to escape. Under unknown circumstances, she fell into the street, as a result of which she was fatally injured."

66. The report observed that it was not known why Ms Rantseva left the apartment on 19 March 2001 but on the basis of the investigation (translation):

"... it is concluded that the deceased did not want to be expelled from Cyprus and because her employer was at the entrance of the flat where she was a guest, she decided to take the risk of trying to climb over the balcony, as a result of which she fell to the ground and died instantaneously."

67. As to the criticism of the Cypriot autopsy and alleged inconsistencies in the forensic evidence between the Cypriot and Russian authorities, the report advised that these remarks had been forwarded to the Cypriot forensic examiner who had carried out the autopsy. His response was that his own conclusions were sufficient and that no supplementary information was required. Finally, the report reiterated that the inquest had concluded that there was no indication of any criminal liability for Ms Rantseva's death.

68. By letter of 17 August 2005 the Russian Ambassador to Cyprus requested further information about a hearing concerning the case apparently scheduled for 14 October 2005 and reiterated the applicant's request for free legal assistance. The Cypriot Ministry of Justice responded by facsimile of 21 September 2005 indicating that Limassol District Court had been unable to find any reference to a hearing in the case fixed for 14 October 2005 and requesting clarification from the Russian authorities.

69. On 28 October 2005 the applicant asked the Russian authorities to obtain testimonies from two young Russian women, now resident in Russia, who had been working with Ms Rantseva at the cabaret in Limassol and could testify about sexual exploitation taking place there. He reiterated his request on 11 November 2005. The Russian authorities replied that they could only obtain such testimonies upon receipt of a request by the Cypriot authorities.

70. By letter of 22 December 2005 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice seeking an update on the new inquest into Ms Rantseva's death and requesting information on how to appeal Cypriot court decisions. The letter indicated that, according to information available, the hearing set for 14 October 2005 had been suspended due to the absence of evidence from the Russian nationals who had worked in the cabaret with Ms Rantseva. The letter concluded with an undertaking to assist in any request for legal assistance by Cyprus aimed at the collection of further evidence.

71. In January 2006, according to the applicant, the Attorney-General of Cyprus confirmed to the applicant's lawyer that he was willing to order the re-opening of the investigation upon receipt of further evidence showing any criminal activity.

72. On 26 January 2006 the Russian Embassy wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing of 14 October 2005. The Ministry of Justice replied by facsimile on 30 January 2006 confirming that neither the District Court of Limassol nor the Supreme Court of Cyprus had any record of such a hearing and requesting further clarification of the details of the alleged hearing.

73. On 11 April 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing and reiterating its query regarding the appeals procedure in Cyprus.

74. On 14 April 2006, by letter to the Russian authorities, the Attorney-General of Cyprus advised that he saw no reason to request the Russian authorities to obtain the testimonies of the two Russian citizens identified by the applicant. If the said persons were in the Republic of Cyprus their testimonies could be obtained by the Cypriot police and if they were in Russia, the Russian authorities did not need the consent of the Cypriot authorities to obtain their statements.

75. On 26 April 2006 the Cypriot Ministry of Justice replied to the Office of the Prosecutor General of the Russian Federation reiterating its request for more information about the alleged suspended hearing.

76. On 17 June 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Attorney-General of Cyprus reminding him of the outstanding requests for renewal of investigations into Ms Rantseva's death and for information on the progress of judicial proceedings.

77. On 22 June and 15 August 2006 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women.

78. On 17 October 2006 the Cypriot Ministry of Justice confirmed to the Office of the Prosecutor General of the Russian Federation that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that it found that her death was the result of an accident. The letter noted:

"No appeal was filed against the decision, because of the lack of additional evidence".

79. On 25 October 2006, 27 October 2006, 3 October 2007 and 6 November 2007 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women. (…)

THE LAW
(…)

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

213. The applicant contended that there had been a violation of Article 2 of the Convention by both the Russian and Cypriot authorities on account of the failure of the Cypriot authorities to take steps to protect the life of his daughter and the failure of the authorities of both States to conduct an effective investigation into her death. Article 2 provides, *inter alia*, that:
"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.
...." (…)

B. The procedural obligation to carry out an effective investigation

1. Submissions of the parties

a. The applicant

224. The applicant claimed that Cyprus and Russia had violated their obligations under Article 2 of the Convention to conduct an effective investigation into the circumstances of Ms Rantseva's death. He pointed to alleged contradictions between the autopsies of the Cypriot and Russian authorities (see paragraph 50 above) and his requests to Cyprus, via the relevant Russian authorities, for further investigation of apparent anomalies, requests which were not followed up by the Cypriot authorities (see paragraphs 52 and 62 above). He also complained about the limited number of witness statements taken by the police (see paragraphs 31 and 33 above), highlighting that five of the seven relevant statements were either from the police officers on duty at Limassol Police Station or those present in the apartment at the time of his daughter's death, persons who, in his view, had an interest in presenting a particular version of events. The applicant further argued that any investigation should not depend on an official complaint or claim from the victim's relatives. He contended that his daughter clearly died in strange circumstances requiring elaboration and that an Article 2-compliant investigation was accordingly required. The Cypriot investigation did not comply with Article 2 due to the inadequacies outlined above, as well as the fact that it was not accessible to him, as a relative of the victim.
225. Specifically, as regards the inquest, the applicant complained that he was not advised of the date of the final inquest hearing, which prevented his participation in it. He was not informed of the progress of the case or of other remedies available to him. He alleged that he only received the District Court's conclusion in the inquest proceedings on 16 April 2003, some 15 months after the proceedings had ended. Furthermore, the Cypriot authorities failed to provide him with free legal assistance, when the cost of legal representation in Cyprus was prohibitive for him.
226. As regards the Russian Federation, the applicant argued that the fact that his daughter was a citizen of the Russian Federation meant that even though she was temporarily resident in Cyprus and her death occurred there, the Russian Federation also had an obligation under Article 2 to investigate the circumstances of her arrival in Cyprus, her employment there and her subsequent death. He submitted that the Russian authorities should have applied to the Cypriot authorities under the Legal Assistance Treaty to initiate criminal proceedings in accordance with Articles 5 and 36 (see paragraphs 181 and 207 above), as

he had requested. Instead, the Russian authorities merely sought information concerning the circumstances of Ms Rantseva's death. The applicant's subsequent application to the relevant authorities in Russia to initiate criminal proceedings was refused by the Chelyabinsk Prosecutor's Office as Ms Rantseva died outside Russia. His repeated requests that Russian authorities take statements from two Russian nationals resident in Russia were refused as the Russian authorities considered that they were unable to take the action requested without a legal assistance request from the Cypriot authorities. The applicant concluded that these failures meant that the Russian authorities had not conducted an effective investigation into the death of his daughter, as required by Article 2 of the Convention.

b. The Cypriot Government

227. In their written submissions, the Cypriot Government conceded that an obligation to conduct an effective investigation arose under Article 2 where State agents were involved in events leading to an individual's death, but contended that not every tragic death required that special steps by way of inquiry should be taken. In the present case, the Cypriot authorities did not have an obligation to conduct an investigation into the circumstances of Ms Rantseva's death but nonetheless did so. Although the exact circumstances leading to Ms Rantseva's death remained unclear, the Cypriot Government contested the allegation that there were failures in the investigation. The investigation was carried out by the police and was capable of leading to the identification and punishment of those responsible. Reasonable steps were taken to secure relevant evidence and an inquest was held.

228. As far as the inquest was concerned, the Cypriot Government submitted that the applicant was advised by the Cypriot authorities of the date of the inquest hearing. Moreover, the inquest was adjourned twice because the applicant was not present. The Cypriot Government pointed to the delay of the Russian authorities in advising the Cypriot authorities of the applicant's request for adjournment: the request only arrived four months after the inquest had been concluded. Had the court been aware of the applicant's request, it might have adjourned the hearing again. All other requests by the applicant had been addressed and relevant Cypriot authorities had sought to assist the applicant where possible. In respect of the applicant's complaint regarding legal aid, the Cypriot Government pointed out that the applicant did not apply through the correct procedures. He should have applied under the Law on Legal Aid; the Legal Assistance Treaty, invoked by the applicant, did not provide for legal aid but for free legal assistance, which was quite different.

229. In their unilateral declaration (see paragraph 187 above), the Cypriot Government confirmed that three independent criminal investigators had recently been appointed to investigate the circumstances of Ms Rantseva's death and the extent of any criminal responsibility of any person or authority for her death.

c. The Russian Government

230. The Russian Government accepted that at the relevant time, Russian criminal law did not provide for the possibility of bringing criminal proceedings in Russia against non-Russian nationals in respect of a crime committed outside Russian territory against a Russian national, although the law had since been changed. In any event, the applicant did not request the Russian authorities to institute criminal proceedings themselves but merely requested assistance in establishing the circumstances leading to his daughter's death in

Cyprus. Accordingly, no preliminary investigation into Ms Rantseva's death was conducted in Russia and no evidence was obtained. Although the applicant requested on a number of occasions that the Russian authorities take evidence from two young Russian women who had worked with Ms Rantseva, as he was advised, the Russian authorities were unable to take the action requested in the absence of a legal assistance request from the Cypriot authorities. The Russian authorities informed the Cypriot authorities that they were ready to execute any such request but no request was forthcoming.

231. The Russian Government contended that the Russian authorities took all possible measures to establish the circumstances of Ms Rantseva's death, to render assistance to the Cypriot authorities in their investigations and to protect and reinstate the applicant's rights. Accordingly, they argued, Russia had fulfilled any procedural obligations incumbent on it under Article 2 of the Convention.

2. The Court's assessment

a. General principles

232. As the Court has consistently held, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I; *Medova v. Russia*, cited above, § 103). The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. 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 (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII; *Paul and Audrey Edwards*, cited above, § 69).

233. For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001-III (extracts); and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001). The investigation must be capable of leading to the identification and punishment of those responsible (see *Paul and Audrey Edwards*, cited above, § 71). A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-104, *Reports* 1998-VI; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV; and *Kelly and Others*, cited above, § 97). In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests (see, for example, *Güleç v. Turkey*, 27 July 1998, § 82, *Reports of Judgments and Decisions* 1998-IV; and *Kelly and Others*, cited above, § 98).

b. Application of the general principles to the present case

i. Cyprus

234. The Court acknowledges at the outset that there is no evidence that Ms Rantseva died as a direct result of the use of force. However, as noted above (see paragraph 232 above), this does not preclude the existence of an obligation to investigate her death under Article 2 (see also *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48 to 50, ECHR 2002-I; and *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 70 to 74, ECHR 2004-XII). In light of the ambiguous and unexplained circumstances surrounding Ms Rantseva's death and the allegations of trafficking, ill-treatment and unlawful detention in the period leading up to her death, the Court considers that a procedural obligation did arise in respect of the Cypriot authorities to investigate the circumstances of Ms Rantseva's death. By necessity, the investigation was required to consider not only the immediate context of Ms Rantseva's fall from the balcony but also the broader context of Ms Rantseva's arrival and stay in Cyprus, in order to assess whether there was a link between the allegations of trafficking and Ms Rantseva's subsequent death.

235. As to the adequacy of the investigation, the Court notes that the police arrived quickly and sealed off the scene within minutes. Photographs were taken and a forensic examination was carried out (see paragraph 32 above). That same morning, the police took statements from those present in the apartment when Ms Rantseva died and from the neighbour who had witnessed the fall. The police officers on duty at Limassol Police Station also made statements (see paragraph 33 above). An autopsy was carried out and an inquest was held (see paragraphs 35 to 41 above). However, there are a number of elements of the investigation which were unsatisfactory.

236. First, there was conflicting testimony from those present in the apartment which the Cypriot investigating authorities appear to have taken no steps to resolve (see paragraphs 22 to 24 and 26 to 28 above). Similarly, inconsistencies emerge from the evidence taken as to Ms Rantseva's physical condition, and in particular as to the extent of the effects of alcohol on her conduct (see paragraphs 18, 20 to 21 and 24 above). There are other apparent anomalies, such as the alleged inconsistencies between the forensic reports of the Cypriot and Russian authorities and the fact that Ms Rantseva made no noise as she fell from the balcony, for which no satisfactory explanation has been provided (see paragraphs 29, 50 to 52 and 67 above).

237. Second, the verdict at the inquest recorded that Ms Rantseva had died in "strange circumstances" in an attempt to escape from the apartment in which she was a "guest" (see paragraph 41 above). Despite the lack of clarity surrounding the circumstances of her death, no effort was made by the Cypriot police to question those who lived with Ms Rantseva or worked with her in the cabaret. Further, notwithstanding the striking conclusion of the inquest that Ms Rantseva was trying to escape from the apartment, no attempt was made to establish why she was trying to escape or to clarify whether she had been detained in the apartment against her will.

238. Third, aside from the initial statements of the two police officers and passport officer on duty made on 28 and 29 March 2001, there was apparently no investigation into what had occurred at the police station, and in particular why the police had handed Ms Rantseva into the custody of M.A.. It is clear from the witness statements that the AIS considered M.A. to be responsible for Ms Rantseva but the reasons for, and the appropriateness of, this conclusion have never been fully investigated. Further, the statements of the police officers do not refer to any statement being taken from Ms Rantseva and there is nothing in the investigation file to explain why this was not done; a statement was made by M.A. (see paragraph 19 above). The Court recalls that the Council of Europe Commissioner reported in 2008 that he was assured that allegations of trafficking-related corruption

within the police force were isolated cases (see paragraph 102 above). However, in light of the facts of the present case, the Court considers that the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms Rantseva's death.

239. Fourth, despite his clear request to the Cypriot authorities, the applicant was not personally advised of the date of the inquest and as a consequence was not present when the verdict was handed down. The Cypriot Government do not dispute the applicant's claim that he was only advised of the inquest finding 15 months after the hearing had taken place. Accordingly, the Cypriot authorities failed to ensure that the applicant was able to participate effectively in the proceedings, despite his strenuous efforts to remain involved.

240. Fifth, the applicant's continued requests for investigation, via the Russian authorities, appear to have gone unheeded by the Cypriot authorities. In particular, his requests for information as to further remedies open to him within the Cypriot legal order, as well as requests for free legal assistance from the Cypriot authorities, were ignored. The Cypriot Government's response in their written observations before the Court that the request for legal assistance had been made under the wrong instrument is unsatisfactory. Given the applicant's repeated requests and the gravity of the case in question, the Cypriot Government ought, at the very least, to have advised the applicant of the appropriate procedure for making a request for free legal assistance.

241. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty (see paragraphs 175 to 185 above). These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence (see paragraph 70 above). However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation. Although Ms Rantseva died in 2001, the applicant is still waiting for a satisfactory explanation of the circumstances leading to her death.

242. The Court accordingly finds that there has been a procedural violation of Article 2 of the Convention as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death.

ii. Russia

243. The Court recalls that Ms Rantseva's death took place in Cyprus. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 38, ECHR 2001-XI).

244. As to the existence of special features, the applicant relies on the fact that Ms Rantseva was a Russian national. However, the Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. There are no other special features which would support the

imposition of a duty on Russia to conduct its own investigation. Accordingly, the Court concludes that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death.

245. However, the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request. In the present case, as noted above, the Prosecutor General of the Russian Federation, referring to the evidence of the two Russian women, expressed willingness to comply with any mutual legal assistance request forwarded to the Russian authorities and to organise the taking of the witness testimony, but no such request was forthcoming (see paragraph 241 above). The applicant argued that the Russian authorities should have proceeded to interview the two women notwithstanding the absence of any request from the Cypriot authorities. However, the Court recalls that the responsibility for investigating Ms Rantseva's death lay with Cyprus. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 to secure the evidence themselves.

246. As to the applicant's complaint that the Russian authorities failed to request the initiation of criminal proceedings, the Court observes that the Russian authorities made extensive use of the opportunities presented by mutual legal assistance agreements to press for action by the Cypriot authorities (see, for example, paragraphs 48, 52, 55, 57 and 61 to 62 above). In particular, by letter dated 11 December 2001, they requested that further investigation be conducted into Ms Rantseva's death, that relevant witnesses be interviewed and that the Cypriot authorities bring charges of murder, kidnapping or unlawful deprivation of freedom in respect of Ms Rantseva's death (see paragraph 52 above). By letter dated 27 December 2001, a specific request was made to institute criminal proceedings (see paragraph 53 above). The request was reiterated on several occasions.

247. In conclusion, the Court finds that there has been no procedural violation of Article 2 by the Russian Federation. (…)

V. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

253. The applicant alleged a violation of Article 4 of the Convention by both the Russian and Cypriot authorities in light of their failure to protect his daughter from being trafficked and their failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there. Article 4 provides, in so far as relevant, that:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

..."

A. Submissions of the parties

1. The applicant

254. Referring to *Siliadin v. France*, no. 73316/01, ECHR 2005-VII, and the Anti-Trafficking Convention (see paragraphs 162 to 174, above), the applicant contended that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. He pointed to the reports of the Council of Europe's Commissioner on Human Rights (see paragraphs 91 to 104 above), which he said demonstrated that there had been a deterioration in the situation of young foreign women moving to Cyprus to work as cabaret artistes. He concluded that the

obligations incumbent on Cyprus to combat trafficking had not been met. In particular, the applicant pointed out that the Cypriot authorities were unable to explain why they had handed Ms Rantseva over to her former employer at the police station instead of releasing her (see paragraph 82 above). He contended that in so doing, the Cypriot authorities had failed to take measures to protect his daughter from trafficking. They had also failed to conduct any investigation into whether his daughter had been a victim of trafficking or had been subjected to sexual or other exploitation. Although Ms Rantseva had entered Cyprus voluntarily to work in the cabaret, the Court had established that prior consent, without more, does not negate a finding of compulsory labour (referring to *Van der Mussele v. Belgium*, 23 November 1983, § 36, Series A no. 70).

255. In respect of Russia, the applicant pointed out that at the relevant time, the Russian Criminal Code did not contain provisions which expressly addressed trafficking in human beings. He argued that the Russian authorities were aware of the particular problem of young women being trafficked to Cyprus to work in the sex industry. Accordingly, the Russian Federation was under an obligation to adopt measures to prevent the trafficking and exploitation of Russian women but had failed to do so. In the present case, it was under a specific obligation to investigate the circumstances of Ms Rantseva's arrival in Cyprus and the nature of her employment there, but no such investigation had been carried out.

2. The Cypriot Government

256. In their written observations, the Cypriot Government confirmed that no measures were taken in the period prior to or following Ms Rantseva's death to ascertain whether she had been a victim of trafficking in human beings or whether she had been subjected to sexual or other forms of exploitation. However they denied that there had been a violation of Article 4 of the Convention. They conceded that there were positive obligations on the State which required the penalisation and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. However, they argued by analogy with Articles 2 and 3 that positive obligations only arose where the authorities knew or ought to have known of a real and immediate risk that an identified individual was being held in such a situation. These positive obligations would only be violated where the authorities subsequently failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

257. In the present case, there was nothing in the investigation file, nor was there any other evidence, to indicate that Ms Rantseva was held in slavery or servitude or was required to perform forced or compulsory labour. The Cypriot Government further pointed to the fact that no complaint had been lodged with the domestic authorities by the applicant that his daughter had been a victim of trafficking or exploitation and that none of the correspondence from the Russian authorities made any reference to such a complaint. Ms Rantseva herself had made no allegations of that nature prior to her death and the note she left in her apartment saying she was tired and was going back to Russia (see paragraph 17 above) was inadequate to support any such allegations. The Government claimed that the first time that any complaint of this nature was made to the authorities was on 13 April 2006, by a Russian Orthodox priest in Limassol. They argued that the Russian authorities had failed to cooperate with the Cypriot authorities and take witness statements from two Russian women who had worked with Ms Rantseva at the cabaret.

258. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government accepted that they had violated their positive obligations under Article 4 in failing to take any measures to ascertain whether Ms Rantseva had been a victim of trafficking in human beings or had been subjected to sexual or any other kind of

exploitation. They also confirmed that three independent investigators had been appointed to investigate the circumstances of Ms Rantseva's employment and stay in Cyprus and whether there was any evidence that she was a victim of trafficking or exploitation.

3. The Russian Government

259. As noted above, the Russian Government contested that Ms Rantseva's treatment in the present case fell within the scope of Article 4 (see paragraph 209 above).

260. On the merits, the Russian Government agreed that the positive obligations arising under Article 4 required member States to ensure that residents were not being kept in slavery or servitude or being forced to work. Where such a case did occur, member States were required to put in place an effective framework for the protection and reinstatement of victims' rights and for the prosecution of guilty persons. However, in so far as the applicant's complaint was directed against Russia, his argument was that the Russian authorities ought to have put in place a system of preventative measures to protect citizens going abroad. The Russian Government pointed out that any such measures would have had to strike a balance between Article 4 and the right to free movement guaranteed by Article 2 of Protocol No. 4 of the Convention, which provides that "[e]veryone shall be free to leave any country, including his own". They also argued that the scope of any such measures was significantly restricted by the need to respect the sovereignty of the State to which the citizen wished to travel.

261. According to the Russian Government, there was a wealth of measures set out in Russian criminal law to prevent violations of Article 4, to protect victims and to prosecute perpetrators. Although at the relevant time Russian criminal law did not contain provisions on human trafficking and slave labour, such conduct would nonetheless have fallen within the definitions of other crimes such as threats to kill or cause grave harm to health, abduction, unlawful deprivation of liberty and sexual crimes (see paragraphs 133 to 135). The Russian Government also pointed to various international treaties ratified by the Russian Federation, including the Slavery Convention 1926 (see paragraphs 137 to 141above) and the Palermo Protocol 2000 (see paragraphs 149 to 155 above), and highlighted that Russia had signed up to a number of mutual legal assistance agreements (see paragraphs 175 to 185 above). In the present case, they had taken active measures to press for the identification and punishment of guilty persons within the framework of mutual legal assistance treaties. They further explained that on 27 July 2006, the application of the Criminal Code was extended to allow the prosecution of non-nationals who had committed crimes against Russian nationals outside Russian territory. However, the exercise of this power depended on the consent of the State in whose territory the offence was committed.

262. As regards the departure of Ms Rantseva for Cyprus, the Russian authorities pointed out that they only became aware of a citizen leaving Russia at the point at which an individual crossed the border. Where entry requirements of the State of destination were complied with, and in the absence of any circumstances preventing the exit, the Russian authorities were not permitted to prohibit a person from exercising his right of free movement. Accordingly, the Russian authorities could only make recommendations and warn its citizens against possible dangers. They did provide warnings, via the media, as well as more detailed information regarding the risk factors.

263. The Russian Government also requested the Court to consider that there had been no previous findings of a violation of Article 4 against Cyprus. They submitted that they were entitled to take this into consideration in the development of their relations with Cyprus.
(…)

B. The Court's assessment

1. Application of Article 4 of the Convention

272. The first question which arises is whether the present case falls within the ambit of Article 4. The Court recalls that Article 4 makes no mention of trafficking, proscribing "slavery", "servitude" and "forced and compulsory labour".

273. The Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein (*Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, 12 November 2008). It has long stated that one of the main principles of the application of the Convention provisions is that it does not apply them in a vacuum (see *Loizidou v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *Öcalan v. Turkey* [GC], no. 46221/99, § 163, ECHR 2005-IV). As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties.

274. Under that Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Loizidou*, cited above, § 43; and Article 31 § 1 of the Vienna Convention). The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara*, cited above, § 67; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-...; and Article 31 para. 3 (c) of the Vienna Convention).

275. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

276. In *Siliadin*, considering the scope of "slavery" under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an "object" (*Siliadin*, cited above, § 122). With regard to the concept of "servitude", the Court has held that what is prohibited is a "particularly serious form of denial of freedom" (see *Van Droogenbroeck v. Belgium*, Commission's report of 9 July 1980, §§ 78-80, Series B no. 44). The concept of "servitude" entails an obligation, under coercion, to provide one's services, and is linked with the concept of "slavery" (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000; and *Siliadin*, cited above, § 124). For "forced or compulsory labour" to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person's will (*Van der Mussele v. Belgium*, 23 November 1983, § 34, Series A no. 70;*Siliadin*, cited above, § 117).

277. The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited "slavery and the slave trade in all

their forms". However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 71, ECHR 2002-VI; and *Siliadin*, cited above, § 121).

278. The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years (see paragraphs 89, 100, 103 and 269 above). In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.

279. The Court is not regularly called upon to consider the application of Article 4 and, in particular, has had only one occasion to date to consider the extent to which treatment associated with trafficking fell within the scope of that Article (*Siliadin*, cited above). In that case, the Court concluded that the treatment suffered by the applicant amounted to servitude and forced and compulsory labour, although it fell short of slavery. In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.

280. The Court observes that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of "slavery" has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership (see paragraph 142 above). In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person's movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour (see paragraph 143 above).

281. The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see paragraphs 101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see paragraphs 85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions (see paragraphs 85, 87 to 88 and 101 above). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (see paragraphs 161 and 266 above). The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place "under a regime of modern slavery" (see paragraph 84 above).

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that

trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. The Russian Government's objection of incompatibility *ratione materiae* is accordingly dismissed.

2. General principles of Article 4

283. The Court reiterates that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe (*Siliadin*, cited above, § 82). Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.

284. In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 93, ECHR 2005-VII). The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking (see, *mutatis mutandis*, *Guerra and Others v. Italy*, 19 February 1998, §§ 58 to 60, *Reports of Judgments and Decisions* 1998-I; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73 to 74, ECHR 2001-V; and *Nachova and Others*, cited above, §§ 96 to 97 and 99-102).

285. In its *Siliadin* judgment, the Court confirmed that Article 4 entailed a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour (cited above, §§ 89 and 112). In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers (see paragraphs 149 and 163 above). It is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (see also the submissions of Interights and the AIRE Centre at paragraphs 267 and 271 above). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context.

286. As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking (see, *mutatis mutandis*, *Osman*, cited above, § 115; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III). In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the

authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (see,*mutatis mutandis*, *Osman*, cited above, §§116 to 117; and *Mahmut Kaya*, cited above, §§ 115 to 116).

287. Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, *mutatis mutandis*, *Osman*, cited above, § 116). It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking (see paragraphs 153 to 154 above). States are also required to provide relevant training for law enforcement and immigration officials (see paragraph 155 above).

288. Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II). For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests (see, *mutatis mutandis*, *Paul and Audrey Edwards*, cited above, §§ 70 to 73).

289. Finally, the Court reiterates that trafficking is a problem which is often not confined to the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States. Although the Palermo Protocol is silent on the question of jurisdiction, the Anti-Trafficking Convention explicitly requires each member State to establish jurisdiction over any trafficking offence committed in its territory (see paragraph 172 above). Such an approach is, in the Court's view, only logical in light of the general obligation, outlined above, incumbent on all States under Article 4 of the Convention to investigate alleged trafficking offences. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination (see paragraph 149 above). It is also consistent with international agreements on mutual legal assistance in which the respondent States participate in the present case (see paragraphs 175 to 185 above).

3. Application of the general principles to the present case

a. Cyprus

i. Positive obligation to put in place an appropriate legislative and administrative framework

290. The Court observes that in Cyprus legislation prohibiting trafficking and sexual exploitation was adopted in 2000 (see paragraphs 127 to 131 above). The law reflects the provisions of the Palermo Protocol and prohibits trafficking and sexual exploitation, with consent providing no defence to the offence. Severe penalties are set out in the legislation. The law also provides for a duty to protect victims, *inter alia* through the appointment of a guardian of victims. Although the Ombudsman criticised the failure of the authorities to adopt practical implementing measures, she considered the law itself to be satisfactory (see paragraph 90 above). The Council of Europe Commissioner also found the legal framework established by Law 3(1) 2000 to be "suitable" (see paragraph 92 above). Notwithstanding the applicant's complaint as to the inadequacy of Cypriot trafficking legislation, the Court does not consider that the circumstances of the present case give rise to any concern in this regard.

291. However, as regards the general legal and administrative framework and the adequacy of Cypriot immigration policy, a number of weaknesses can be identified. The Council of Europe Commissioner for Human Rights noted in his 2003 report that the absence of an immigration policy and legislative shortcomings in this respect have encouraged the trafficking of women to Cyprus (see paragraph 91 above). He called for preventive control measures to be adopted to stem the flow of young women entering Cyprus to work as cabaret artistes (see paragraph 94 above). In subsequent reports, the Commissioner reiterated his concerns regarding the legislative framework, and in particular criticised the system whereby cabaret managers were required to make the application for an entry permit for the artiste as rendering the artiste dependent on her employer or agent and increasing her risk of falling into the hands of traffickers (see paragraph 100 above). In his 2008 report, the Commissioner criticised the artiste visa regime as making it very difficult for law enforcement authorities to take the necessary steps to combat trafficking, noting that the artiste permit could be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective (see also the report of the U.S. State Department at paragraphs 105 and 107 above). The Commissioner expressed regret that, despite concerns raised in previous reports and the Government's commitment to abolish it, the artiste work permit was still in place (see paragraph 103 above). Similarly, the Ombudsman, in her 2003 report, blamed the artiste visa regime for the entry of thousands of young foreign women into Cyprus, where they were exploited by their employers under cruel living and working conditions (see paragraph 89 above).

292. Further, the Court emphasises that while an obligation on employers to notify the authorities when an artiste leaves her employment (see paragraph 117 above) is a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations, responsibility for ensuring compliance and for taking steps in cases of non-compliance must remain with the authorities themselves. Measures which encourage cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes are unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus. Against this backdrop, the Court considers that the practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed (see paragraph 115 above) particularly troubling. The separate bond signed in Ms Rantseva's case is of equal concern (see paragraph 15 above), as is the unexplained conclusion of the AIS that M.A. was responsible for Ms Rantseva and was

therefore required to come and collect her from the police station (see paragraph 20 above).

293. In the circumstances, the Court concludes that the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation. There has accordingly been a violation of Article 4 in this regard.

ii. Positive obligation to take protective measures

294. In assessing whether a positive obligation to take measures to protect Ms Rantseva arose in the present case, the Court considers the following to be significant. First, it is clear from the Ombudsman's 2003 report that here has been a serious problem in Cyprus since the 1970s involving young foreign women being forced to work in the sex industry (see paragraph 83 above). The report further noted the significant increase in artistes coming from former Soviet countries following the collapse of the USSR (see paragraph 84 above). In her conclusions, the Ombudsman highlighted that trafficking was able to flourish in Cyprus due to the tolerance of the immigration authorities (see paragraph 89 above). In his 2006 report, the Council of Europe's Commissioner for Human Rights also noted that the authorities were aware that many of the women who entered Cyprus on artiste's visas would work in prostitution (see paragraph 96 above). There can therefore be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers.

295. Second, the Court emphasises that Ms Rantseva was taken by her employer to Limassol police station. Upon arrival at the police station, M.A. told the police that Ms Rantseva was a Russian national and was employed as a cabaret artiste. Further, he explained that she had only recently arrived in Cyprus, had left her employment without warning and had also moved out of the accommodation provided to her (see paragraph 19 above). He handed to them her passport and other documents (see paragraph 21 above).

296. The Court recalls the obligations undertaken by the Cypriot authorities in the context of the Palermo Protocol and, subsequently, the Anti-Trafficking Convention to ensure adequate training to those working in relevant fields to enable them to identify potential trafficking victims (see paragraphs 155 and 167 above). In particular, under Article 10 of the Palermo Protocol, States undertake to provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation. Accordingly, a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva.

297. However, in the present case, it appears that the police did not even question Ms Rantseva when she arrived at the police station. No statement was taken from her. The police made no further inquiries into the background facts. They simply checked whether Ms Rantseva's name was on a list of persons wanted by the police and, on finding that it was not, called her employer and asked him to return and collect her. When he refused and insisted that she be detained, the police officer dealing with the case put M.A. in contact with his superior (see paragraph 20 above). The details of what was said during M.A.'s conversation with the officer's superior are unknown, but the result of the conversation was that M.A. agreed to come and collect Ms Rantseva and subsequently did so.

298. In the present case, the failures of the police authorities were multiple. First, they failed to make immediate further inquiries into whether Ms Rantseva had been trafficked. Second,

they did not release her but decided to confide her to the custody of M.A.. Third, no attempt was made to comply with the provisions of Law 3(1) of 2000 and to take any of the measures in section 7 of that law (see paragraph 130 above) to protect her. The Court accordingly concludes that these deficiencies, in circumstances which gave rise to a credible suspicion that Ms Rantseva might have been trafficked or exploited, resulted in a failure by the Cypriot authorities to take measures to protect Ms Rantseva. There has accordingly been a violation of Article 4 in this respect also.

iii. Procedural obligation to investigate trafficking

299. A further question arises as to whether there has been a procedural breach as a result of the continuing failure of the Cypriot authorities to conduct any effective investigation into the applicant's allegations that his daughter was trafficked.

300. In light of the circumstances of Ms Rantseva's subsequent death, the Court considers that the requirement incumbent on the Cypriot authorities to conduct an effective investigation into the trafficking allegations is subsumed by the general obligation arising under Article 2 in the present case to conduct an effective investigation into Ms Rantseva's death (see paragraph 234 above). The question of the effectiveness of the investigation into her death has been considered above in the context of the Court's examination of the applicant's complaint under Article 2 and a violation has been found. There is therefore no need to examine separately the procedural complaint against Cyprus under Article 4.

b. Russia

i. Positive obligation to put in place an appropriate legislative and administrative framework

301. The Court recalls that the responsibility of Russia in the present case is limited to the acts which fell within its jurisdiction (see paragraphs 207 to 208 above). Although the criminal law did not specifically provide for the offence of trafficking at the material time, the Russian Government argued that the conduct about which the applicant complained fell within the definitions of other offences.

302. The Court observes that the applicant does not point to any particular failing in the Russian criminal law provisions. Further, as regards the wider administrative and legal framework, the Court emphasises the efforts of the Russian authorities to publicise the risks of trafficking through an information campaign conducted through the media (see paragraph 262 above).

303. On the basis of the evidence before it, the Court does not consider that the legal and administrative framework in place in Russia at the material time failed to ensure Ms Rantseva's practical and effective protection in the circumstances of the present case.

ii. Positive obligation to take protective measures

304. The Court recalls that any positive obligation incumbent on Russia to take operational measures can only arise in respect of acts which occurred on Russian territory (see, *mutatis mutandis*, *Al-Adsani,* cited above, §§ 38 to 39).

305. The Court notes that although the Russian authorities appear to have been aware of the general problem of young women being trafficked to work in the sex industry in foreign States, there is no evidence that they were aware of circumstances giving rise to a credible suspicion of a real and immediate risk to Ms Rantseva herself prior to her departure for

Cyprus. It is insufficient, in order for an obligation to take urgent operational measures to arise, merely to show that there was a general risk in respect of young women travelling to Cyprus on artistes' visas. Insofar as this general risk was concerned, the Court recalls that the Russian authorities took steps to warn citizens of trafficking risks (see paragraph 262 above).

306. In conclusion, the Court does not consider that the circumstances of the case were such as to give rise to a positive obligation on the part of the Russian authorities to take operational measures to protect Ms Rantseva. There has accordingly been no violation of Article 4 by the Russian authorities in this regard.

iii. Procedural obligation to investigate potential trafficking

307. The Court recalls that, in cases involving cross-border trafficking, trafficking offences may take place in the country of origin as well as in the country of destination (see paragraph 289 above). In the case of Cyprus, as the Ombudsman pointed out in her report (see paragraph 86 above), the recruitment of victims is usually undertaken by artistic agents in Cyprus working with agents in other countries. The failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity. In this regard, the Court highlights that the definition of trafficking adopted in both the Palermo Protocol and the Anti-Trafficking Convention expressly includes the recruitment of victims (see paragraphs 150 and 164 above). The need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable. The Russian authorities therefore had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantseva to Cyprus.

308. However, the Court observes that the Russian authorities undertook no investigation into how and where Ms Rantseva was recruited. In particular, the authorities took no steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used. The recruitment having occurred on Russian territory, the Russian authorities were best placed to conduct an effective investigation into Ms Rantseva's recruitment. The failure to do so in the present case was all the more serious in light of Ms Rantseva's subsequent death and the resulting mystery surrounding the circumstances of her departure from Russia.

309. There has accordingly been a violation by the Russian authorities of their procedural obligation under Article 4 to investigate alleged trafficking.

CASE OF SALDUZ v. TURKEY

Application no. 36391/02 GRAND CHAMBER, 27 November 2008

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicant's arrest and detention

12. On 29 May 2001 at about 10.15 p.m., the applicant was taken into custody by police officers from the anti-terrorism branch of the İzmir Security Directorate on suspicion of having participated in an unlawful demonstration in support of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan). The applicant was also accused of hanging an illegal banner from a bridge in Bornova on 26 April 2001.
13. At about 12.30 a.m. on 30 May 2001 the applicant was taken to the Atatürk Teaching and Research Hospital, where he was examined by a doctor. The medical report stated that there was no trace of ill-treatment on his body.
14. Subsequently, at about 1 a.m., the applicant was interrogated at the anti-terrorism branch in the absence of a lawyer. According to a form explaining arrested persons' rights which the applicant had signed, he had been reminded of the charges against him and of his right to remain silent. In his statement, the applicant admitted his involvement in the youth branch of HADEP (Halkın Demokrasi Partisi – the People's Democracy Party). He gave the names of several persons who worked for the youth branch of the Bornova District Office. He explained that he was the assistant youth press and publications officer and was also responsible for the Osmangazi neighbourhood. He further stated that it had been part of his job to assign duties to other members of the youth branch. He admitted that he had participated in the demonstration on 29 May 2001 organised by HADEP in support of the imprisoned leader of the PKK. He said that there had been about sixty demonstrators present and that the group had shouted slogans in support of Öcalan and the PKK. He had been arrested on the spot. He also admitted that he had written "Long live leader Apo" on a banner which had been hung from a bridge on 26 April 2001. The police took samples of the applicant's handwriting and sent it to the police laboratory for examination.
15. On 1 June 2001 the İzmir Criminal Police Laboratory issued a report after comparing the applicant's handwriting to that on the banner. It concluded that although certain characteristics of the applicant's handwriting bore similarities to the handwriting on the banner, it could not be established whether or not the writing on the banner was in fact his.
16. At 11.45 p.m. on 1 June 2001 the applicant was again examined by a doctor, who stated that there were no traces of ill-treatment on his body.
17. On the same day, the applicant was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor, he explained that he was not a member of any political party, but had taken part in certain activities of HADEP. He denied fabricating an illegal banner or participating in the demonstration on 29 May 2001. He stated that he was in the Doğanlar neighbourhood to visit a friend when he was arrested by the police. The applicant also made a statement to the investigating judge, in which he retracted his statement to the police, alleging that it had been extracted under duress. He claimed that he had been beaten and insulted while in police custody. He again denied engaging in any illegal activity and explained that on 29 May 2001 he had gone to the Doğanlar neighbourhood to visit a friend and had not been part of the group shouting slogans. After the questioning was over, the investigating judge remanded the applicant in

custody, having regard to the nature of the offence of which he was accused and the state of the evidence. The applicant was then allowed to have access to a lawyer.

B. The trial

18. On 11 July 2001 the public prosecutor at the İzmir State Security Court filed an indictment with that court accusing the applicant and eight other accused of aiding and abetting the PKK, an offence under Article 169 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).
19. On 16 July 2001 the State Security Court held a preparatory hearing. It decided that the applicant's detention on remand should be continued and that the accused be invited to prepare their defence submissions.
20. On 28 August 2001 the State Security Court held its first hearing, in the presence of the applicant and his lawyer. It heard evidence from the applicant in person, who denied the charges against him. The applicant also rejected the police statement, alleging that it had been extracted from him under duress. He explained that while he was in custody, police officers had ordered him to copy the words from a banner. He also stated that he had witnessed the events that had taken place on 29 May 2001; however, he had not taken part in the demonstration as alleged. Instead, he had been in the neighbourhood to visit a friend named Özcan. He also denied hanging an illegal banner from a bridge on 26 April 2001.
21. At the next hearing, which was held on 25 October 2001, the applicant and his lawyer were both present. The court also heard from other accused persons, all of whom denied having participated in the illegal demonstration on 29 May 2001 and retracted statements they had made previously. The prosecution then called for the applicant to be sentenced pursuant to Article 169 of the Criminal Code and the applicant's lawyer requested time to submit the applicant's defence submissions.
22. On 5 December 2001 the applicant made his defence submissions. He denied the charges against him and requested his release. On the same day, the İzmir State Security Court delivered its judgment. It acquitted five of the accused and convicted the applicant and three other accused as charged. It sentenced the applicant to four years and six months' imprisonment, which was reduced to two and a half years as the applicant had been a minor at the time of the offence.
23. In convicting the applicant, the State Security Court had regard to the applicant's statements to the police, the public prosecutor and the investigating judge respectively. It also took into consideration his co-defendants' evidence before the public prosecutor that the applicant had urged them to participate in the demonstration of 29 May 2001. The court noted that the co-defendants had also given evidence that the applicant had been in charge of organising the demonstration. It further took note of the expert report comparing the applicant's handwriting to that on the banner and of the fact that, according to the police report on the arrest, the applicant had been among the demonstrators. It concluded:
"... in view of these material facts, the court does not accept the applicant's denial and finds that his confession to the police is substantiated."

C. The appeal

24. On 2 January 2002 the applicant's lawyer appealed against the judgment of the İzmir State Security Court. In her notice of appeal, she alleged a breach of Articles 5 and 6 of the Convention, arguing that the proceedings before the first-instance court had been unfair and that the court had failed to assess the evidence properly.

25. On 27 March 2002 the Principal Public Prosecutor at the Court of Cassation lodged a written opinion with the Ninth Division of the Court of Cassation in which he submitted that the Division should uphold the judgment of the İzmir State Security Court. This opinion was not served on the applicant or his representative.
26. On 10 June 2002 the Ninth Division of the Court of Cassation, upholding the İzmir State Security Court's reasoning and assessment of the evidence, dismissed the applicant's appeal.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The legislation in force at the time of the application

27. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment they were taken into police custody. Article 138 clearly stipulated that for juveniles, legal assistance was obligatory.
28. According to section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts.

2. Recent amendments

29. On 15 July 2003, by Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted.
30. On 1 July 2005 a new Code of Criminal Procedure entered into force. According to the relevant provisions of the new Code (Articles 149 and 150), all detained persons have the right of access to a lawyer from the moment they are taken into police custody. The appointment of a lawyer is obligatory if the person concerned is a minor or if he or she is accused of an offence punishable by a maximum of at least five years' imprisonment.
31. Finally, section 10 of the Prevention of Terrorism Act (Law no. 3713), as amended on 29 June 2006, provides that for terrorist-related offences, the right of access to a lawyer may be delayed for twenty-four hours on the order of a public prosecutor. However, the accused cannot be interrogated during this period. (…)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Access to a lawyer during police custody

45. The applicant alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody. He relied on Article 6 § 3 (c) of the Convention, which provides:
"3. Everyone charged with a criminal offence has the following minimum rights:
...

(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."

1. The Chamber judgment

46. In its judgment of 26 April 2007, the Chamber held that there had been no violation of Article 6 § 3 (c) of the Convention. In that connection, it pointed out that the applicant had been represented during the trial and appeal proceedings by a lawyer and that the applicant's statement to the police was not the sole basis for his conviction. According to the Chamber, the applicant had had the opportunity of challenging the prosecution's allegations under conditions which did not place him at a substantial disadvantage vis-à-vis his opponent. The Chamber also noted that in convicting the applicant, the İzmir State Security Court had had regard to the circumstances in which the applicant was arrested, the expert report concerning the handwriting on the banner, and witness statements. In view of the above, it concluded that the fairness of the applicant's trial had not been prejudiced by the lack of legal assistance during his police custody.

2. The parties' submissions

(a) The applicant

47. The applicant contested the grounds on which the Chamber had found that there had been no violation of Article 6 § 3 (c) of the Convention. He stated that the assistance of a lawyer in police custody was a fundamental right. He reminded the Court that all the evidence which had been used against him had been collected at the preliminary investigation stage, during which he had been denied the assistance of a lawyer. At this point, the applicant also argued that although the domestic court had convicted him, there had been no evidence to prove that he was guilty. He also stated that he had been ill-treated during his police custody and had signed his statement to the police under duress. That statement had been used by the İzmir State Security Court, although he had clearly retracted it before the public prosecutor, the investigating judge and at the trial. The applicant also stressed that he had been a minor at the material time and had no previous criminal record. In his submission, in view of the serious charges that had been brought against him, the lack of legal assistance had breached his right to a fair trial. He also argued that the Government had failed to submit any good reason to justify the lack of legal assistance.

(b) The Government

48. The Government asked the Grand Chamber to endorse the Chamber's finding that there had been no violation of Article 6 § 3 (c) of the Convention. They stated, firstly, that the legislation had been changed in 2005. Furthermore, in their submission, the restriction imposed on the applicant's access to a lawyer had not infringed his right to a fair trial under Article 6 of the Convention. Referring to the case-law of the Court (see, in particular, Imbrioscia v. Switzerland, 24 November 1993, Series A no. 275; John Murray v. the United Kingdom, 8 February 1996, Reports of Judgments and Decisions 1996 I; Averill v. the United Kingdom, no. 36408/97, ECHR 2000 VI; Magee v. the United Kingdom, no. 28135/95, ECHR 2000 VI; and Brennan v. the United Kingdom, no. 39846/98, ECHR 2001 X), they maintained that in assessing whether or not the trial was fair, regard should be

had to the entirety of the proceedings. Thus, as the applicant had been represented by a lawyer during the proceedings before the İzmir State Security Court and the Court of Cassation, his right to a fair hearing had not been violated. The Government further drew attention to several Turkish cases (see Saraç v. Turkey (dec.), no. 35841/97, 2 September 2004; Yurtsever v. Turkey (dec.), no. 42086/02, 31 August 2006; Uçma v. Turkey (dec.), no. 15071/03, 3 October 2006; Yavuz and Others v. Turkey (dec.), no. 38827/02, 21 November 2006; and Yıldız v. Turkey (dec.), nos. 3543/03 and 3557/03, 5 December 2006), in which the Court had declared similar complaints inadmissible as being manifestly ill-founded on the ground that, since the police statements had not been the only evidence to support the convictions, the lack of legal assistance during police custody had not constituted a violation of Article 6 of the Convention.

49. Turning to the facts of the instant case, the Government maintained that when the applicant was taken into police custody, he was reminded of his right to remain silent and that during the ensuing criminal proceedings his lawyer had had the opportunity to challenge the prosecution's allegations. They further emphasised that the applicant's statement to the police was not the sole basis for his conviction.

3. The Court's assessment

(a) The general principles applicable in this case

50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see Imbrioscia, cited above, § 36). As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see Imbrioscia, cited above, § 37, and Brennan, cited above, § 45).

51. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see Poitrimol v. France, 23 November 1993, § 34, Series A no. 277 A, and Demebukov v. Bulgaria, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see Imbrioscia, cited above, § 38).

52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified

restriction is capable of doing so in certain circumstances (see John Murray, cited above, § 63; Brennan, cited above, § 45; and Magee, cited above, § 44).

53. These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards (see paragraphs 37 42 above) which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.

54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see Can v. Austria, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see Jalloh v. Germany [GC], no. 54810/00, § 100, ECHR 2006 IX, and Kolu v. Turkey, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, mutatis mutandis, Jalloh, cited above, § 101). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see paragraphs 39 40 above), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above), Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (see, mutatis mutandis, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

(b) Application of the above principles to the present case

56. In the present case, the applicant's right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not

have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. Thus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect, as set out at paragraph 52 above.

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution's arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police, both at the trial and on appeal. However, as is apparent from the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge on 1 June 2001. Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy (see paragraph 23 above). In this connection, the Court observes that in convicting the applicant, the İzmir State Security Court in fact used the evidence before it to confirm the applicant's statement to the police. This evidence included the expert's report dated 1 June 2001 and the statements of the other accused to the police and the public prosecutor. In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's (see paragraph 15 above). It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings.

59. The Court further notes that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006 II; Kolu, cited above, § 53; and Colozza v. Italy, 12 February 1985, § 28, Series A no. 89). Thus, in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent (see paragraph 14 above).

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see paragraphs 32 36 above), the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

61. Still, in the present case, as explained above, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the State Security Courts.

62. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights.

(c) Conclusion

63. In view of the above, the Court concludes that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case. (…)

CASE OF SALVADOR TORRES v. SPAIN

(Application no. 21525/93 COURT (CHAMBER), 24 October 1996

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant, Mr de Salvador Torres, was born in 1928 and is resident in Barcelona.
7. In June 1966, in his capacity as head administrator of a public hospital in Barcelona (Hospital Clínico y Provincial), the applicant made an agreement with a bank to the effect that interest on deposits would be paid at a higher rate than that applicable by law. The applicant arranged for payment into his personal account of the excess amounts corresponding to the difference between the legal rate of interest and that of the additional interest (extratipos) paid by the bank on the sums deposited. Between 1966 and 1983 a total sum of 147,614,565 pesetas were thus transferred to the applicant.
8. In 1983 criminal proceedings were brought against the applicant. By a decision of 16 March 1984 (auto de procesamiento), Barcelona investigating judge no. 2 found that the facts established by him disclosed the offence of embezzlement of public funds (malversación de caudales públicos) under Article 394 para. 4 of the Criminal Code (see paragraph 15 below), carried out not by a civil servant stricto sensu but by a person entrusted with funds belonging to a public institution (Article 399 of the Criminal Code - see paragraph 16 below). The applicant was subsequently committed for trial in the Barcelona Audiencia Provincial. The public prosecutor and the hospital, acting as a private prosecutor, lodged submissions which essentially endorsed the findings of the investigating judge and requested, inter alia, that the applicant be sentenced to fifteen years' imprisonment. State Counsel (Abogado del Estado), appearing also as a private prosecutor on behalf of the State finances, submitted that the facts of the case constituted the offence of corruption of a civil servant.
9. In a judgment of 12 September 1988, the Audiencia Provincial, held that, although the applicant fell into the category provided for in Article 399, the sums embezzled by him were not "public funds" and, accordingly, Article 394 para. 4 was not applicable. It further held that, owing to his particular personal status in the hospital, the applicant could not be considered a civil servant stricto sensu. It therefore dismissed the charges of corruption. The applicant was nonetheless convicted of the offence of simple embezzlement (apropiación indebida) under Article 535 (see paragraph 17 below) and sentenced to eighteen months' imprisonment pursuant to Articles 528 and 529 para. 7 of the Criminal Code (see paragraphs 18 and 19 below). The Audiencia Provincial did not find any aggravating circumstance of general application (see paragraph 21 below).
10. The public prosecutor and the hospital appealed on points of law. They described the amounts in question as public funds and again requested the applicant's conviction for the offence of embezzlement of public funds under Articles 394 para. 4 and 399 of the Criminal Code. In his submissions, the public prosecutor stressed the fact that the Audiencia Provincial had clearly acknowledged that the applicant was a person entrusted with funds belonging to a public institution for the purposes of Article 399.
11. The applicant did not appeal, thereby accepting the facts as established by the Audiencia Provincial, their legal classification and the sentence.
12. In two subsequent decisions of 21 March 1990, the Supreme Court (Tribunal Supremo) found that, although the sums embezzled could be considered public, the offence under Article 394 para. 4 did not apply since the hospital was not legally entitled to those sums. Contrary to the Audiencia Provincial, the Supreme Court further held that:

"(...)
In any event, it is true that, even if Article 394 of the Criminal Code (embezzlement of public funds) cannot be applied, the fact remains that the accused Mr de Salvador is a civil servant and that he took advantage of his position in order to commit the offence of which he was found guilty. Therefore, ... the aggravating circumstance in Article 10 para. 10 must be applied. To put it in a graphic manner: if the offence of embezzlement of public funds cannot apply due to the lack of the objective element, the aggravating circumstance must apply given the offender's legal position."
The Supreme Court therefore quashed the judgment being appealed and convicted the applicant of the offence of simple embezzlement with the aggravating circumstance that he had taken advantage of the public nature of his position in performing the duties entrusted to him (Article 10 para. 10 of the Criminal Code - see paragraph 21 below). In doing so, the Supreme Court considered that a request to apply this aggravating circumstance could be inferred from the public prosecutor's submissions (see paragraph 10 above). In the exercise of its powers (see paragraph 22 below), the Supreme Court sentenced the applicant to five years' imprisonment, the maximum term of imprisonment for the offence of embezzlement under the rules for the determination of sentence set forth in Article 61 para. 2 of the Criminal Code (see paragraph 20 below).

13. Mr de Salvador Torres filed an amparo appeal in the Constitutional Court (Tribunal Constitucional). He asserted that he had not been informed of all the components of the charge against him and that, accordingly, his right to a fair trial had been violated (Article 24 of the Constitution - see paragraph 14 below). By a decision (auto) dated 20 July 1992, the appeal was declared inadmissible on the ground that it did not disclose any relevant issues of constitutional law. The Constitutional Court found that the applicant was well aware that the charges against him presupposed not only that the offender's position was equivalent to that of a civil servant, but also that he had taken advantage of that position in the commission of the offence. He had therefore had the possibility to address that issue throughout the proceedings and his defence rights had not been forfeited.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

14. According to Article 24 of the Constitution:
"1. Everyone has the right to effective protection by the judges and courts in the exercise of his rights and his legitimate interests and in no circumstances may there be any denial of defence rights. 2. Likewise, everyone has the right ... to be informed of the charge against him, to have a ... trial ... attended by all the safeguards, to adduce the evidence relevant to his defence,
(...)"

B. The Criminal Code

1. The offence of embezzlement of public funds (malversación de caudales públicos)

15. By Article 394 of the Criminal Code:
"Any civil servant who embezzles or suffers others to embezzle public funds or other property entrusted to his care by virtue of his office shall be liable to: ... 4. a term of imprisonment ranging from twelve years and one day to twenty years (reclusión menor)

if the amount embezzled exceeds 2,500,000 pesetas. ... In all cases, the offender shall also be permanently disqualified from public office."

16. By Article 399, the foregoing provision also applies to:
"(...)
those entrusted, in any capacity whatsoever, with funds ... belonging to provincial or municipal authorities or to educational establishments or charitable organisations, and to administrators or depositories of funds ... deposited by a public authority, even if they belong to individuals".
According to the case-law, the offender must not only be a civil servant or a person entrusted with sums belonging to a public institution, he or she must also have taken advantage of that position.

2. The offence of simple embezzlement (apropiación indebida)

17. By virtue of Article 535:
"Anyone who, to the detriment of others, appropriates or embezzles money, assets or any other personal property, entrusted to his care as depository, agent or administrator, or in any other capacity carrying the obligation to deliver or return the property, or denies having received such property shall be liable to the penalties laid down in Article 528
(...)"

18. Article 528, in so far as relevant, provides as follows:
"(...)
A person convicted of this offence shall be liable to a term of imprisonment ranging from one month and one day to six months (arresto mayor) if the sum involved exceeds 30,000 pesetas. If there are found to be two or more of the aggravating circumstances provided for in Article 529 below or one especially aggravating circumstance, the person convicted shall be sentenced to a term of imprisonment ranging from six months and one day to six years (prisión menor) ... Where only one of the aggravating circumstances referred to in Article 529 is found to be established, the term of imprisonment shall be in the range of the maximum sentence available (grado máximo) [from four months and one day to six months]."

19. By Article 529:
"The following circumstances shall be deemed to be aggravating circumstances for the purposes of the preceding Article:
(...)
7. Where the offence is particularly serious in terms of the sum embezzled."

3. Aggravating circumstances

20. In order to determine the sentence, where a particular offence is punished with a term of imprisonment, this can be divided in three identical periods (grados): minimum, medium and maximum. If a court finds that no mitigating circumstances and only one aggravating circumstance can be established, it shall impose a medium or maximum sentence. Where more than one aggravating circumstances are established, the maximum sentence shall be imposed (Article 61).

21. Aggravating circumstances can be specific to a particular offence (see, for example, paragraph 19 above) or of a general nature. Article 10 of the Criminal Code describes the aggravating circumstances which can be applied to any offence:
"The following are aggravating circumstances:
(...)

10. the fact that the offender has taken advantage of the public nature of his or her position."

C. The Supreme Court's powers

22. Where the Supreme Court finds that an appealed decision is in breach of the law, it will quash it and set it aside and render a new decision on the merits. In doing so, the only restriction on the court is not to pass a heavier sentence than the one which would correspond to the prosecutor's request (Article 902 of the Code of Criminal Procedure).

23. As with any court, the Supreme Court has the power to depart from the legal classification given by the prosecution provided that: (a) the criminal intent in the offence found applicable is essentially identical to that in the offence as charged ("delitos homogéneos" - for instance homicide and parricide); (b) no different facts are taken into consideration; (c) the new classification leads to the imposition of a sentence that is less severe than that requested by the prosecution. These powers have been considered constitutional by the Constitutional Court in, among others, its judgments of 23 November 1983 (105/83), 17 July 1986 (104/86) and 29 October 1986 (134/86). The new legal classification may involve the finding of aggravating circumstances that are implicit in the original characterisation (Supreme Court, Criminal Chamber, judgment of 13 June 1984, Repertorio de Jurisprudencia Aranzadi no. 3553, p. 2708). (...)

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (a) OF THE CONVENTION (art. 6-3-a)

27. Mr de Salvador Torres alleged that the fact that he had been convicted of an offence with an aggravating circumstance with which he had never been expressly charged constituted a violation of Article 6 para. 3 (a) of the Convention (art. 6-3-a) which, in so far as relevant, reads:
"Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, ... and in detail, of the nature and cause of the accusation against him;"

28. The Commission shared the applicant's view. Noting that that provision (art. 6-3-a) should be examined in the broader context of a fair trial under Article 6 para. 1 (art. 6-1), it considered that, for the purpose of preparing his or her defence, a person charged with a criminal offence is entitled to be informed not only of the material facts on which the accusation is based but also of the precise legal classification given to these facts. Since the finding of an aggravating circumstance led to a heavier sentence being imposed, the applicant should have been formally notified that such a finding was possible in his case.

29. The Government, for their part, contended that the applicant must always have known that his position as head administrator of a public hospital could give rise to the finding of the aggravating circumstance in Article 10 para. 10 of the Criminal Code (see paragraph 21 above). They observed that the provisions on which the charges of embezzlement of public funds against him were based (Articles 394 para. 4 and 399 of the Criminal Code - see paragraphs 15 and 16 above) required that the offender be a civil servant or an administrator of funds belonging to a public institution who had taken advantage of his or her position in committing the offence. As to the fact that the applicant's sentence of imprisonment was increased from eighteen months to five years as a result of the finding of the aggravating circumstance, the Government pointed out that, under Spanish law, the Supreme Court's sentencing powers are limited only by the maximum penalty requested by the prosecutor (see paragraph 22 above), which was fifteen years in the present case.

30. The Court notes that from the outset the investigating judge characterised the facts as established by him as falling within the definition of the offence of embezzlement of public funds (see paragraph 8 above). This legal classification was endorsed by the public prosecutor and the private prosecutor acting on behalf of the hospital, and they both maintained it throughout the proceedings (see paragraphs 8 and 10 above). In Spanish law, the offence of embezzlement of public funds requires that the offender be either a civil servant or an administrator of funds in a public institution, that he should have taken advantage of his position in committing the offence and that the sums embezzled be "public funds" (see paragraphs 15 and 16 above).

31. It further notes that the applicant never disputed the fact that, in his capacity as head administrator of a Barcelona public hospital, he fell within the category of those "entrusted ... with funds belonging to the provincial or municipal authorities or to educational establishments or charitable organisations", or that of administrators or depositories of funds deposited by a public authority (Article 399 of the Criminal Code - see paragraph 16 above). In fact, the file of the case shows that this was common ground between the parties (see paragraphs 9 and 11 above). In that capacity, the applicant was clearly occupying a position of a public nature. Neither the Audiencia Provincial nor the Supreme Court characterised the sums embezzled as "public funds". Both applied the more general offence of simple embezzlement. However, whereas the Audiencia Provincial found that no aggravating circumstance of a general character applied in this case (see paragraph 9 above), the Supreme Court considered that the fact - as established by the Audiencia Provincial and uncontested by the applicant - that Mr de Salvador Torres had taken advantage of his position as head administrator of a public institution aggravated the offence. In the exercise of its powers (see paragraphs 22 and 23 above), the Supreme Court imposed a sentence which, though heavier than that of the Audiencia Provincial, was well below that requested by the prosecutors at the outset and maintained throughout the proceedings (see paragraphs 8 and 10 above).

32. The Court observes that unlike Articles 394 and 399 of the Criminal Code, Article 10 para. 10 requires only that the offender should have taken advantage of the "public nature of his position" (carácter público). It is evident that the Supreme Court, in finding that there was an aggravating circumstance, was referring to this factor (see paragraph 12 above and, mutatis mutandis, the Gea Catalán v. Spain judgment of 10 February 1995, Series A no. 309, p. 11, para. 29).

33. In sum, as expressed by the Constitutional Court in its decision of 20 July 1992 (see paragraph 13 above), the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the possibility that the courts - that is, the Audiencia Provincial and the Supreme Court - would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence. Therefore, the Court finds no infringement of the applicant's right under Article 6 para. 3 (a) (art. 6-3-a) to be informed of the nature and cause of the accusation against him.

CASE OF SAUNDERS v. UNITED KINGDOM

Application no. 19187/91 COURT (CHAMBER), 17 December 1996

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. Factual background leading to the appointment of inspectors

14. The applicant had become a director and chief executive of Guinness PLC ("Guinness") in 1981.
15. In early 1986 Guinness was competing with another public company, Argyll Group PLC ("Argyll"), to take over a third public company, the Distillers Company PLC ("Distillers"). The take-over battle resulted in victory for Guinness. Guinness's offer to Distillers' shareholders, like Argyll's, included a substantial share exchange element, and accordingly the respective prices at which Guinness and Argyll shares were quoted on the Stock Exchange was a critical factor for both sides. During the course of the bid the Guinness share price rose dramatically, but once the bid had been declared unconditional it fell significantly.
16. The substantial increase in the quoted Guinness share price during the bid was achieved as a result of an unlawful share-support operation. This involved certain persons ("supporters") purchasing Guinness shares in order to maintain, or inflate, its quoted share price. Supporters were offered secret indemnities against any losses they might incur, and, in some cases, also large success fees, if the Guinness bid was successful. Such inducements were unlawful (1) because they were not disclosed to the market under the City Code on Take-overs and Mergers and (2) because they were paid out of Guinness's own moneys in breach of section 151 of the Companies Act 1985 ("the 1985 Act"), which prohibits a company from giving financial assistance for the purpose of the acquisition of its own shares.
17. Supporters who had purchased shares under the unlawful share-support operation were indemnified and rewarded. In addition, some of those who had helped find supporters were rewarded by the payment of large fees. These too came from Guinness funds. In most cases payments were made using false invoices which concealed the fact that payment was being made in respect of the supporters or other recipients' participation in the unlawful share-support operation.
18. Allegations and rumours of misconduct during the course of the bid led the Secretary of State for Trade and Industry to appoint inspectors some months after the events pursuant to sections 432 and 442 of the 1985 Act (see paragraphs 45 and 46 below). The inspectors were empowered to investigate the affairs of Guinness.

B. The inspectors' investigation

19. On 10 December 1986, the inspectors began taking oral evidence. Mr Seelig, a director of the merchant bank advisers to Guinness, was the first witness.
20. On 12 January 1987, the inspectors informed the Department of Trade and Industry ("the DTI") that there was concrete evidence of criminal offences having been committed. On the same date the DTI contacted Mr John Wood of the Director of Public Prosecutions' office ("the DPP"). It was decided that the proper thing to do was to permit the inspectors

to carry on with their inquiry and to pass the transcripts on to the Crown Prosecution Service ("the CPS") which had come into being in September 1986.

21. On 14 January 1987 the applicant was dismissed from Guinness.

22. On 29 January 1987, the Secretary of State required the inspectors to inform him of any matters coming to their knowledge as a result of their investigation pursuant to section 437 (1A) of the 1985 Act. Thereafter the inspectors passed on to the Secretary of State transcripts of their hearings and other documentary material which came into their possession.

23. On 30 January 1987, a meeting was held attended by the inspectors, the solicitor to and other officials of the DTI, Mr John Wood and a representative from the CPS. Amongst other matters, potential accused were identified - including the applicant – possible charges were discussed and it was stated that a decision had to be made as to when to start a criminal investigation. All concerned agreed on the need to work closely together in preparing the way for bringing charges as soon as possible. The inspectors indicated their readiness to cooperate although they reserved the right to conduct their investigations as they thought right.

24. On 5 February 1987 Mr John Wood, who had been appointed head of legal services at the CPS, appointed a team of counsel to advise on the criminal aspects of the investigation. Transcripts and documents from the inspectors were passed on to the team after receipt and consideration by the DTI.

25. The applicant was interviewed by the inspectors on nine occasions: on 10-11, 20 and 26 February, 4-5 March, 6 May and 11-12 June 1987. He was accompanied by his legal representatives throughout these interviews.

C. The criminal proceedings

26. During the first week of May 1987 the police were formally asked by the DPP's office to carry out a criminal investigation. The transcripts and documents obtained as a result of the inspectors' interviews were then passed on to the police.

27. The applicant was subsequently charged with numerous offences relating to the illegal share-support operation and, together with his co-defendants, was arraigned before the Crown Court on 27 April 1989.

In view of the large number of counsel and the number of defendants two separate trials were subsequently ordered by the trial judge in the Crown Court on 21 September 1989.

28. From 6 to 16 November 1989 the court held a voir dire (submissions on a point of law in the absence of the jury) following the application of one of the applicant's co-defendants, Mr Parnes, to rule the DTI transcripts inadmissible. Mr Parnes argued, principally, that the statements obtained during three interviews before the inspectors should be excluded

(i) pursuant to section 76 of the Police and Criminal Evidence Act 1984 ("PACE") on the basis that they had been obtained by oppression or in circumstances which were likely to render them unreliable;

(ii) pursuant to section 78 of PACE because of the adverse effect the admission of the evidence would have on the fairness of the proceedings having regard to the circumstances in which it was obtained.

In a ruling given on 21 November 1989, the trial judge (Mr Justice Henry) held that the transcripts were admissible. He stated that it was common ground that the interviews were capable of being "confessions" as defined in section 82 (1) of PACE. He found that as a matter of construction of the 1985 Act inspectors could ask witnesses questions that tended to incriminate them, the witnesses were under a duty to answer such questions and the answers were admissible in criminal proceedings. He rejected Mr Parnes's assertion that the inspectors should have given a warning against self-incrimination. He

was satisfied that there was no element of oppression involved in the obtaining of the evidence and that the answers were not obtained in consequence of anything said or done which was likely to render them unreliable in all the circumstances existing at the time.

29. From 22 to 24 January 1990 the court held a further voir dire following the application of the applicant to rule inadmissible the DTI transcripts concerning the eighth and ninth interviews on the basis that they should be excluded either as unreliable under section 76 of PACE or pursuant to section 78 of PACE because of the adverse effect the admission of the evidence would have on the fairness of the proceedings having regard to the circumstances in which it was obtained. Reliance was placed on the applicant's alleged ill-health at the time and on the fact that the two interviews in question had taken place after the applicant had been charged.

In his ruling of 29 January 1990 Mr Justice Henry rejected the defence argument as to the applicant's medical condition. He did, however, exercise his discretion pursuant to section 78 to exclude the evidence from the two above-mentioned interviews which had taken place after the applicant had been charged on the grounds that his attendance could not be said to be voluntary. In his view, moreover, it could not be said to be fair to use material obtained by compulsory interrogation after the commencement of the accusatorial process.

1. The applicant's trial

30. The applicant was tried together with three co-defendants. The trial involved seventy-five days of evidence, ten days of speeches by counsel and a five-day summing-up to the jury by the trial judge. The applicant faced fifteen counts including, inter alia, eight counts of false accounting contrary to section 17 (1) b of the Theft Act 1968 and two counts of theft and several counts of conspiracy.

In the course of his trial the applicant, who was the only accused to give evidence (days 63-82) - after the reading of the transcripts (see paragraph 31 below) - testified that he knew nothing about the giving of indemnities or the paying of success fees and that he had not been consulted on such matters. He asserted that he had been guilty of no wrongdoing.

The Crown relied heavily on the evidence of Mr Roux (Guinness's finance director) who had been granted immunity from prosecution. It also referred to the statements made by the applicant in the course of interviews to the DTI inspectors.

31. The transcripts of the interviews were read to the jury by the prosecution over a three-day period during the trial (days 45-47). They were used in order to establish the state of the applicant's knowledge and to refute evidence given by the applicant to the jury.

For example, counsel for the prosecution used passages from the interviews to demonstrate that Mr Saunders had been aware, inter alia, of the payment to Mr W., who had been allegedly involved in the share-support operation, of more than £5 million, before the inspectors had shown him an invoice for the payment of the money to Mr W. In his answers to the inspectors Mr Saunders had stated that he had agreed on the payment to Mr W. of £5 million as an appropriate success fee. When the inspectors showed him the invoice for the payment of this money to a company (MAC) used by Mr W. to receive fees for work done, he replied that he had not seen the invoice before but had deduced that it related to his agreement to pay Mr W. £5 million.

In his opening speech to the jury, counsel for the prosecution stated as follows:

"Mr Saunders also told [DTI] inspectors why the [£5 million] had been paid. He said that Mr [W.] had performed invaluable service during the bid for Distillers and that Mr [W.] had persuaded him that £5 million was an appropriate fee as a reward. Mr Saunders accepted that there was no documentation to support his decision to pay Mr [W.] £5

million. Mr Saunders admitted to the [inspectors] that he knew that MAC was a company used by Mr [W.] and his associates to receive money."

During the trial Mr Saunders testified that he did not know that the money had been paid to Mr W. prior to being shown the invoice by the inspectors. In his cross-examination of the applicant, counsel for the prosecution referred to the above answers in the transcripts to contradict Mr Saunders's testimony. In his closing speech to the jury he stated:

"But Mr Saunders's ... evidence to the inspectors make it clear that he knew perfectly well ... that Mr [W.] had been paid. You will remember those passages in his ... interviews where he knew all about this payment before he was shown the invoice."

32. Reference was also made to the interview transcripts by counsel for the co-accused [Mr R.] in an attempt to demonstrate that Mr Saunders was not telling the truth. In his answers to the inspectors Mr Saunders had repeatedly stated that he did not recall any conversations with Mr R. concerning the purchase of shares in Guinness or about indemnities against loss in the event of such purchase. However, a letter written by Mr R. to another person stating that such conversations had taken place and generally implicating Mr Saunders in the share-support operation had been previously published in the press.

During cross-examination of Mr Saunders, counsel for Mr R. suggested that Mr Saunders's answers to the inspectors on this point were not believable, that he had "lost his nerve" before them and that this explained his replies that he could not recollect the conversations with Mr R. taking place. He repeatedly asked why Mr Saunders did not take the opportunity to tell the inspectors that Mr R.'s accusations in the published letter were a "pack of lies" instead of replying as he did.

33. In his summing-up to the jury, the judge also compared and contrasted what the applicant had said in court with the answers which he had given to the inspectors.

34. On 22 August 1990 the applicant was convicted of twelve counts in respect of conspiracy, false accounting and theft. He received an overall prison sentence of five years.

2. Ruling on "abuse of process" claims

35. In the second set of proceedings concerning the other co-defendants, further challenge was made to the admissibility of the transcripts of the interviews on the ground, inter alia, that there was an abuse of process in that there was misconduct by the inspectors and/or the prosecuting authorities in the use of the inspectors' statutory powers for the purpose of constructing a criminal case. In particular, it was alleged by one of the co-defendants, Mr Seelig, that there was a deliberate delay in charging the accused in order that the inspectors could use their powers to obtain confessions.

36. In a ruling given on 10 December 1990 Mr Justice Henry found that there was no prima facie case of abuse by either the inspectors or the prosecuting authorities. He had heard evidence from both the inspectors and the police officer in charge of the criminal investigation. In a ruling given on 14 December 1990 the judge rejected the application for a stay, finding that there had been no abuse of the criminal process in the questioning of the defendants or in the passing of Mr Seelig's depositions to the inspectors to the prosecuting authorities or in their conduct of the prosecution. He saw nothing improper or sinister in the decision by Mr Wood not to involve the police until the beginning of May. He concluded rather that proper use had been made of the statutory powers. The judge also refused an application to exclude the evidence of the interviews under section 78 of PACE as constituting evidence which had such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

37. On appeal the Court of Appeal in a judgment dated 2 May 1991 (R. v. Seelig) upheld the trial judge's ruling as to the admissibility of the interviews before the inspectors. On 24 July 1991 leave to appeal was refused by the House of Lords.

3. The applicant's appeal

38. The applicant applied for leave to appeal against conviction and sentence. He argued, inter alia, that the trial judge had misdirected the jury as to the weight to be allowed to the evidence given by Mr Roux, the finance director of Guinness who had been afforded immunity from prosecution.
The applicant was granted leave to appeal against conviction. Following a hearing at which the applicant was represented, the Court of Appeal gave its judgment on 16 May 1991. It held that while there were some blemishes and infelicities in the judge's summing-up, it was in the main a masterly exposition, which left the main issue of dishonesty to the jury. It commented that the applicant's counsel had expressed the possibility that he might wish to address the court as to the admissibility of the transcripts. It stated however that the question had been decided, as far as it was concerned, by the decision given by another division of the Court of Appeal in the case of R. v. Seelig, which had held that such statements were admissible. It went on to reject the applicant's appeal on all but one count: it found that the judge had erred in his direction on one count and quashed that conviction. It reduced his sentence to two and a half years' imprisonment.

D. Subsequent reference to the Court of Appeal by the Home Secretary

39. On 22 December 1994 the Home Secretary referred the applicant's case and that of his co-defendants to the Court of Appeal pursuant to section 17 (1) of the Criminal Appeal Act 1968. He did so on the basis of applications by the applicant's co-defendants - but not the applicant himself - who submitted that the prosecution had failed to disclose certain documents at their trial.

40. At the appeal the applicant argued, inter alia, that the use at the trial of answers given to the DTI inspectors automatically rendered the criminal proceedings unfair.
The court rejected this argument, pointing out that Parliament had expressly and unambiguously provided in the 1985 Act that answers given to DTI inspectors may be admitted in evidence in criminal proceedings even though such admittance might override the privilege against self-incrimination.
In its judgment the court noted that the interviews with each of the accused "formed a significant part of the prosecution case".

41. With reference to the allegation that it was unfair that those interviewed by DTI inspectors should be treated less favourably than those interviewed by the police under PACE, the court noted as follows:
"... the unravelling of complex and devious transactions in those fields is particularly difficult and those who enjoy the immunities and privileges afforded by the Bankruptcy Laws and the Companies Acts must accept the need for a regime of stringent scrutiny especially where fraud is suspected ..."

42. In relation to the argument that the difference between the Companies Act and the Criminal Justice Act regimes (see paragraphs 48 and 54 below) was anomalous the court stated:
"... the explanation lies in the very different regime of interviews by DTI inspectors compared with that of interviews either by police or the SFO [Serious Fraud Office]. DTI

inspectors are investigators; unlike the police or SFO they are not prosecutors or potential prosecutors. Here, typically, the two inspectors were a Queen's Counsel and a senior accountant. They are bound to act fairly, and to give anyone they propose to condemn or criticise a fair opportunity to answer what is alleged against them ... Usually, the interviewee will be represented by lawyers and he may be informed in advance of the points to be raised."

43. The court also rejected an allegation that there had been an abuse of process in that the DTI inspectors were used wrongly as "evidence gatherers" for the prosecution or that there had been improper or unfair "collusion", as follows:

"We have carefully considered the effect of the events of November 1986 to October 1987 in the light of all the documents. We conclude that to allow the inspectors to continue their inquiry and to bring in the police only in May 1987 was a proper course subject to two essentials.

(1) That the inspectors were left to conduct their inquiries and interviews independently without instruction, briefing or prompting by the prosecuting authority. We are quite satisfied that the inspectors themselves made that clear and abided by it. Counsel also laid down those ground rules correctly and they were observed ...

(2) That the interviews were conducted fairly and unobjectionably. It was not suggested to the trial judge or before us that the inspectors could be criticised on this score. These were carefully structured sessions of proper length in suitable conditions. The appellants, experienced businessmen of high intelligence, were each represented either by counsel (usually Queen's Counsel) or a senior solicitor. The questions were put scrupulously fairly and the Code laid down in the Pergamon case ... was observed."

44. Finally, the court also rejected the allegation that non-disclosure prior to the trial of the material alleged to indicate abuse caused any unfairness to the applicant. It subsequently refused to certify that the case involved a point of public importance and denied leave to appeal to the House of Lords. Following this decision no further avenue of appeal was open to the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

(...)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

59. The applicant contended that he was denied a fair trial in breach of Article 6 para. 1 of the Convention (art. 6-1) which, in so far as relevant, states:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

The Commission found that there had been such a violation, although this was contested by the Government.

A. The right not to incriminate oneself

1. The arguments of those appearing before the Cour

a) The applicant

60. The applicant complained of the fact that statements made by him under compulsion to the inspectors appointed by the Department of Trade and Industry (DTI) (see paragraph 18 above) during their investigation were admitted as evidence against him at his subsequent criminal trial (see paragraphs 30-33 above).
He maintained that implicit in the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), as the Court had recognised in its judgments in Funke v. France (25 February 1993, Series A no. 256-A, p. 22, para. 44) and John Murray v. the United Kingdom (8 February 1996, Reports of Judgments and Decisions 1996-I, p. 49, para. 45), was the right of an individual not to be compelled to contribute incriminating evidence to be used in a prosecution against him. This principle was closely linked to the presumption of innocence which was expressly guaranteed by Article 6 para. 2 of the Convention (art. 6-2) and had been recognised by the Court of Justice of the European Communities (Orkem v. Commission, Case 374/87 [1989] European Court Reports 3283) and by the Constitutional Court of South Africa (Ferreira v. Levin and Others, judgment of 6 December 1995) amongst others. It should apply equally to all defendants regardless of the nature of the allegations against them or their level of education and intelligence. It followed that the use made by the prosecution of the transcripts of interviews with the inspectors in subsequent criminal proceedings was contrary to Article 6 (art. 6).

61. Furthermore, the applicant argued that this use of the transcripts was particularly unfair in his case since, in the words of the Court of Appeal, they "formed a significant part of the prosecution case". Three days were spent reading extracts from his interviews with the inspectors to the jury before Mr Saunders decided that he ought to give evidence to explain and expand upon this material. As a result, he was subjected to intensive cross examination concerning alleged inconsistencies between his oral testimony at trial and his responses to the inspectors' questions, to which the trial judge drew attention in his summing-up to the jury. The prosecution's task was thus facilitated when it was able to contrast its own evidence with Mr Saunders's more specific denials in his interviews.

b) The Government

62. The Government submitted that only statements which are self incriminating can fall within the privilege against self-incrimination. However, exculpatory answers or answers which, if true, are consistent with or would serve to confirm the defence of an accused cannot be properly characterised as self-incriminating. In their submission, neither the applicant nor the Commission had identified at any stage a single answer given by the applicant to the DTI inspectors which was self-incriminating. There cannot be derived from the privilege against self-incrimination a further right not to be confronted with evidence that requires the accused, in order successfully to rebut it, to give evidence himself. That, in effect, was what the applicant was claiming when he alleged that the admission of the transcript "compelled" him to give evidence.
The Government accepted that a defendant in a criminal trial cannot be compelled by the prosecution or by the court to appear as a witness at his own trial or to answer questions put to him in the dock, and that an infringement of this principle would be likely to result in a defendant not having a fair hearing. However, the privilege against self-incrimination was not absolute or immutable. Other jurisdictions (Norway, Canada, Australia, New

Zealand and the United States of America) permit the compulsory taking of statements during investigation into corporate and financial frauds and their subsequent use in a criminal trial in order to confront the accused's and witnesses' oral testimony. Nor does it follow from an acceptance of the privilege that the prosecution is never to be permitted to use in evidence self-incriminating statements, documents or other evidence obtained as a result of the exercise of compulsory powers. Examples of such permitted use include the prosecution's right to obtain documents pursuant to search warrants or samples of breath, blood or urine.

63. In the Government's submission it would be wrong to draw from the Court's Funke judgment (referred to at paragraph 60 above) a broad statement of principle concerning the "right to silence", since the nature of that right was not defined in the judgment. There can be no absolute rule implicit in Article 6 (art. 6) that any use of statements obtained under compulsion automatically rendered criminal proceedings unfair. In this respect it was necessary to have regard to all the facts of the case including the many procedural safeguards inherent in the system. For example, at the stage of the inspectors' inquiry, injustice was prevented by the facts that the inspectors were independent and subject to judicial supervision and that the person questioned was entitled to be legally represented before them and provided with a transcript of his responses which he could correct or expand. Moreover, during the course of any subsequent criminal trial, a defendant who had provided answers to the inspectors under compulsion was protected by the judge's powers to exclude such evidence; admissions which might be unreliable or might have been obtained by oppressive means had to be excluded and there was a discretion to exclude other evidence if its admission would have an adverse effect on the fairness of the proceedings (see paragraphs 51-52 above).

64. The Government further emphasised that, whilst the interests of the individual should not be overlooked, there was also a public interest in the honest conduct of companies and in the effective prosecution of those involved in complex corporate fraud. This latter interest required both that those under suspicion should be compelled to respond to the questions of inspectors and that the prosecuting authorities should be able to rely in any subsequent criminal trial on the responses elicited. In this respect a distinction could properly be drawn between corporate fraud and other types of crime, since devices such as complex corporate structures, nominee companies, complicated financial transactions and false accounting records could be used to conceal fraudulent misappropriation of corporate funds or personal responsibility for such misconduct. Frequently the documentary evidence relating to such transactions would be insufficient for a prosecution or incomprehensible without the explanations of the individuals concerned. Furthermore, it had to be remembered that the kind of person questioned by the inspectors was likely to be a sophisticated businessman with access to expert legal advice, who had moreover chosen to take advantage of the benefits afforded by limited liability and separate corporate personality.

(…)

2. The Court's assessment

67. The Court first observes that the applicant's complaint is confined to the use of the statements obtained by the DTI inspectors during the criminal proceedings against him. While an administrative investigation is capable of involving the determination of a "criminal charge" in the light of the Court's case-law concerning the autonomous meaning of this concept, it has not been suggested in the pleadings before the Court that Article 6 para. 1 (art. 6-1) was applicable to the proceedings conducted by the inspectors or that these proceedings themselves involved the determination of a criminal charge within the

meaning of that provision (art. 6-1) (see, inter alia, the Deweer v. Belgium judgment of 27 February 1980, Series A no. 35, pp. 21 24, paras. 42-47). In this respect the Court recalls its judgment in Fayed v. the United Kingdom where it held that the functions performed by the inspectors under section 432 (2) of the Companies Act 1985 were essentially investigative in nature and that they did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative (judgment of 21 September 1994, Series A no. 294-B, p. 47, para. 61). As stated in that case, a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6 para. 1 (art. 6-1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities (ibid., p. 48, para. 62).

Accordingly the Court's sole concern in the present case is with the use made of the relevant statements at the applicant's criminal trial.

68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (see the above-mentioned John Murray judgment, p. 49, para. 45, and the above-mentioned Funke judgment, p. 22, para. 44). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).

69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6 para. 1 (art. 6-1) of which the right not to incriminate oneself is a constituent element.

70. It has not been disputed by the Government that the applicant was subject to legal compulsion to give evidence to the inspectors. He was obliged under sections 434 and 436 of the Companies Act 1985 (see paragraphs 48-49 above) to answer the questions put to him by the inspectors in the course of nine lengthy interviews of which seven were admissible as evidence at his trial. A refusal by the applicant to answer the questions put to him could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years (see paragraph 50 above) and it was no defence to such refusal that the questions were of an incriminating nature (see paragraph 28 above). However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence.

In their submission only statements which are self-incriminating could fall within the privilege against self-incrimination.

71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6 (art. 6), the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.

72. In this regard, the Court observes that part of the transcript of answers given by the applicant was read to the jury by counsel for the prosecution over a three-day period despite objections by the applicant. The fact that such extensive use was made of the interviews strongly suggests that the prosecution must have believed that the reading of the transcripts assisted their case in establishing the applicant's dishonesty. This interpretation of the intended impact of the material is supported by the remarks made by the trial judge in the course of the voir dire concerning the eighth and ninth interviews to the effect that each of the applicant's statements was capable of being a "confession" for the purposes of section 82 (1) of the Police and Criminal Evidence Act 1984 (see paragraph 53 above). Similarly, the Court of Appeal considered that the interviews formed "a significant part" of the prosecution's case against the applicant (see paragraph 40 above). Moreover, there were clearly instances where the statements were used by the prosecution to incriminating effect in order to establish the applicant's knowledge of payments to persons involved in the share-support operation and to call into question his honesty (see paragraph 31 above). They were also used by counsel for the applicant's co accused to cast doubt on the applicant's version of events (see paragraph 32 above).
In sum, the evidence available to the Court supports the claim that the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.

73. Both the applicant and the Commission maintained that the admissions contained in the interviews must have exerted additional pressure on the applicant to give testimony during the trial rather than to exercise his right to remain silent. However, it was the Government's view that the applicant chose to give evidence because of the damaging effect of the testimony of the chief witness for the prosecution, Mr Roux.
Although it cannot be excluded that one of the reasons which affected this decision was the extensive use made by the prosecution of the interviews, the Court finds it unnecessary to speculate on the reasons why the applicant chose to give evidence at his trial.

74. Nor does the Court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.
It does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal

offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.

75. It follows from the above analysis and from the fact that section 434 (5) of the Companies Act 1985 authorises, as noted by both the trial judge and the Court of Appeal, the subsequent use in criminal proceedings of statements obtained by the inspectors that the various procedural safeguards to which reference has been made by the respondent Government (see paragraph 63 above) cannot provide a defence in the present case since they did not operate to prevent the use of the statements in the subsequent criminal proceedings.

76. Accordingly, there has been an infringement in the present case of the right not to incriminate oneself.

(…)

C. Conclusion

81. In conclusion the applicant was deprived of a fair hearing in violation of Article 6 para. 1 of the Convention (art. 6-1). (…)

CASE OF SCHATSCHASCHWILI v. GERMANY

Application no. 9154/10 GRAND CHAMBER, 15 December 2015

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The events in Kassel and Göttingen as established by the domestic courts

1. The offence committed in Kassel

12. On the evening of 14 October 2006 the applicant and an unidentified accomplice robbed L. and I., two Lithuanian nationals, in the women's apartment in Kassel.
13. The perpetrators were aware that the apartment was used for prostitution and expected its two female occupants to keep valuables and cash there. They passed by the apartment in the early evening in order to make sure that no clients or a procurer were present. Shortly afterwards they returned and overpowered L., who had answered the doorbell. The applicant pointed a gas pistol which resembled a real gun at both women and threatened to shoot them if they did not disclose where their money was kept. While his accomplice watched over the women, the applicant partly collected in the apartment and partly forced the women to hand over to him some 1,100 euros (EUR) and six mobile phones.

2. The offence committed in Göttingen

14. On 3 February 2007 the applicant, acting jointly with several accomplices, robbed O. and P., two female Latvian nationals who were temporarily resident in Germany and working as prostitutes, in their apartment in Göttingen.
15 On the evening of 2 February 2007, the day before the offence, one of the applicant's co-accused had passed by O. and P.'s apartment in Göttingen together with an accomplice, R., an acquaintance of O. and P. They intended to verify whether the two women were the apartment's only occupants and whether they kept any valuables there, and discovered a safe in the kitchen.
16. On 3 February 2007 at around 8 p.m. the applicant and a further accomplice, B., gained access to O. and P.'s apartment by pretending to be potential clients, while one of their co-accused waited in a car parked close to the apartment building and another waited in front of the building. Once inside the apartment B. produced a knife that he had been carrying in his jacket. P., in order to escape from the perpetrators, jumped from the balcony located approximately two metres off the ground and ran away. The applicant jumped after her but abandoned the chase after some minutes when some passers-by appeared nearby on the street. He then called the co-accused who had been waiting in front of the women's apartment building on his mobile phone and told him that one of the women had jumped from the balcony and that he had unsuccessfully chased her. The applicant agreed on a meeting point with his co-accused where they would pick him up by car once B. had left the crime scene and joined them.
17. In the meantime inside the apartment, B., after having overpowered O., threatened to kill her with his knife if she did not disclose where the women kept their money or if she refused to open the safe for him. Fearing for her life, O. opened the safe, from which B. removed EUR 300, and also handed over the contents of her wallet, EUR 250. B. left the

apartment at around 8.30 p.m., taking the money and P.'s mobile telephone as well as the apartment's landline telephone with him, and joined the co accused. The co accused and B. then picked up the applicant at the agreed meeting point in their car. At approximately 9.30 p.m. P. rejoined O. in the apartment.

18. O. and P. gave an account of the events to their neighbour E. the morning after the offence. They then left their Göttingen apartment out of fear and stayed for several days with their friend L., one of the victims of the offence committed in Kassel, to whom they had also described the offence in detail the day after it occurred.

B. The investigation proceedings concerning the events in Göttingen

19. On 12 February 2007 L. informed the police of the offence committed against O. and P. in Göttingen. Between 15 and 18 February 2007 O. and P. were repeatedly questioned by the police as to the events of 2 and 3 February 2007. In those interviews they described the course of events as set out above. The police, having checked O. and P.'s papers, found their residence and occupation in Germany to be in compliance with German immigration and trade law.

20. As the witnesses had explained during their police interviews that they intended to return to Latvia in the days to come, on 19 February 2007 the prosecution asked the investigating judge to question the witnesses in order to obtain a true statement which could be used at the subsequent trial ("eine[r] im späteren Hauptverfahren verwertbare[n] wahrheitsgemäße[n] Aussage").

21. Thereupon, on 19 February 2007, O. and P. were questioned by an investigating judge and again described the course of events as set out above. At that time, the applicant had not yet been informed about the investigation proceedings initiated against him, so as not to put the investigation at risk. No warrant for his arrest had yet been issued and he was not yet represented by counsel. The investigating judge excluded the applicant from the witness hearing before him in accordance with Article 168c of the Code of Criminal Procedure (see paragraph 56 below) since he was concerned that the witnesses, whom he had found to be considerably shocked and distressed by the offence, would be afraid of telling the truth in the applicant's presence. The witnesses confirmed at that hearing that they intended to return to Latvia as soon as possible.

22. Witnesses O. and P. returned to Latvia shortly after that hearing. The applicant was subsequently arrested on 6 March 2007.

C. The trial before the Göttingen Regional Court

1. The court's attempts to question O. and P. and the admission of O. and P.'s pre-trial Statements

23. The Göttingen Regional Court summoned O. and P. by registered mail to appear at the trial on 24 August 2007. However, both witnesses refused to attend the hearing before the Regional Court, relying on medical certificates dated 9 August 2007 which indicated that they were in an unstable, post-traumatic emotional and psychological state.

24. On 29 August 2007 the Regional Court therefore sent letters by registered mail to both witnesses informing them that the court, while not being in a position to compel them to appear at a court hearing in Germany, nonetheless wished to hear them as witnesses at the trial. The court stressed that they would receive protection in Germany and that all costs incurred in attending the hearing would be reimbursed and, proposing several

options, asked in what circumstances they would be willing to testify at the trial. While an acknowledgement of receipt was returned for both letters, no response was obtained from P. O., for her part, informed the Regional Court in writing that she was still traumatised by the offence and would therefore neither agree to appear at the trial in person nor would she agree to testify by means of an audio-visual link. O. further stated that she had nothing to add to the statements she had made in the course of the interviews carried out by the police and the investigating judge in February 2007.

25. The Regional Court nevertheless decided to request legal assistance from the Latvian authorities under the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, as supplemented by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (see paragraphs 64-66 below), taking the view that O. and P. were obliged under Latvian law to appear before a court in Latvia following a request for legal assistance. It asked for the witnesses to be summoned before a court in Latvia and for an audio-visual link to be set up in order for the hearing to be conducted by the presiding judge of the Regional Court (audiovisuelle Vernehmung). It considered, by reference to Article 6 § 3 (d) of the Convention, that defence counsel and the accused, just like the judges and the prosecution, should have the right to put questions to the witnesses for the first time.

26. However, the witness hearing of O. and P. scheduled by the competent Latvian court for 13 February 2008 was cancelled shortly before that date by the presiding Latvian judge. The latter found that the witnesses, again relying on medical certificates, had demonstrated that they were still suffering from post-traumatic disorder as a consequence of the offence and that further confrontation with the events in Göttingen would risk aggravating their condition. O. had further claimed that, following threats by the accused, she feared possible acts of revenge.

27. By letter dated 21 February 2008 the Regional Court, which had obtained copies of the medical certificates the witnesses had submitted to the Latvian court at the Regional Court's request, informed its Latvian counterpart that, according to the standards of German criminal procedure law, the witnesses had not sufficiently substantiated their refusal to testify. The court suggested to the competent Latvian judge that the witnesses be examined by a public medical officer (Amtsarzt) or, alternatively, that they be compelled to attend the hearing. The letter remained unanswered.

28. By decision of 21 February 2008 the Regional Court, dismissing an objection to the admission of the witnesses' pre-trial statements raised by counsel for one of the co-accused, ordered that the records of O. and P.'s interviews by the police and the investigating judge be read out at the trial in accordance with Article 251 §§ 1 (2) and 2 (1) of the Code of Criminal Procedure (see paragraph 61 below). It considered that, as required by the said provisions, there were insurmountable obstacles which made it impossible to hear the witnesses in the foreseeable future as they were unreachable. It had not been possible to hear witnesses O. and P. in the course of the trial since they had returned to their home country, Latvia, shortly after their interviews at the investigation stage, and all attempts to hear their evidence at the main hearing, which the court had no means of enforcing, had been to no avail. Pointing out that the courts were under an obligation to conduct proceedings involving deprivation of liberty expeditiously, and in view of the fact that the accused had already been in custody for a considerable period of time, the court was of the opinion that it was not justified to further delay the proceedings.

29. The Regional Court emphasised that at the investigation stage there had been no indication that O. and P., who had testified on several occasions before the police and then before the investigating judge, would refuse to repeat their statements at a subsequent trial. It considered that, notwithstanding the resulting restrictions for the defence on account of the admission of O. and P.'s pre-trial statements as evidence in the proceedings,

the trial as a whole could be conducted fairly and in compliance with the requirements of Article 6 § 3 (d) of the Convention.

2. The Regional Court's judgment

30. By judgment of 25 April 2008 the Göttingen Regional Court, considering the facts established as described above, convicted the applicant of two counts of aggravated robbery combined with aggravated extortion involving coercion, committed jointly with other perpetrators in Kassel on 14 October 2006 and in Göttingen on 3 February 2007, respectively. It sentenced the applicant, who had been represented by counsel at the trial, to nine years and six months' imprisonment.

(a) The assessment of the available evidence concerning the offence in Kassel

31. The Regional Court based its findings of fact concerning the offence committed by the applicant in Kassel on the statements made at the trial by the victims L. and I., who had identified the applicant without any hesitation. It further noted that their statements were supported by the statements made at the trial by the police officers who had attended the crime scene and had interviewed L. and I. in the course of the preliminary investigation. In view of these elements, the Regional Court considered that the submissions made by the applicant, who had initially claimed his innocence and had then admitted that he had been in L. and I.'s flat but had only secretly stolen EUR 750, alone, after a quarrel with the women, had been refuted.

(b) The assessment of the available evidence concerning the offence in Göttingen

(i) O. and P.'s statements

32. In the establishment of the facts concerning the offence in Göttingen, the Regional Court relied in particular on the pre-trial statements made by the victims O. and P., whom it considered to be key witnesses for the prosecution (maßgebliche[n] Belastungszeuginnen), in the course of their police interviews and before the investigating judge.

33. In its judgment, which ran to some 152 pages, the Regional Court pointed out that it was aware of the reduced evidentiary value of the records of O. and P.'s pre-trial testimonies. It further took into account the fact that neither the applicant nor counsel for the defence had been provided with an opportunity to examine the only direct witnesses to the offence in Göttingen at any stage of the proceedings.

34. The Regional Court noted that the records of O. and P.'s interviews at the investigation stage showed that they had given detailed and coherent descriptions of the circumstances of the offence. Minor contradictions in their statements could be explained by their concern not to disclose their residence and activities to the authorities and by the psychological strain to which they had been subjected during and following the incident. The witnesses had feared problems with the police and acts of revenge by the perpetrators. This explained why they had not reported the offence immediately after the events and why the police had only been informed on 12 February 2007 by their friend L.

35. The Regional Court further took note of the fact that O. and P. had failed to identify the applicant when confronted with several photos of potential suspects during the police interviews. It observed that the witnesses' attention during the incident had been focused

on the other perpetrator carrying the knife and that the applicant himself had only stayed a short period of time in the apartment. Their inability to identify the applicant also showed that, contrary to the defence's allegation, the witnesses had not testified with a view to incriminating him. The court further considered that the fact that the witnesses had failed to attend the trial could be explained by their unease at having to recall, and being questioned about, the offence and therefore did not as such affect their credibility.

(ii) Further available evidence

36. In its establishment of the facts, the Regional Court further had regard to the following additional evidence: the statements made at the trial by several witnesses to whom O. and P. had reported the offence shortly after it happened, namely the victims' neighbour E. and their friend L., as well as the police officers and the investigating judge who had examined O. and P. at the pre-trial stage; geographical data and information obtained by tapping the applicant's and his co-accused's mobile telephones and by means of a satellite-based global positioning system ("GPS") receiver in the car of one of the co-accused; the applicant's admission in the course of the trial that he had been in the victims' apartment at the relevant time; and the similarity in the way in which the offences in Kassel and Göttingen had been committed.
37. The Regional Court stressed that, once witnesses O. and P. had proved to be unavailable, it had ensured that as many as possible of the witnesses who had been in contact with O. and P. in relation to the events at issue were heard at the trial, in order to verify the victims' credibility.
38. In the Regional Court's opinion the fact that the detailed description of the events given in O. and P.'s pre-trial statements was consistent with the account they had given the morning after the offence to their neighbour E. was a strong indication of their credibility and the veracity of their statements. E. had further testified that, on the evening of 3 February 2007 at around 9.30 p.m., another neighbour, an elderly woman who became scared and angry when she saw P. running around in front of her window, had called on her and asked her to accompany her to the women's apartment to investigate what had happened. O. and P. had, however, not answered the door when the neighbours rang the doorbell.
39. The Regional Court further observed that O. and P.'s description of the events was also consistent with their friend L.'s recollection of her conversations with O. and P. after the offence.
40. In addition, the Regional Court noted that the three police officers and the investigating judge who had examined O. and P. at the pre-trial stage had all testified at the trial that they had found O. and P. to be credible.
41. The Regional Court stressed that since neither the defence nor the court itself had had an opportunity to observe the main witnesses' demeanour at the trial or during examination by means of an audio-visual link, it had to exercise particular diligence in assessing the evaluation of the witnesses' credibility by the police officers and the investigating judge. The court further emphasised that, when taking into account the testimonies given by the witnesses' neighbour E. and their friend L., it had paid special attention to the fact that their statements constituted hearsay evidence and had to be assessed particularly carefully.
42. In this context it had been of relevance that O. and P.'s testimonies as well as the statements of the additional witnesses heard at the trial had been supported by further significant and admissible evidence such as data and information obtained by tapping the applicant's and the co-accused's mobile telephones and by means of GPS. The information in question had been gathered in the context of police surveillance measures carried out

at the relevant time in the criminal investigation initiated against the accused on suspicion of racketeering and extortion on the Göttingen drug scene.

43. It transpired from the geographical data and the recordings of two mobile telephone conversations between one of the co-accused and the applicant on the evening of 3 February 2007 at 8.29 p.m. and 8.31 p.m. that the latter had been present in the victims' apartment together with B., and that he had jumped from the balcony in order to chase one of the escaping victims, whom he had failed to capture, while B. had stayed in the apartment. Furthermore, an analysis of the GPS data showed that the car of one of the co-accused had been parked near the crime scene from 7.58 p.m. to 8.32 p.m. on the evening of 3 February 2007, a period that coincided with the timeframe in which the robbery in question had occurred.

44. Furthermore, while the applicant and the co-accused had denied any participation in the robbery as such or any premeditated criminal activity, their own statements at the trial had at least confirmed that one of the co accused together with R. had visited the victims' apartment in Göttingen on the evening before the offence and that they had all been present in the car parked close to the victims' apartment at the time of the offence. The accused had initially stated that a different perpetrator and R. had been in the apartment at the time of the incident the following day. The applicant had subsequently amended his submissions and claimed that it had been he and B. who had gone into the victims' apartment on 3 February 2007 with a view to making use of the women's services as prostitutes. He had further conceded that he had followed P. when she escaped over the balcony. He explained that he had done so in order to prevent her from calling the neighbours or the police, since, in view of his criminal record, he had been afraid of getting into trouble and because of the problems he had previously encountered with prostitutes on a similar occasion in Kassel.

45. Finally, the Regional Court considered that the very similar way in which the offences had been committed against two female victims, foreign nationals working as prostitutes in an apartment, was an additional element indicating that the applicant had also participated in the offence committed in Göttingen.

46. In the Regional Court's view, the body of evidence, taken together, gave a coherent and complete overall picture of events which supported the version provided by witnesses O. and P. and refuted the contradictory versions of events put forward by the applicant and his co-accused in the course of the trial.

D. The proceedings before the Federal Court of Justice

47. On 23 June 2008 the applicant, represented by counsel, lodged an appeal on points of law against the judgment of the Göttingen Regional Court. He complained that he had not been able to examine the only direct and key witnesses to the offence committed in Göttingen at any stage of the proceedings, in breach of Article 6 §§ 1 and 3 (d) of the Convention. As the prosecution authorities, contrary to the case-law of the Federal Court of Justice (the applicant referred to a judgment dated 25 July 2000, see paragraphs 58-59 and 62 below), had not requested that defence counsel be appointed for him prior to O. and P.'s hearing before the investigating judge, their statements ought to have been excluded at the trial.

48. In written submissions dated 9 September 2008 the Federal Public Prosecutor General requested that the applicant's appeal on points of law be dismissed by the Federal Court of Justice as manifestly ill-founded in written proceedings, under Article 349 § 2 of the Code of Criminal Procedure (see paragraph 63 below). The Federal Public Prosecutor General argued that while it was true that the proceedings had been characterised by a "complete loss" of the applicant's right to examine O. and P., they had as a whole been fair and there had been no reason to exclude the witness statements of O. and P. as evidence.

49. The Federal Public Prosecutor General considered that the Regional Court had assessed the content of the records of the witnesses' testimonies read out at the trial particularly carefully and critically. Furthermore, the victims' statements had been neither the sole nor the decisive basis for the applicant's conviction by the Regional Court, as the latter had based its findings on further significant evidence. In view of the various layers of corroborating evidence the applicant had had ample opportunity to challenge the credibility of the two prosecution witnesses and to defend himself effectively.

50. Endorsing the Regional Court's reasoning, the Federal Public Prosecutor General further pointed out that there was nothing to demonstrate that the restrictions on the defence's right to examine witnesses O. and P. had been imputable to the domestic authorities. The prosecution authorities had not been obliged to appoint counsel for the applicant in order for counsel to participate in the hearing by the investigating judge. In view of the witnesses' consistent cooperation, the authorities had had no reason to expect that, despite their return to their home country, they would no longer be available for questioning at the trial, especially as they had been obliged under Latvian law to at least participate in a hearing via video link.

51. By decision of 30 October 2008 the Federal Court of Justice, referring to Article 349 § 2 of the Code of Criminal Procedure, dismissed the applicant's appeal on points of law as manifestly ill-founded.

52. In its decision of 9 December 2008 rejecting the applicant's complaint concerning a violation of his right to be heard the Federal Court of Justice pointed out that any decision dismissing an appeal on the basis of Article 349 § 2 of the Code of Criminal Procedure necessarily entailed a reference to the reasoned application by the Federal Public Prosecutor General.

E. The proceedings before the Federal Constitutional Court

53. In a constitutional complaint dated 30 December 2008 against the decisions of the Federal Court of Justice of 30 October and 9 December 2008, the applicant complained, in particular, that there had been a breach of his right to a fair trial and of his defence rights under Article 6 § 3 (d) of the Convention. He argued that neither he nor his counsel had had the opportunity to question O. and P. at any stage of the proceedings.

54. By decision of 8 October 2009 the Federal Constitutional Court, without providing reasons, declined to consider the applicant's complaint.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions and practice concerning the conduct of the investigation proceedings

55. Article 160 §§ 1 and 2 of the Code of Criminal Procedure provides that, in investigating the facts relating to a suspicion that a criminal offence has been committed, the public prosecution authorities must investigate not only the incriminating but also the exonerating circumstances and must ensure that evidence which might be lost is taken.

56. Under Article 168c § 2 of the Code of Criminal Procedure, the prosecutor, the accused and defence counsel are authorised to be present during the judicial examination of a witness prior to the opening of the main proceedings. The judge may exclude an accused from being present at the hearing if his or her presence would endanger the purpose of the investigation, in particular if there is a risk that a witness will not tell the truth in the presence of the accused. The persons entitled to be present must be given prior notice of

the dates set down for the hearings. Notification may be dispensed with if it would endanger the success of the investigation.

57. In accordance with Article 141 § 3 of the Code of Criminal Procedure, defence counsel may be appointed during the investigation proceedings. The public prosecutor's office requests such appointment if, in its opinion, the assistance of defence counsel in the main proceedings will be mandatory. The assistance of defence counsel is mandatory if, inter alia, the main hearing is held at first instance before the Regional Court or the accused is charged with a serious criminal offence.

58. In a leading judgment of 25 July 2000, the Federal Court of Justice found that Article 141 § 3 of the Code of Criminal Procedure, interpreted in the light of Article 6 § 3 (d) of the Convention, obliged the investigating authorities to consider the appointment of counsel for an unrepresented accused if the key witness for the prosecution was to testify before an investigating judge for the purpose of securing evidence and the accused was excluded from that hearing.

59. The Federal Court of Justice stressed that respect for the right to cross-examination required that the appointed counsel be given an opportunity to discuss the matter with the accused prior to the witness's examination by the investigating judge, in order to be in a position to ask the relevant questions. The court also noted that it might not be necessary to appoint a lawyer for the accused if there were justifiable reasons not to notify counsel of the hearing before the investigating judge or if the delay caused by appointing and involving a lawyer would endanger the success of the investigation. In the case before it, the Federal Court of Justice further did not have to determine whether it was necessary to appoint counsel for the accused when the purpose of the investigation might be endangered simply as a result of the lawyer discussing the matter with the accused prior to the hearing.

B. Relevant provisions and practice concerning the conduct of the trial

60. Article 250 of the Code of Criminal Procedure lays down the principle according to which, where the proof of a fact is based on a person's observation, that person must be examined at the trial. The examination must not be replaced by reading out the record of a previous examination or a written statement.

61. Article 251 of the Code of Criminal Procedure contains a number of exceptions to that principle. Under Article 251 § 1 (2), the examination of a witness may be replaced by reading out a record of another examination if the witness has died or cannot be examined by the court for another reason within a foreseeable period of time. Article 251 § 2 (1) of the Code of Criminal Procedure provides that, in the event of previous examination by a judge, the examination of a witness may be replaced by reading out the written record of his or her previous examination; this also applies if illness, infirmity or other insurmountable obstacles prevent the witness from appearing at the main hearing for a long or indefinite period.

62. In its above-mentioned judgment of 25 July 2000 (see paragraphs 58-59 above), the Federal Court of Justice found that the failure to appoint counsel for the accused as required by Article 141 § 3 of the Code of Criminal Procedure did not result in the exclusion of the evidence obtained during examination by the investigating judge, but diminished its evidentiary value. Regard had to be had to the proceedings as a whole. As a rule, a conviction could be based on the statement of a witness whom the defence had been unable to cross-examine only if the statement was corroborated by other significant factors independent of it. The trial court was further obliged to assess the evidence with particular care, also having regard to the fact that the statement made by the investigating judge at the trial constituted hearsay evidence.

C. Provision concerning appeals on points of law

63. Under Article 349 § 2 of the Code of Criminal Procedure the court deciding on the appeal on points of law may, on a reasoned application by the public prosecutor's office, dismiss a defendant's appeal on points of law without a hearing if it considers the appeal to be manifestly ill-founded. The decision must be unanimous. (…)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

67. The applicant complained that his trial had been unfair and that the principle of equality of arms had been infringed since neither he nor his lawyer had been granted an opportunity at any stage of the criminal proceedings to examine O. and P., the only direct witnesses to and victims of the offence allegedly committed by him in Göttingen in February 2007. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows: (…)

68. The Government contested that argument.

A. The Chamber judgment

(…)

B. The parties' submissions

1. The applicant

73. In the applicant's submission his right to a fair trial, including the right to examine witnesses against him under Article 6 §§ 1 and 3 (d) of the Convention, had been breached. He stressed that neither he nor his counsel had had the opportunity, at any stage of the proceedings, to examine the key witnesses O. and P.

(a) The applicable principles

74. In his observations before the Grand Chamber the applicant agreed that the principles developed by the Court in Al-Khawaja and Tahery (cited above) were applicable to his case. He stressed that, according to that case law, failure to give the defence an opportunity to cross-examine a prosecution witness would result in a breach of Article 6 § 3 (d) of the Convention save in exceptional circumstances.

(b) Whether there was a good reason for the non-attendance of witnesses O. and P. at the trial

75. In the applicant's submission there had not been a good reason for the non-attendance of witnesses O. and P. at his trial. The psychological difficulties allegedly caused by the offence in Göttingen had not prevented the witnesses from making statements to the police and the investigating judge at the investigation stage. Moreover, the Göttingen Regional Court had itself considered that there had not been sufficient reason for the

witnesses not to attend the trial. Further attempts should have been made by the domestic authorities to obtain the hearing of those witnesses at the trial, notably by means of bilateral negotiations with Latvia at political level.

(c) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

76. In the applicant's view, his conviction had been based at least to a decisive extent on the evidence given by O. and P., who had been the only eyewitnesses to the events in Göttingen. He could not have been found guilty on the basis of the other available evidence if the evidence provided by witnesses O. and P. had been disregarded.

(d) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

77. The applicant took the view that there had not been any counterbalancing factors to compensate for the difficulties caused to the defence as a result of the witnesses' absence at the trial.

78. The applicant submitted that the Regional Court had not assessed the witness statements made by O. and P. with particular caution. It had not taken into account the fact that the witnesses' failure to attend the hearing before it without an adequate excuse had affected their credibility. Moreover, the fact that there had been some additional hearsay evidence and that the applicant had had the opportunity to question the investigating judge had not constituted sufficient counterbalancing factors to secure equality of arms in the proceedings. The fact that, under German criminal procedure law, the prosecution was obliged to investigate both the incriminating and the exonerating evidence against the accused (see paragraph 55 above) did not compensate for his lack of opportunity to cross-examine the prosecution witnesses, as the prosecution authorities had not investigated the exonerating evidence in his case.

79. The applicant stressed, in particular, that he had been deprived of a procedural safeguard under domestic law aimed at protecting his defence rights, in that counsel representing him had not been allowed to be present at the hearing of witnesses O. and P. before the investigating judge. Under the applicable provisions of the Code of Criminal Procedure, as interpreted by the Federal Court of Justice, the prosecution had been obliged to appoint counsel to represent him at the stage of the investigation proceedings. This should have been done prior to the hearing of the main witnesses for the prosecution by the investigating judge, from which he had been excluded under Article 168c § 3 of the Code of Criminal Procedure. In such circumstances, defence counsel had a right to be present at the witness hearing under Article 168c § 2 of the Code of Criminal Procedure (save in the circumstances enumerated in Article 168c § 5 of the Code of Criminal Procedure, which were not present in his case). He referred to the findings in this Court's judgment in the case of Hümmer v. Germany in support of his submission.

80. The applicant stressed that, in practice, witnesses were only heard by the investigating judge in the investigation proceedings, in addition to their examination by the police, if there was a danger of evidence being lost. Records of examinations by an investigating judge could be read out and used as evidence at the trial under less strict conditions than records of interviews by the police (Article 251 §§ 1 and 2 of the Code of Criminal Procedure, see paragraph 61 above). The presence of the accused and counsel at hearings conducted by an investigating judge in accordance with Article 168c § 2 of the Code of

Criminal Procedure was thus essential in order to safeguard the accused's right under Article 6 § 3 (d) of the Convention.

81. In the applicant's submission, it had not been justified to deny him that right simply because the investigating judge had gained the mistaken impression that the witnesses had been afraid to testify in the applicant's and even his counsel's presence, without him having given cause for any such fears. In any event, this would not have justified his and counsel's exclusion from that hearing as there were various means of allaying such fears. As witnesses O. and P. were due to leave Germany shortly after their hearing by the investigating judge, it would have been possible to appoint counsel for the applicant just before the hearing and also to arrest the applicant immediately before that hearing, thus allowing him or at least his counsel to question the witnesses in person without the latter having to fear any intimidation.

82. In the applicant's view, the likelihood that witnesses O. and P., who had possibly been liable to punishment under the trade or tax laws because of their work as prostitutes, would no longer be available to testify in Germany in the proceedings against him had been foreseeable for the investigating authorities. He nevertheless stressed that he had not had any reason to request a repetition of the witnesses' hearing by the investigating judge in his presence following his arrest as he had assumed that he would be able to cross-examine the witnesses at the trial; the witnesses had in any event already left Germany at the time of his arrest.

2. The respondent Government

83. In the Government's submission, the criminal proceedings against the applicant had complied with Article 6 §§ 1 and 3 (d) of the Convention despite the fact that the applicant had not had the opportunity to cross examine witnesses O. and P. at any stage of the proceedings.

(a) The applicable principles

84. In the Government's view, there was no reason to tighten or amend the principles established by the Court in its judgment in Al-Khawaja and Tahery (cited above), which were applicable to the present case and according to which the cross-examination of witnesses could be dispensed with in certain circumstances. The Court's findings in that judgment, made in the context of a common-law system, should be transposed to continental-law systems in a flexible manner. Even if these principles were applied, the scope for exceptions to the principle of cross-examination was liable to be wider in continental-law systems such as the German legal system. The latter relied to a greater extent on professional judges experienced in evaluating the reliability of evidence, and the assessment of the evidence was made far more transparent in the reasoning of the judgments.

85. The Government added that a comparative-law study commissioned by them had shown that in none of the Contracting Parties to the Convention with a criminal-law system comparable to the German system was there an unrestricted right for the defendant to cross-examine prosecution witnesses at the hearing. Moreover, in many other legal systems it was not prohibited to have recourse to the records of previous witness examinations even if the accused had been unable to question the witness concerned at that stage.

(b) Whether there was a good reason for the non-attendance of witnesses O. and P. at the

trial

86. In the Government's view, there had been a good reason, as defined by the Court's case-law, for the non-attendance of witnesses O. and P. at the trial. The Regional Court had made all reasonable efforts to hear the witnesses, who had resided and worked legally in Germany, in person at the trial or to examine them via a video conference with the help of the Latvian courts. It had summoned the witnesses for a hearing. Following the submission of medical certificates by the witnesses, the court had again attempted to secure their presence by informing them that they would be protected and asking them to state in which circumstances they would be prepared to testify. The Regional Court had no jurisdiction to compel the witnesses, who were Latvian nationals residing in Latvia, to attend a hearing in Germany, as coercive measures were prohibited under Article 8 of the European Convention on Mutual Assistance in Criminal Matters (see paragraph 66 above).

87. The Government submitted that the Regional Court had then asked the Latvian authorities, by way of legal assistance in accordance with the applicable rules, to have the witnesses summoned by a court in Latvia so that they could be examined via a video conference. However, the Latvian court had cancelled the hearing following a preliminary discussion with the witnesses, who had again submitted medical certificates. The Regional Court's request to the Latvian court asking the latter to verify the grounds given by the witnesses for their refusal to testify, or to explore further ways of questioning them, had remained unanswered. There was nothing to indicate that the hearing of the witnesses could have been brought about by different means such as bilateral negotiations on a political level, mentioned for the first time by the applicant in the proceedings before the Court.

(c) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

88. The Government submitted that in the Regional Court's view, which was decisive in that respect, the witness statements made by O. and P. had been "relevant" ("maßgeblich") in grounding the applicant's conviction. However, there had also been a number of other weighty items of evidence, including the results of police surveillance measures and the applicant's own submissions, which had allowed the veracity of the witness statements to be tested. The question whether the witness evidence at issue, in the light of these elements, amounted to "decisive evidence" for the purposes of the Court's case-law could be left open because, in any event, sufficient counterbalancing factors had been both necessary and present in the applicant's case to compensate for the defence's lack of opportunity to question the witnesses.

(d) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

89. In the Government's submission, the impossibility for the applicant to question witnesses O. and P. had been sufficiently compensated for by the Regional Court, which had made a comprehensive and critical assessment of the credibility of the witness statements. The Regional Court had assessed with particular caution the evidence given by the two witnesses for the prosecution, inter alia by comparing the statements made by them during their different examinations.

90. The Government argued that in German criminal proceedings, both the court and the prosecution were obliged by law to investigate both the incriminating and the exonerating

evidence against the accused. This partly compensated for an accused's lack of opportunity to cross-examine a prosecution witness.

91. In testing the veracity of the witness statements, the Regional Court had also had recourse to a large number of corroborating evidentiary elements, including both hearsay witness evidence and reliable physical evidence obtained by means of surveillance of the applicant. The surveillance measures had included, in particular, analysis of the geographical data from the applicant's mobile phone and the recording of his telephone conversation with one of his co-accused at the time of the offence, in which he had described one of the witnesses jumping down from a balcony and hiding from the applicant, who had pursued her.

92. Moreover, the applicant had had the opportunity to cross-examine and challenge the credibility of almost all the persons who had questioned O. and P. at the investigation stage; the Regional Court had also heard evidence from those persons concerning the witnesses' conduct and emotional state during questioning.

93. As to the fact that neither the applicant nor his counsel had been given an opportunity to question witnesses O. and P. at the investigation stage, the Government argued that the investigating judge had excluded the applicant from the hearing in accordance with Article 168c § 3 of the Code of Criminal Procedure in order to ensure the witnesses' protection and the establishment of the truth. The witnesses, who had been very frightened of the perpetrators, would not have made complete and truthful statements about the offence in the presence of the applicant. They had had legitimate grounds for their fear of revenge, given that the applicant had been suspected of committing a similar robbery in Kassel.

94. Moreover, as the witnesses would have had reason to fear that any defence counsel appointed to represent the applicant would inform the latter of the hearing and of their statements made therein, they would not have made any, or accurate, statements in counsel's presence either. The Government explained that under Article 168c § 5 of the Code of Criminal Procedure the trial court was authorised to dispense with notifying any lawyer appointed for the applicant of the hearing if it considered that notification would endanger the success of the investigation. Therefore, in accordance with the case-law of the Federal Court of Justice (they also referred to that court's judgment of 25 July 2000, see paragraphs 58-59 and 62 above), the appointment of defence counsel and the latter's presence at the hearing before the investigating judge were not required.

95. The Government noted that following his arrest the applicant had not requested a repetition of the witnesses' examination in his presence in the investigation proceedings. They stressed that it had not been foreseeable that O. and P. would not attend the trial since the applicant and his accomplices, who were in detention at that stage, would then have posed less of a threat to them. In any event, the applicant had never lodged any applications stating which questions he would have liked to put to the witnesses, whose identity and whereabouts had been known to him, or on what grounds he might have wished to challenge their credibility.

(…)

C. The Grand Chamber's assessment

1. Recapitulation of the relevant principles

(a) The general principles

100. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision (see Al-Khawaja and

Tahery, cited above, § 118); it will therefore consider the applicant's complaint under both provisions taken together.

101. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, to the rights of witnesses (see Al-Khawaja and Tahery, cited above).

102. The principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him were admitted as evidence have been summarised and refined in the judgment of the Grand Chamber of 15 December 2011 in Al-Khawaja and Tahery.

103. The Court reiterated in that judgment that Article 6 § 3 (d) enshrined the principle that, before an accused could be convicted, all evidence against him normally had to be produced in his presence at a public hearing with a view to adversarial argument (see Al-Khawaja and Tahery, cited above).

104. The Court must stress, in that context, the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. Even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.

105. However, the use as evidence of statements obtained at the stage of a police inquiry and judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness is making his statements or at a later stage of the proceedings.

106. In its judgment in Al-Khawaja and Tahery the Court concluded that the admission as evidence of the statement of a witness who had been absent from the trial and whose pre-trial statement was the sole or decisive evidence against the defendant did not automatically result in a breach of Article 6 § 1. It reasoned that applying the so-called "sole or decisive rule" (under which a trial was unfair if a conviction was based solely or to a decisive extent on evidence provided by a witness whom the accused had been unable to question at any stage of the proceedings; ibid., §§ 128 and 147) in an inflexible manner would run counter to the traditional way in which the Court approached the right to a fair hearing under Article 6 § 1, namely to examine whether the proceedings as a whole had been fair. However, the admission of such evidence, because of the inherent risks for the fairness of the trial, constituted a very important factor to balance in the scales.

107. According to the principles developed in the Al-Khawaja and Tahery judgment, it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence (ibid., § 152). The Court must examine

(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence (ibid., §§ 119-25);

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (ibid., §§ 119 and 126-47); and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (ibid., § 147).

108. As regards the applicability of the above principles in the context of the diverse legal systems in the Contracting States, and in particular in the context of both common-law and continental-law systems, the Court reiterates that, while it is important for it to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Article 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates (see Al-Khawaja and Tahery, cited above, § 130).

109. Furthermore, in cases arising from individual applications the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it. When examining cases, the Court is of course mindful of the differences between the legal systems of the Contracting Parties to the Convention when it comes to matters such as the admission of evidence of an absent witness and the corresponding need for safeguards to ensure the fairness of the proceedings. It will have due regard in the instant case to such differences when examining, in particular, whether there were sufficient counterbalancing factors to compensate for the handicaps caused to the defence as a result of the admission of the untested witness evidence (compare Al-Khawaja and Tahery).

(b) The relationship between the three steps of the Al-Khawaja test

110. The Court considers that the application of the principles developed in Al-Khawaja and Tahery in its subsequent case-law discloses a need to clarify the relationship between the above-mentioned three steps of the Al Khawaja test when it comes to the examination of the compliance with the Convention of a trial in which untested incriminating witness evidence was admitted. It is clear that each of the three steps of the test must be examined if – as in the Al-Khawaja and Tahery judgment – the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction) are answered in the affirmative (see Al-Khawaja and Tahery). The Court is, however, called upon to clarify whether all three steps of the test must likewise be examined in cases in which either the question in step one or that in step two is answered in the negative, as well as the order in which the steps are to be examined.

(i) Whether the lack of a good reason for a witness's non-attendance entails, by itself, a breach of Article 6 §§ 1 and 3 (d)

111. As to the question whether the lack of a good reason for a witness's non-attendance (first step of the Al-Khawaja test) entails, by itself, a breach of Article 6 §§ 1 and 3 (d) of the Convention, without it being necessary to examine the second and third steps of the Al-Khawaja test, the Court observes the following. In its judgment in Al-Khawaja and Tahery, it considered that the requirement that there be a good reason for admitting the evidence of an absent witness was a "preliminary question" which had to be examined before any consideration was given as to whether that evidence was sole or decisive (ibid., § 120). It further noted that it had found violations of Article 6 §§ 1 and 3 (d) even in cases in which the evidence of an absent witness had been neither sole nor decisive, when no good reason

had been shown for the failure to have the witness examined (ibid., with further references).

112. The Court observes that the requirement to provide a justification for not calling a witness has been developed in its case-law in connection with the question whether the defendant's conviction was solely or to a decisive extent based on evidence provided by an absent witness (see Al Khawaja and Tahery, cited above, § 128). It further reiterates that the rationale underlying its judgment in Al-Khawaja and Tahery, in which it departed from the so-called "sole or decisive rule", was to abandon an indiscriminate rule and to have regard, in the traditional way, to the fairness of the proceedings as a whole (ibid., §§ 146-47). However, it would amount to the creation of a new indiscriminate rule if a trial were considered to be unfair for lack of a good reason for a witness's non-attendance alone, even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case.

113. The Court notes that in a number of cases following the delivery of the Al-Khawaja judgment it took an overall approach to the examination of the fairness of the trial, having regard to all three steps of the Al-Khawaja test. However, in other cases, the lack of a good reason for a prosecution witness's absence alone was considered sufficient to find a breach of Article 6 §§ 1 and 3 (d). In yet other cases a differentiated approach was taken: the lack of good reason for a prosecution witness's absence was considered conclusive of the unfairness of the trial unless the witness testimony was manifestly irrelevant for the outcome of the case, considers that the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial. This being said, the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d).

(ii) Whether sufficient counterbalancing factors are still necessary if the untested witness evidence was neither sole nor decisive

114. In its judgment in Al-Khawaja and Tahery the Court addressed the requirement of the existence of sufficient counterbalancing factors to secure a fair and proper assessment of the reliability of the evidence in the context of cases in which convictions were based solely or to a decisive extent on the evidence of absent witnesses (ibid., § 147).

115. As regards the question whether it is necessary to review the existence of sufficient counterbalancing factors even in cases in which the importance of an absent witness's evidence did not attain the threshold of sole or decisive evidence grounding the applicant's conviction, the Court reiterates that it has generally considered it necessary to carry out an examination of the overall fairness of the proceedings. This has traditionally included an examination of both the significance of the untested evidence for the case against the accused and of the counterbalancing measures taken by the judicial authorities to compensate for the handicaps under which the defence laboured.

116. Given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or the decisive basis for the applicant's conviction. It must also do so in those cases where, following its assessment of the domestic courts' evaluation of the weight of the evidence (described in more detail in paragraph 124 below), it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the

counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.

(iii) As to the order of the three steps of the Al-Khawaja test

117. The Court observes that in Al-Khawaja and Tahery, the requirement that there be a good reason for the non-attendance of the witness (first step), and for the consequent admission of the evidence of the absent witness, was considered as a preliminary question which had to be examined before any consideration was given as to whether that evidence was sole or decisive (second step). "Preliminary", in that context, may be understood in a temporal sense: the trial court must first decide whether there is good reason for the absence of the witness and whether, as a consequence, the evidence of the absent witness may be admitted. Only once that witness evidence is admitted can the trial court assess, at the close of the trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness and, in particular, whether the evidence of the absent witness is the sole or decisive basis for convicting the defendant. It will then depend on the weight of the evidence given by the absent witness how much weight the counterbalancing factors (third step) will have to carry in order to ensure the overall fairness of the trial.

118. Against that background, it will, as a rule, be pertinent to examine the three steps of the Al-Khawaja-test in the order defined in that judgment (see paragraph 107 above). However, all three steps of the test are interrelated and, taken together, serve to establish whether the criminal proceedings at issue have, as a whole, been fair. It may therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings.

(c) Principles relating to each of the three steps of the Al-Khawaja test

(i) Whether there was a good reason for the non-attendance of a witness at the trial

119. Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence. There are a number of reasons why a witness may not attend trial, such as absence owing to death or fear, absence on health grounds or the witness's unreachability.

120. In cases concerning a witness's absence owing to unreachability, the Court requires the trial court to have made all reasonable efforts to secure the witness's attendance. The fact that the domestic courts were unable to locate the witness concerned or the fact that a witness was absent from the country in which the proceedings were conducted was found not to be sufficient in itself to satisfy the requirements of Article 6 § 3 (d), which require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States have to exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner. Otherwise, the witness's absence is imputable to the domestic authorities.

121. It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a

witness whom they finally considered to be unreachable. However, it is clear that they must have actively searched for the witness with the help of the domestic authorities including the police and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available.

122. The need for all reasonable efforts on the part of the authorities to secure the witness's attendance at the trial further implies careful scrutiny by the domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness.

(ii) Whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction

123. As regards the question whether the evidence of the absent witness whose statements were admitted in evidence was the sole or decisive basis for the defendant's conviction (second step of the Al-Khawaja test), the Court reiterates that "sole" evidence is to be understood as the only evidence against the accused (see Al-Khawaja and Tahery). "Decisive" evidence should be narrowly interpreted as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (ibid., § 131).

124. As it is not for the Court to act as a court of fourth instance, its starting point for deciding whether an applicant's conviction was based solely or to a decisive extent on the depositions of an absent witness is the judgments of the domestic courts. The Court must review the domestic courts' evaluation in the light of the meaning it has given to "sole" and "decisive" evidence and ascertain for itself whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear.

(iii) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

125. As to the question whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of untested witness evidence at the trial (third step of the Al-Khawaja test), the Court reiterates that these counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence (see Al-Khawaja and Tahery, cited above, § 147).

126. The fact that the domestic courts approached the untested evidence of an absent witness with caution has been considered by the Court to be an important safeguard. The courts must have shown that they were aware that the statements of the absent witness carried less weight (compare, for instance, Al-Khawaja and Tahery, cited above, § 157, and Bobeș, cited above, § 46). The Court has taken into account, in that context, whether the domestic courts provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available. It likewise has regard to any directions given to a jury by the trial judge as to the approach to be taken to absent witnesses' evidence.

127. An additional safeguard in that context may be to show, at the trial hearing, a video recording of the absent witness's questioning at the investigation stage in order to allow

the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability.

128. A further considerable safeguard is the availability at the trial of corroborative evidence supporting the untested witness. Such evidence may comprise, inter alia, statements made at the trial by persons to whom the absent witness reported the events immediately after their occurrence. The Court has further considered as an important factor supporting an absent witness's statement the fact that there were strong similarities between the absent witness's description of the alleged offence committed against him or her and the description, given by another witness with whom there was no evidence of collusion, of a comparable offence committed by the same defendant. This holds even more true if the latter witness gave evidence at the trial and that witness's reliability was tested by cross-examination (compare Al-Khawaja and Tahery).

129. Moreover, in cases in which a witness is absent and cannot be questioned at the trial, a significant safeguard is the possibility offered to the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial.

130. Another important safeguard countering the handicaps under which the defence labours as a result of the admission of untested witness evidence at the trial is to have given the applicant or defence counsel an opportunity to question the witness during the investigation stage. The Court has found in that context that where the investigating authorities had already taken the view at the investigation stage that a witness would not be heard at the trial, it was essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation. Such pre-trial hearings are indeed often set up in order to pre-empt any risk that a crucial witness might not be available to give testimony at the trial.

131. The defendant must further be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses. Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.

2. Application of these principles to the present case

(a) Whether there was a good reason for the non-attendance of witnesses O. and P. at the trial

132. In the present case the Court shall examine, first, whether there was a good reason for the non-attendance of prosecution witnesses O. and P. at the trial from the trial court's perspective and, as a result, a good reason or justification for that court to admit the untested statements of the absent witnesses as evidence (see paragraph 119 above).

133. In determining whether the Regional Court had good factual or legal grounds for not securing the witnesses' attendance at the trial, the Court would note at the outset that, as rightly stressed by the applicant, the Regional Court did not accept the witnesses' state of health or fear on their part as justification for their absence at the trial.

134. This is demonstrated by the fact that the Regional Court, by letter of 29 August 2007, asked the witnesses residing in Latvia to appear at the hearing although they had previously refused to comply with the court's summons, relying on medical certificates indicating that they were in an unstable post-traumatic emotional and psychological state (see paragraphs 23-24 above). In addition, following the cancellation of the hearing by the Latvian court, before which the witnesses had again relied on medical certificates indicating that they were still suffering from post-traumatic disorder, the Regional Court

indicated to the Latvian court that, according to the standards of German criminal procedure law, the witnesses had not sufficiently substantiated their refusal to testify. The Regional Court therefore suggested to the Latvian court that it have the witnesses' state of health and ability to testify examined by a public medical officer or, alternatively, that it compel them to attend the hearing in Latvia. The Latvian court did not respond to these suggestions (see paragraphs 26 27 above).

135. It was only after these efforts to hear the witnesses in person proved futile that the Regional Court found that there were insurmountable obstacles to its hearing the witnesses in the near future. The Regional Court, relying on Article 251 §§ 1 (2) and 2 (1) of the Code of Criminal Procedure, therefore admitted the records of the witnesses' examination at the investigation stage as evidence in the proceedings (see paragraph 28 above). The reason for this measure by the Regional Court was therefore the witnesses' unreachability for the trial court, which lacked power to compel them to appear (that is, a procedural or legal ground), and not their state of health or fear on their part (a substantive or factual ground).

136. As required in cases concerning the absence of prosecution witnesses owing to unreachability, the Court must examine whether the trial court made all reasonable efforts to secure the witnesses' attendance (see paragraph 120 above). It notes in this regard that the Regional Court took considerable positive steps to enable the defence, the court itself and the prosecution to examine witnesses O. and P.

137. The Regional Court, having critically reviewed the reasons given by each witness for refusing to testify at the trial in Germany, as set out in medical certificates submitted by them, and having, as shown above, considered these reasons insufficient to justify their non-attendance, contacted the witnesses individually, offering them different options in order to testify at the trial, which the witnesses declined.

138. The Regional Court then had recourse to international legal assistance and requested that the witnesses be summoned to appear before a Latvian court in order for the presiding judge of the Regional Court to examine them via a video link and to enable the defence to cross-examine them. However, the hearing was cancelled by the Latvian court, which accepted the witnesses' refusal to testify on the basis of the medical certificates they had submitted. The Regional Court, having again critically reviewed the reasons given for the witnesses' inability to attend the trial, as mentioned above, then even suggested to the Latvian court that it have the witnesses' state of health examined by a public medical officer or that it compel the witnesses to attend the hearing, a suggestion which received no response (see, in detail, paragraphs 23-27 above).

139. In view of these elements the Grand Chamber, sharing the Chamber's conclusion in this regard, finds that the Regional Court made all reasonable efforts within the existing legal framework (see paragraphs 64 66) to secure the attendance of witnesses O. and P. It did not have any other reasonable means within its jurisdiction, on the territory of Germany, to secure the attendance at the trial of O. and P., Latvian nationals residing in their home country. The Court considers, in particular, that there is nothing to indicate that the trial court would have been likely to obtain a hearing of the witnesses, within a reasonable time, following bilateral negotiations with the Republic of Latvia at political level, as proposed by the applicant. In line with the principle impossibilium nulla est obligatio, the witnesses' absence was thus not imputable to the domestic court.

140. Accordingly, there was a good reason, from the trial court's perspective, for the non-attendance of witnesses O. and P. at the trial and, as a result, for admitting the statements they had made to the police and the investigating judge at the pre-trial stage as evidence.

(b) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

141. In determining the weight of the evidence given by the absent witnesses and, in particular, whether the evidence given by them was the sole or decisive basis for the applicant's conviction, the Court has regard, in the first place, to the domestic courts' assessment. It observes that the Regional Court considered O. and P. to have been key witnesses for the prosecution, but relied on further available evidence (see paragraphs 32 and 36 above). The Federal Court of Justice, for its part, in dismissing the applicant's appeal on points of law, made a general reference to the reasoning provided by the Federal Public Prosecutor General before that court. The latter had argued that the said witness statements had been neither the sole nor the decisive basis for the applicant's conviction as the Regional Court had based its findings on further significant evidence (see paragraph 49 above).

142. The Court finds that the domestic courts, which did not consider O. and P.'s witness statements as the sole (that is to say, only) evidence against the applicant, did not clearly indicate whether they considered the witness statements in question as "decisive" evidence as defined by the Court in its judgment in Al-Khawaja and Tahery (which itself was delivered after the domestic courts' decisions in the present case), that is, as being of such significance as to be likely to be determinative of the outcome of the case (see paragraph 123 above). The Regional Court's classification of the witnesses as "maßgeblich" (which, in addition to "key", may also be translated as "important", "significant" or "decisive"), is not unambiguous in this regard. Moreover, the Federal Court of Justice's general reference to the reasoning given by the Federal Public Prosecutor General denying that the victims' statements were the sole or decisive basis for the applicant's conviction (see paragraph 49 above) cannot be understood as signifying that that court endorsed each and every argument made by the prosecutor.

143. In making its own assessment of the weight of the witness evidence in the light of the domestic courts' findings, the Court must have regard to the strength of the additional incriminating evidence available (see paragraph 123 above). It observes that the Regional Court had before it, in particular, the following further evidence concerning the offence: the hearsay statements made by the witnesses' neighbour E. and their friend L. at the trial concerning the account O. and P. had given them of the events of 3 February 2007; the applicant's own admission in the course of the trial that he had been in O. and P.'s apartment at the relevant time, and had jumped from the balcony to follow P.; the geographical data and recordings of two mobile telephone conversations between one of the co-accused and the applicant at the time of the offence, which revealed that the applicant had been present in an apartment at the scene of the crime and had jumped from the balcony to chase one of the escaping inhabitants; the GPS data revealing that the car of one of the co-accused had been parked near the witnesses' apartment at the relevant time; and, finally, the evidence relating to the offence committed in Kassel on 14 October 2006 by the applicant and an accomplice.

144. The Court, having regard to these elements of evidence, cannot but note that O. and P. were the only eyewitnesses to the offence in question. The other evidence available to the courts was either just hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion as such. In view of these elements, the Court considers that the evidence of the absent witnesses was "decisive", that is, determinative of the applicant's conviction.

(c) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

145. The Court must further determine, in a third step, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the decisive evidence of the absent witnesses. As shown above (see paragraphs 125-131), the following elements are relevant in this context: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial.

(i) The trial court's approach to the untested evidence

146. As regards the domestic courts' treatment of the evidence of the absent witnesses O. and P., the Court observes that the Regional Court approached that evidence with caution. It expressly noted in its judgment that it had been obliged to exercise particular diligence in assessing the witnesses' credibility, as neither the defence nor the court had been able to question and observe the demeanour of the witnesses at the trial.

147. The Court observes in that context that the Regional Court was unable to watch, at the trial, a video recording of the witness hearing before the investigating judge, no such recording having been made. It notes that trial courts in different legal systems have recourse to that possibility (compare the examples in paragraph 127 above) which allows them, as well as the defence and the prosecution, to observe a witness's demeanour under questioning and to form a clearer impression of the witness's credibility.

148. The Regional Court, in its thoroughly reasoned judgment, made it clear that it was aware of the reduced evidentiary value of the untested witness statements. It compared the content of the repeated statements made by both O. and P. at the investigation stage and found that the witnesses had given detailed and coherent descriptions of the circumstances of the offence. The trial court considered that minor contradictions in the witnesses' statements could be explained by their concern not to disclose their professional activities to the authorities. It further observed that the witnesses' inability to identify the applicant showed that they had not testified with a view to incriminating him.

149. The Court further observes that the Regional Court, in assessing the witnesses' credibility, also addressed different aspects of their conduct in relation to their statements. It took into account the fact that the witnesses had not reported the offence to the police immediately and that they had failed to attend the trial without an adequate excuse. It considered that there were explanations for that conduct – namely the witnesses' fear of encountering problems with the police or of acts of revenge by the perpetrators, and their unease about having to recall and be questioned about the offence – which did not affect their credibility.

150. In view of the foregoing, the Court considers that the Regional Court examined the credibility of the absent witnesses and the reliability of their statements in a careful manner. It notes in that context that its task of reviewing the trial court's approach to the untested evidence is facilitated by the fact that the Regional Court, as is usual in a continental-law system, gave reasons for its assessment of the evidence before it.

(ii) Availability and strength of further incriminating evidence

151. The Court further observes that the Regional Court, as shown above (see paragraphs 143-44), had before it some additional incriminating hearsay and circumstantial evidence supporting the witness statements made by O. and P.

(iii) Procedural measures aimed at compensating for the lack of opportunity to directly cross-examine the witnesses at the trial

152. The Court observes that the applicant had the opportunity to give his own version of the events on 3 February 2007 – an opportunity of which he availed himself – and to cast doubt on the credibility of the witnesses, whose identity had been known to him, also by cross-examining the other witnesses giving hearsay evidence at his trial.

153. The Court notes, however, that the applicant did not have the possibility to put questions to witnesses O. and P. indirectly, for instance in writing. Moreover, neither the applicant himself nor his lawyer was given the opportunity at the investigation stage to question those witnesses.

154. The Court observes in that context that the parties disagreed as to whether or not the refusal to appoint defence counsel for the applicant and to permit counsel to take part in the witnesses' hearing before the investigating judge had complied with domestic law. The Court considers that it is not necessary for the purposes of the present proceedings for it to take a final stance on that question. It reiterates that in examining compliance with Article 6 of the Convention, it is not its function to determine whether the domestic courts acted in accordance with domestic law, but to evaluate the overall fairness of the trial in the particular circumstances of the case, including the way in which the evidence was obtained (compare paragraph 101 above).

155. The Court considers that in the present case it is sufficient for it to note that, under the provisions of German law, the prosecution authorities could have appointed a lawyer for the applicant. That lawyer would have had a right to be present at the witness hearing before the investigating judge and, as a rule, would have had to be notified. However, these procedural safeguards, which existed in the Code of Criminal Procedure and were reinforced by their interpretation by the Federal Court of Justice (see paragraphs 58-59 above), were not used in the applicant's case.

156. The Court would stress that, while Article 6 § 3 (d) of the Convention concerns the cross-examination of prosecution witnesses at the trial itself, the way in which the prosecution witnesses' questioning at the investigation stage was conducted attains considerable importance for, and is likely to prejudice, the fairness of the trial itself where key witnesses cannot be heard by the trial court and the evidence as obtained at the investigation stage is therefore introduced directly into the trial (compare paragraph 104 above).

157. In such circumstances, it is vital for the determination of the fairness of the trial as a whole to ascertain whether the authorities, at the time of the witness hearing at the investigation stage, proceeded on the assumption that the witness would not be heard at the trial. Where the investigating authorities took the reasonable view that the witness concerned would not be examined at the hearing of the trial court, it is essential for the defence to have been given an opportunity to put questions to the witness at the investigation stage.

158. The Court notes in this regard that the applicant challenged the Regional Court's finding that the witnesses' absence at the trial had not been foreseeable. It agrees with the applicant that the witnesses were heard by the investigating judge because, in view of the witnesses' imminent return to Latvia, the prosecution authorities considered that there was a danger of their evidence being lost. This is shown by the reasoning of the prosecution's own request to the investigating judge to hear O. and P. speedily in order to

obtain a true statement which could be used at the subsequent trial (see paragraph 20 above). The Court observes in that context that under Article 251 § 1 of the Code of Criminal Procedure, the written records of a witness's previous examination by an investigating judge may be read out at the trial under less strict conditions than the records of a witness examination by the police.

159. The Court observes that in the present case the authorities were aware that witnesses O. and P. had not pressed charges against the perpetrators immediately for fear of problems with the police and acts of revenge by the perpetrators, that they had been staying in Germany only temporarily while their families remained in Latvia and that they had explained that they wished to return to their home country as soon as possible. In these circumstances, the prosecution authorities' assessment that it might not be possible to hear evidence from those witnesses at a subsequent trial against the applicant in Germany indeed appears convincing.

160. Despite this, the prosecution authorities did not give the applicant an opportunity – which he could have been given under the provisions of domestic law – to have witnesses O. and P. questioned at the investigation stage by a lawyer appointed to represent him. By proceeding in that manner, they took the foreseeable risk, which subsequently materialised, that neither the accused nor his counsel would be able to question O. and P. at any stage of the proceedings.

(iv) Assessment of the trial's overall fairness

161. In assessing the overall fairness of the trial the Court will have regard to the available counterbalancing factors, viewed in their entirety in the light of its finding to the effect that the evidence given by O. and P. was "decisive" for the applicant's conviction (see paragraph 144 above).

162. The Court observes that the trial court had before it some additional incriminating evidence regarding the offence of which the applicant was found guilty. However, the Court notes that hardly any procedural measures were taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial. In the Court's view, affording the defendant the opportunity to have a key prosecution witness questioned at least during the pre-trial stage and via his counsel constitutes an important procedural safeguard securing the accused's defence rights, the absence of which weighs heavily in the balance in the examination of the overall fairness of the proceedings under Article 6 §§ 1 and 3 (d).

163. It is true that the trial court assessed the credibility of the absent witnesses and the reliability of their statements in a careful manner, thus attempting to compensate for the lack of cross-examination of the witnesses, and that the applicant had the opportunity to give his own version of the events in Göttingen. However, in view of the importance of the statements of the only eyewitnesses to the offence of which he was convicted, the counterbalancing measures taken were insufficient to permit a fair and proper assessment of the reliability of the untested evidence.

164. The Court considers that, in these circumstances, the absence of an opportunity for the applicant to examine or have examined witnesses O. and P. at any stage of the proceedings rendered the trial as a whole unfair.

165. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention. (…)

CASE OF VENDITTELLI v. ITALY

Application no. 14804/89, COURT (CHAMBER) 18 July 1994

AS TO THE FACTS

8. Mr Manlio Vendittelli, an architect, lives in Rome.
9. On 19 May 1986 the Rome municipal police (vigili urbani) sealed his flat, on the ground that he had infringed the town-planning regulations.
10. On 20 May 1986 the Rome magistrate (pretore) confirmed the sequestration (sequestro) and criminal proceedings were instituted against the applicant. Mr Vendittelli lodged three applications for release of his property from sequestration on 30 May 1986 and 5 and 26 June 1987 but they were dismissed on 12 June 1986 and 9 July 1987 for reasons of prevention and of preservation of evidence (per fini preventivi e cautelari).
11. On 25 July 1987 the applicant sought an early hearing, pointing to the damage caused him by his being unable to enjoy the benefit of his property. The trial was initially set down for 17 November 1987 but was postponed to 15 December 1987.
    In a judgment delivered the same day, which was filed in the registry on 30 December 1987 and notified on 1 December 1988, the magistrate imposed on Mr Vendittelli, who was present when the judgment was delivered, a suspended sentence of twenty days' imprisonment and a fine of ten million lire, without any entry in the criminal records, for having carried out works in his flat without a permit from the mayor (concessione edilizia).
12. The applicant appealed against this decision within three days of its delivery and filed his pleadings on 10 December 1988; the twenty-day period allowed for filing grounds of appeal began to run on the day of service of the judgment. The hearing in the Rome Court of Appeal began on 2 May 1989. It was adjourned on 8 January and 27 March 1990 - on the first occasion at the request of Mr Vendittelli, whose doctor had ordered him to rest for five days, and on the second occasion because his counsel was unable to attend. In the meantime, on 13 January 1990, the lawyer had already applied for the trial to be resumed.
13. In a judgment of 4 July 1990, which was filed in the registry on the same day and became final and therefore enforceable on 30 October 1990, the Court of Appeal held that the offence had been amnestied and the prosecution barred as a result of a presidential decree that had been issued on 12 April 1990. It did not, however, order that the property should be released from sequestration, nor was the judgment notified to the applicant, who had to obtain a copy from the registry on 5 December 1990. In the meantime, by a letter of 19 July 1990, Mr Vendittelli had applied for a hearing to be fixed.
14. On 19 November 1990 the file was sent to the magistrate for placing in the archives. In a letter of 10 December 1990 to the President of the Rome Court of Appeal, which was sent on 17 December to the magistrate's court (pretura), the applicant again sought to have his property released from sequestration. He complained of the bad state of his flat.
15. On 17 December the registrar of the magistrate's court sent the file to the magistrate for execution of the judgment, that is to say release from sequestration. On 31 January 1991 the magistrate held that he had no jurisdiction and ordered that the file should be returned to the Court of Appeal.
16. It arrived the next day. The central registry of the Court of Appeal recorded the point raised regarding execution (incidente di esecuzione) and on 11 February 1991 sent the file to the registry of the Second Criminal Division. On 10 April and 9 May 1991 Mr Vendittelli again sought to have his property released from sequestration.
17. In an order of 17 May 1991, which was filed on 21 May, sent to Rome Town Hall on 23 May "for execution of what was ordered in it" and served on the applicant on 3 June, the Rome Court of Appeal allowed Mr Vendittelli's application and also noted that the mayor had issued a permit in the meantime. (…)

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

20. The applicant submitted that the length of the criminal proceedings against him had been contrary to Article 6 para. 1 (art. 6-1) of the Convention, which provides:
"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."
The Government rejected this complaint but the Commission accepted it.

21. The period to be taken into consideration began on 20 May 1986 with the decision by the Rome magistrate, who upheld the placing of seals on Mr Vendittelli's flat (see paragraph 10 above). It ended on 30 October 1990, when the Rome Court of Appeal's decision became final (see paragraph 13 above and, as the most recent authority and mutatis mutandis, the Raimondo v. Italy judgment of 22 February 1994, Series A no. 281-A, p. 20, para. 42). It therefore covers four years, five months and ten days.

22. The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.

23. The Government stated that the length of the proceedings in the two courts concerned could not be regarded as excessive. They blamed the applicant for having at first instance sought to have his property released from sequestration rather than to have his case dealt with more quickly (see paragraph 10 above) and for having on appeal twice sought adjournments (see paragraph 12 above).

24. In Mr Vendittelli's submission, there had been legitimate reasons for adjourning the hearings on appeal (see paragraph 12 above) and the proceedings had been delayed for only a few days. The judicial authorities had waited eleven months and fifteen days before notifying the decision of the magistrate's court (see paragraph 11 above) and did not serve the Court of Appeal's decision of 4 July 1990 at all (see paragraph 13 above).

25. The Court reiterates that only delays attributable to the State may justify a finding that a "reasonable time" has been exceeded (see, among other authorities, the Monnet v. France judgment of 27 October 1993, Series A no. 273-A, p. 12, para. 30).

26. Like the Commission, it notes, firstly, that the case was not particularly complex.

27. It considers, furthermore, that Mr Vendittelli bears some responsibility for the prolongation of the proceedings in the Court of Appeal as, although legitimate, the two adjournments he sought (see paragraph 12 above) caused a delay of about six months, which, in proceedings lasting fourteen months in all, was a fairly substantial one; moreover, they enabled the applicant to take advantage of the amnesty.

28. As to the conduct of the authorities, the Court notes that it took eleven months and fifteen days for the magistrate's court to notify its decision of 15 December 1987. Nevertheless, seeing that Mr Vendittelli had been present when it was delivered, he could reasonably have been expected to obtain a copy of the judgment himself it was sent to the registry on 30 December 1987 (see paragraph 11 above) and draw up his grounds of appeal from that moment.
The Court of Appeal's judgment which was filed on the same day that it was delivered (see paragraph 13 above) and not five months later, as the Commission indicated was admittedly never served. However, that failure had no effect on the length of the proceedings since the matter was one of taking formal note of an amnesty.

29. Having regard to all the circumstances of the case, to the applicant's conduct, to the fact that two courts dealt with the case, and to the outcome, the Court does not consider the overall length of the trial to have been excessive. There has accordingly been no breach of Article 6 para. 1 (art. 6-1).