III: DYNAMIC OR EVOLUTIVE INTERPRETATION

It follows from the emphasis placed upon the 'object and purpose' of the Convention that it must be given a dynamic or evolutive interpretation. Thus, in *Tyrer v UK*, the Court stated that the Convention is 'a living instrument which...must be interpreted in the light of present-day conditions'. Accordingly, the Court could not 'but be influenced by the developments...accepted standards in the penal policy of the member states of the Council of Europe' when considering whether judicial corporal punishment was consistent with Article 3. What was determinative, the Court stated, were the standards currently accepted in European society, not those prevalent when the Convention was adopted. In terms of the intentions of the drafting states, the emphasis is therefore upon their general rather than their particular intentions in 1950. Other decisions that follow the *Tyrer* approach have reflected changes in the policy of the law in European states resulting from changed social attitudes towards, for example, children born out of wedlock and homosexuals and from other policy developments. However, the Convention may not be interpreted in response to 'present-day conditions' so as to introduce into it a right that it was not intended to include when the Convention was drafted. For this reason, Article 12, which guarantees the right to marry, could not be interpreted as including a right to divorce, even though such a right is now generally recognized in Europe. In this way, a line is sought to be drawn between judicial interpretation, which is permissible, and judicial legislation, which is not. Mahoney has suggested that, with this distinction in mind, the Court tends to emphasize incremental, rather than sudden, change. The closed shop cases are good examples of this gradualist approach. However, as in national law, the line between judicial interpretation and legislation can be a difficult one to draw, particularly in the case of generally worded provisions. Decisions can be seen either as instances of judicial creativity that move the Convention into distinct areas beyond its intended domain or as the elaboration of rights that are already protected. For example, the Court's finding of positive obligations for states throughout the Convention and, more particularly, its application of Article 3 to cases of removal of individuals from a state's territory and of Article 8 to environmental matters can

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54 cf Mahoney, 11 HRIJ 57 at 70 (1990). See also Nicol, 2000 PL 152.
55 Marckx v Belgium A 31 (1979), 2 EHRR 330 PC.
57 See eg Soreng v UK A 161 (1989), 11 EHRR 439 PC; *Dudgeon v UK* A 45 (1981), 4 EHRR 149 PC; *Siegertsson v Iceland* A 264 (1993); 16 EHRR 462 (closed shops); *Stafford v UK* 2002-V, 35 EHRR 1121 GC (life sentences). The Convention enforcement machinery provisions are also to be interpreted dynamically: *Loizidou v Turkey* A 310 (1995); 20 EHRR 99 para 71.
58 Johnston v Ireland A 112 (1986); 9 EHRR 203 PC. Quaere whether the sensitive nature of the divorce question in Ireland at the time was another factor in the *Johnston* case.
59 11 HRIJ 57 at 60 (1990). Mahony draws an analogy with the judicial activism and judicial restraint distinction found in the jurisprudence of the US Supreme Court.
60 See below, p 540. Cf the gradual extension of Article 6(3) to pre-trial criminal proceedings: see below, p 506. See also the Court's approach to different retirement ages for men and women in *Stev v UK* 2006-VI GC.
62 See *Soreng v UK* A 161 (1989); 11 EHRR 439 PC.
63 See below, p 590.
either be seen as the discovery of obligations that were always implicit in the guarantees concerned or as the addition of new obligations for states.

When deciding a case by reference to the dynamic character of the Convention, the Court must make a judgment as to the point at which a change in the policy of the law has achieved sufficiently wide acceptance in European states to affect the meaning of the Convention. In the course of doing so, the Court has generally been cautious, preferring to follow state practice rather than to precipitate a new approach. But the Court does not necessarily wait until only the defendant state remains out of line before it recognizes a new approach. For example, in Markx v Belgium the Court relied upon a new approach to the status of children born out of wedlock that had been adopted in the law of the 'great majority', but not all, of Council of Europe states by 1979. The Court adopted a somewhat different and less demanding approach than this in the case of Goodwin (Christine) v UK. In a series of transsexual cases from the mid-1980s onwards, the Court had indicated that it was not satisfied that a common new European standard requiring the full recognition in law of the new sexual identity of post-operative transsexuals had emerged; standards were still in transition with 'little common ground between the contracting states'. However, in the Goodwin case, while recognizing that there remained no 'common European approach' on the matter, the Court was persuaded to overturn its earlier rulings by 'clear and uncontested evidence of a continuing international trend both in Europe and elsewhere, in the direction of legal recognition of the new sexual identity of post-operative transsexuals'. It thus referred to national standards around the world, as well as European, and did not require that a 'great majority' of European states follow the new approach.

IV. RELIANCE UPON EUROPEAN NATIONAL LAW STANDARDS

The question whether the Court should be influenced by the law in European states in its interpretation of the Convention is relevant not only in contexts in which the policy of the law has changed. The question may arise when the Court has to decide how rigorously to interpret the requirements of the Convention in other circumstances also. Here, too, any European consensus that exists has had a considerable impact upon the Court's jurisprudence. For example, the Court's ringing pronouncements on the importance of freedom of speech and of the press in a democratic society stem from a confident conviction as to longstanding values that generally underpin European society. Equally clearly, the easy incorporation into Article 1, First Protocol of a compensation requirement for the taking of the property of nationals followed from the 'legal systems of the contracting states'. Former Judge Van der Meersch has pointed to the paradox of

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64 A state that is entirely on its own is particularly at risk of an adverse judgment if its practice offends common European standards relevant to human rights: see eg, the Tyner case, above (corporal punishment) and Uzun Tekeli v Turkey 2004-X: 42 ECHR 1185 (married women's surnames): For an exception, see EB v France (2008) GC.


66 Cossey v UK A 184 (1990): 13 ECHR 622 para 46. For other cases, see below, p 385.

67 A 'majority', but not the 'great majority', of member states provided for full legal recognition: Sheffield and Horsham v UK (1998-V: 27 ECHR 163 paras 35, 57 and Goodwin (Christine) v UK, above, n 66.


69 See Lingens v Austria A 103 (1941); 8 ECHR 407 para 41 PC.

70 James v UK A 98 (1986); 8 ECHR 123 para 54 PC. Other examples include A v UK 2002-X: 36 ECHR 917 (parliamentary immunity) and Bryan v UK A 335-A (1995); 21 ECHR 342 (judicial review of administrative action).

71 1 HRLJ 13 at 15 (1989).
Taking standards in national law into account when interpreting an international treaty whose purpose is to control national law. The convincing justification that he provides is that there is a necessarily close relationship between the Convention standards and the European 'common law' by which they are inspired. Another reason may be that an interpretation of the Convention that deviated substantially from general European practice would undermine state confidence in the Convention system and thereby threaten its continued success or acceptance by states. Generally, the Court's reliance upon any European consensus is acceptable in that it is likely to be in accordance with recognized human rights standards, as in the case of the emphasis placed upon freedom of speech. Even so, the Court needs to be aware that government and individual interests do not always coincide and that a practice may not be acceptable in human rights terms simply because it is generally followed.

In the absence of a European consensus, the Court has tended to reflect national law by applying a lowest common denominator approach or to accommodate variations in state practice through the margin of appreciation doctrine when deciding upon the meaning of a Convention guarantee. The result is that a state's law or conduct may well escape condemnation if it reflects a practice followed in a number of European states or where practice is widely varied. For example, the fact that members of a linguistic minority may not be able to vote in an election for candidates whose language is theirs or that civil servants may sit as expert members of a tribunal does not present problems for the rights to free elections (Article 3, First Protocol) and an independent and impartial tribunal (Article 6) respectively, given that such situations are common in European states. Widespread differences in practice in European states can lead to a similar tolerance, as in the case of laws governing abortion and artificial insemination. Other examples can be found in connection with the right to a fair trial, where there is much diversity of practice resulting, most clearly, from the differences between civil and common law systems of criminal justice. Thus, when interpreting the Article 6(1) requirement that judgments be pronounced in public, the Court has taken account of the fact that courts of cassation in civil law jurisdictions commonly do not deliver their judgments in public. Similarly, the Court has been influenced in its approach to the 'trial within a reasonable time' guarantee in Article 6(1) by the characteristics of civil law criminal justice systems.

It is encouraging, however, that, faced with a diversity of practice, the Court has sometimes acted positively in the interests of protecting human rights. This is the case, for example, in the Court's application of Article 6(1) to administrative justice, its strict reading of the requirement of an impartial tribunal that is found in the same provision, and its expansive interpretation of the residual 'fair hearing' guarantee. More controversial perhaps is the balance that the Court has struck between the rights of parents and their children. The policy of some states of permitting their child care authorities to intervene to protect children at the expense of parental rights more than most European states do has led to findings of breaches of the Convention in several cases.

73 See Stavros, p 346. 74 As to this doctrine, see below, p 11.
75 Mathieu-Mohin and Clerfayt v Belgium A 113 (1987); 10 EHRR 1 para 57 PC ('a good many states').
76 Ettvus v Austria A 117 (1987); 10 EHRR 325 para 40 ('...of member states affords many examples').
77 See Ettl v Austria 2004-VIII; 40 EHRR 225 para 40 ('...affords many examples').
78 See Vo v France 2004-VIII; 40 EHRR 728 GC.
79 See below, p 277.
80 See below, p 283. Note also the absence of any need for jury trial in criminal cases, which is not found generally across Europe. For other examples of differing practice concerning the law of evidence and trial in absentia, resulting in a 'low common denominator', see Stavros, pp 238 and 265-266.
81 See eg, Andersson (M & R) v Sweden A 226-A (1992); 14 EHRR 615.
Finally, it is interesting to consider the evidence that the Court has available to it when it acts by reference to the standards in European national law or international law. After many years in which the Court lacked the time or resources to undertake research in relevant areas of law, it now has a small research division which is asked to carry out studies on questions of comparative or international law that arise in cases before the Grand Chamber. This is an important new development in the practice of the Court that has taken place over the last five years or so. Thus today Grand Chambers and occasionally Chambers will have at their disposal in-house documents that provide extremely useful and detailed comparative and international law information. Beyond such resources, the Court relies upon the collective knowledge of its members and its registry and upon the amici curiae briefs of non-governmental organizations and others, which have been of great assistance on occasion. The contribution of judges is obviously valuable but is curtailed by the Court’s practice of hearing cases in chambers and the fact that judges are unlikely to claim expertise in all areas of their national law.

V. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality is a recurring theme in the interpretation of the Convention. As the Court stated in Soering v UK, 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights'. The achievement of such a balance necessarily requires an approach based; inter alia, upon considerations of proportionality. Reliance on the principle of proportionality is most evident in areas in which the Convention expressly allows restrictions upon a right. Thus, under the second paragraphs of Articles 8–11, a state may restrict the protected right to the extent that this is necessary in a democratic society for certain listed public interest purposes. This formula has been interpreted as meaning that the restriction must be 'proportionate to the legitimate aim pursued'. Similarly, proportionality has been invoked when setting the limits to an implied restriction that has been read into a Convention guarantee and in some cases in determining whether a positive obligation

81 For earlier doubts as to whether the Court made a thorough investigation of the law of European states when relying on common standards, see eg, the dissenting opinion of Judge Matscher in Ótturk v FRG A 73 (1984), 6 EHRR 409 PC and, among writers, Bernhardt, European System, p 35, Heller, 26 Corn ILJ 133 at 138–40 (1989), and Mahoney, 11 HRJ 57 at 79 (1990). 82 See eg, the reliance on a study by the NGO Liberty in Goodwin (Christine) v UK 2002-VI, 35 EHRR 447 GC. 83 As to third party interventions, see below, p 853. 84 See Van Drooghenbroeck, La proportionnalite dans le droit de la Convention europena des droits de l'homme, 2001. See also Essen, European System, Ch 7, McBride, in Ellis, ed, The Principle of Proportionality in the Laws of Europe, 1999, p 23, and McHarg, 62 MLR 671 (1999). 85 A 161 (1989), 11 EHRR 49 para 89 PC; cf, 'Belgian Linguistics’ Case (No 2) A 6 096H}, 11 HRJ 252 PC. 86 Sporrong and Lonnroth v Sweden A 52 (1982), 7 EHRR 35 PC, and Fayed v UK A 294-B (1994), 18 EHRR 393 More recently, see eg, JA Pye (Oxford) Ltd v UK (hudoc) (2007), 46 EHRR 1083 GC. 87 Handbook v UK A 24 (1996) para 49, 1 EHRR 737 PC. See also the 'absolutely necessary' test in Article 2(2), where the test is one of 'strict proportionality'. As to this test and the proportionality principle’s possible use in connection with the death penalty under Article 2, see below, pp 61 and 60 respectively. The principle has also been applied to differently formulated restrictions in other Articles, eg, Article 5 (Wouters v Netherlands A 33 (1979), 2 EHRR 367 para 9), Article 12 (F v Switzerland A 128 (1987), 10 EHRR 411 PC), and Article 1, First Protocol (James v UK A 98 (1986), 8 EHRR 123 para 50 PC). 88 Mathieu-Mohini and Clerfayt v Belgium A 113 (1987), 1 EHRR 1 para 52 PC (Article 1, First Protocol) and Fayol v UK A 294-B (1994), 18 EHRR 393 para 71 (Article 6(1)). In the former case the Court also stated that a
The principle has also been introduced into the non-discrimination rule in Article 14, so that for its prohibition of discrimination to be infringed there must be 'no reasonable relationship of proportionality between the means employed and the aim sought to be pursued.' Finally, the principle is relied upon when interpreting the requirement in Article 15 that measures taken in a public emergency in derogation of Convention rights must be 'strictly required by the exigencies of the situation.' In general, the principle of proportionality is not applied under Article 3, which contains an absolute guarantee. A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate, even allowing for a margin of appreciation (see below), where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.

VI. THE MARGIN OF APPRECIATION DOCTRINE

A doctrine that plays a crucial role in the interpretation of the Convention and that has been extensively commented upon is that of the margin of appreciation. In general terms, it means that the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right. The doctrine was first explained by the Court in Handyside v UK. This was a case concerning a restriction upon a right within the Articles 8–11 group of rights. In the Handyside case, the Court had to consider whether a conviction restriction must not impair the 'essence' of the right: ibid. Cf. Ashingdane v UK A 93 (1985); 7 EHRR 528 para 57 (Article 6(1)). The Court not uncommonly uses this last idea when vetting a restriction under any of the headings discussed above, whether as an element of 'proportionality' or as a separate requirement.

See eg. the Article 8 cases of Rees v UK A 106 (1986); 9 EHRR 56 para 37 PC and Gaskin v UK A 160 (1989); 12 EHRR 36 para 49 PC.

Belgian Linguistics Case A 6 (1968) p 34; 1 EHRR 241 at 284 PC. Cf. the recourse to proportionality when interpreting the term 'forced labour' in Article 4: Van der Mussele v Belgium A 70 (1983); 6 EHRR 163 para 37 PC.

See Lawless v Ireland (Merits) A 3 (1961); 1 EHRR 15 and Ireland v UK A 15 (1978); 1 EHRR 25 PC. Although the term proportionality is not mentioned in these judgments, the principle is applied in fact.

Seeazed v Italy, below, p 87. A ‘fair balance’ was relevant in the Soering case, above, p 10, in the sense that an individual may be extraded where the danger of ill-treatment contrary to Article 3 abroad subsides sufficiently.

Hirst v UK (Nu 2) 2005-IX; 42 EHRR 849 GC (absolute ban on prisoners’ right to vote) and Dickson v UK humdc (2007); 46 EHRR 927 GC (strict limits on prisoners’ artificial insemination). See, however, Odile v France 2003-III; 38 EHRR 871 GC (no right to know one’s biological parent) where the Court majority gave little heed to such considerations.


A 24 (1976); 1 EHRR 737 paras 48–9 PC. It had in effect been relied upon by the Court earlier, following the Commission, in Lawless v Ireland (Merits) A 3 (1961); 1 EHRR 15 para 28, in the context of public emergencies (Article 15). On the use of the doctrine in Articles 8–11, see further below, Ch 8.
for possessing an obscene article could be justified under Article 10(2) as a limitation upon freedom of expression that was necessary for the ‘protection of morals’. The Court stated:

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them…

Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those states’ engagements, is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

The doctrine has since been applied in the above sense to other Convention articles. As well as Article 10, it has been relied upon when determining whether an interference with other rights in the Articles 8–11 group of rights is justifiable on any of the public interest grounds permitted by paragraph (2) of the Article concerned. The doctrine is also used when assessing whether a state has done enough to comply with any positive obligations that it has under these and other Articles and when determining whether a state’s interference with the right to property protected by Article 1, First Protocol is justified in the public interest. A margin of appreciation is also allowed in the application of other guarantees where an element of judgment by the national authorities is involved, as in certain parts of Articles 5 and 6 and in Article 14. It has been instrumental as well in the application of Article 15 when deciding whether there is a ‘public emergency’ and, if so, whether the measures taken in response to it are ‘strictly required by the exigencies of the situation’. As will be apparent, these Articles largely coincide with those to which the principle of proportionality spelt out in the Handyside case applies, the point being that in assessing the proportionality of the state’s acts, a certain degree of deference is given to the judgment of national authorities when they weigh competing public and individual interests in view of their special knowledge and overall responsibility under domestic law. Finally, it should be noted that national courts are allowed considerable discretion, either under an implied margin of appreciation doctrine or under the fourth instance doctrine (see below), in the conduct of trials in respect of such matters as the admissibility or evaluation of evidence. Thus the Court has stated that Article 6(3)(d) generally ‘leaves it to the competent authorities to decide upon the relevance of proposed

96 See eg. Abdulaziz, Cabales, and Balkandli v UK A 94 (1985); 7 EHR 741 para 67; and Keegan v Ireland A 290 (1994); 18 EHR 342 para 49.
97 See eg. Mathieu-Mohin and Clerfayt v Belgium A 113 (1987); 10 EHR 1 para (Article 3, First Protocol); and Vo v France 2004-VIII; 40 EHR 259 GC (Article 2).
98 See eg. James v UK 98 (1986); 8 EHR 123 para 49.
99 See Winterwerp v Netherlands A 33 (1979); 2 EHR 387 (person of unsound mind); Weeks v UK A 114 (1987); 10 EHR 293 para 67 (release on parole); Brogan v UK A 145-8 (1988); 11 EHR 114 para 67 (terrorist suspects).
100 No margin of appreciation in Article 5(3): see below, p 174. As to a margin of appreciation in connection with the ‘absolutely necessary’ test in Article 3: see below, p 62.
101 See eg. Osman v UK 1998-VIII; 29 EHR 245 (1998) (right of access), but no margin of appreciation on trial within a reasonable time: see below, p 279.
102 Belgium Linguistics’ Case A 6 (1968) p 35; 1 EHR 24 at 284; and Rasmussen v Denmark A 87 (1984); 7 EHR 371 para 40.
103 Ireland v UK A 25 (1978); 2 EHR 25 para 40.
The margin of appreciation doctrine is applied differentially, with the degree of discretion allowed to the state varying according to the context. A state is allowed a considerable discretion in cases of public emergency arising under Article 15, in some national security cases, and in the protection of public morals. Similarly, the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one. It will be wide too when there is a no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues. A wide margin also usually applies if the state is required to strike a balance between competing interests or Convention rights. At the other extreme, the margin of appreciation is limited where 'a particularly important facet of an individual's identity or existence is at stake' and is reduced almost to vanishing point in certain areas, as where the justification for a restriction is the protection of the authority of the judiciary.

The margin of appreciation doctrine reflects the subsidiary role of the Convention in protecting human rights. The overall scheme of the Convention is that the initial and primary responsibility for the protection of human rights lies with the contracting parties. The Court is there to monitor their action, exercising a power of review that has some similarities with that of a federal constitutional court over conduct by democratically elected governments or legislatures within the federation. The margin of appreciation doctrine serves as a mechanism by which a tight or slack rein is kept on state conduct, depending upon the context. The doctrine is nonetheless a controversial one. When it is applied widely, so as to appear to give a state a blank cheque or to tolerate questionable national practices or decisions, it may be argued that the Court has abdicated its responsibilities. However, the doctrine

103 Engel v Netherlands A 22 (1976); 1 EHRR 647 para 91 PC.
105 See eg, Handsyside v UK A 24 (1976); 1 EHRR 737 PC.
106 See below, p 626.
107 See eg, Leander v Sweden A 116 (1987); 9 EHRR 433 para 67.
108 See eg, the Handsyside case, n 95 above.
109 Hatton v UK 2003-VIII; 37 EHRR 611 para 97 GC (airport noise), citing James v UK A 98 (1986); 8 EHRR 123 PC (taking of property).
110 Evans v UK hudoc (2007); 46 EHRR 728 para 77 GC. Cf, Rasmussen v Denmark A 87 (1984); 7 EHRR 371 (fathers' rights) and Vo v France 2004-IIi; 40 EHRR 259 (abortion). Even so, a state's discretion is not unlimited: Dickson v UK hudoc (2007); 46 EHRR 927 GC.
111 Evans v UK, ibid.
112 Ibid, CJ, Dudgeon v UK A 45 (1983); 4 EHRR 149 PC (homosexual acts).
113 Sunday Times v UK A 30 (1979); 2 EHRR 245 PC. The Court may have been influenced by the disagreement within the relevant UK institutions as to the need for the restriction.
114 See Matscher, European System, Ch 5 at p 76. On the principle of subsidiarity in the Convention generally, see Petzold, European System, Ch 4 and Bysdall, 1996 EHRIL 18 at 21 ff. On the principle in the Court's jurisprudence, see eg, Z v UK 2001-V; 34 EHRR 97 GC and Vilho Eskelinen v Finland 2007-GC.
115 Belgian Linguistics' Case A 6 (1966) p 34; 1 EHRR 241 at 284 PC and Handsyside v UK A 24 (1978); 1 EHRR 737 para 48 PC. Thus Article 1 requires the contracting parties to 'secure the rights' in the Convention. See also Articles 13 and 53, Convention.
116 See Mahoney, 11 HRLJ 57 at 65 (1990), who compares the roles of the European Court and the US Supreme Court.
117 See eg, Barfod v Denmark A 149 (1985); 13 EHRR 493 paras 28-36.
has its counterpart in the context of judicial review in national systems of administrative law and serves as a lubricant at the interface between individual rights and public interest. It may also be essential to retain state confidence in the operation of the system. In its absence, Strasbourg might well be seen as imposing solutions from outside without paying proper regard to the expertise and responsibilities of local decision-makers. Underlying the doctrine is the understanding that the legislative, executive, and judicial organs of a state party to the Convention basically operate in conformity with the rule of law and human rights and that their assessment and presentation of the national situation in cases that go to Strasbourg can be relied upon. Given this premise, the doctrine can probably be justified. The difficulty lies not so much in allowing it as in deciding precisely when and how to apply it to the facts of particular cases.

VII. REFERENCE TO INTERNATIONAL STANDARDS

The Court increasingly refers to other sources of international human rights standards when interpreting the Convention in its judgments. Thus the Court refers to other human rights treaties and other relevant instruments—both of the Council of Europe itself—and of other international institutions—and decisions by bodies applying them. A treaty may be referred to whether the respondent state is a party to it or not. The Court also interprets the Convention, as a treaty, against the background of public international law generally. This is all to be welcomed in ensuring a uniformity of approach where this is appropriate.

VIII. THE FOURTH INSTANCE DOCTRINE

The Court, and formerly the Commission, has made it clear that it does not constitute a further court of appeal, that is a fourth instance, from the decisions of national courts applying national law. In the words of the Court, 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention.' An application that merely claims without more that a national court has made an error of fact or law will be declared inadmissible. A claim that such an error is a breach of the right to a fair hearing in Article 6 will not succeed, as Article 6 provides a procedural guarantee only, it does not guarantee that the outcome of the proceedings is fair. However, where the Court is called upon to determine the facts of a case in order to apply a Convention guarantee (e.g. whether there was inhuman treatment contrary to Article 3),

118 See eg Sorensen and Rasmussen v Denmark below p 541 (European Social Charter), Dickson v UK below p 408 (European Prison Rules) Onen y Hdz v Turks below p 42 (Committee of Ministers and Parliamentary Assembly recommendations)
119 See eg Al Adsani v UK below p 242 (UN Torture Convention), Jersild v Denmark below p 445 (UN Racial Discrimination Convention), Sidlow v France below p 113 (ILC Conventions), Lechien v Finland below p 221 (1st Charter on Fundamental Rights) and Duma and Baykara v Turks below p 545
120 See eg Markovs v Belgium below p 392 (Children Born Out of Wedlock Convention)
121 See eg the Bankovic case below p 805 (jurisdiction) and Watts and Kennedy v Germany below p 242 (sovereign immunity). For references to non human rights treaties see Glass v UK below p 399 (Oviedo Convention on Bioethics) and Taskin v Turkey below p 377 (Aarhus Convention on Access to Information, etc on Environmental Matters). See also Al Adsani v UK below p 242 (ICJ Judgment)
122 Garcia Ruiz v Spain 1999 1 31 ECHR 589 para 28
123 See eg Y v IG No 254/57 1 YIR 150 at 152 (1957)
124 For this general position and possible exceptions see below p 202
it is not bound by the finding of facts at the national level. Where an application alleges that national law violates the Convention, the Strasbourg authorities will not in principle question the interpretation of that law by the national courts. However, it may do so where the interpretation by the national court is "arbitrary," or where it is a part of a Convention requirement that national law be complied with (eg that an arrest is "lawful": Article 5(1)). Even so, it is very exceptional for the Court to disagree with any decision by a national court on its interpretation and application of its own national law.

**IX. EFFECTIVE INTERPRETATION**

An important consideration which lies at the heart of the Court's interpretation of the Convention, and which is key to realizing its "object and purpose", is the need to ensure the effective protection of the rights guaranteed. In *Artico v Italy*, the Court stated that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". There the Court found a breach of the right to legal aid in Article 6(3)(c) because the legal aid lawyer appointed by the state proved totally ineffective. The Court has relied upon the principle of effectiveness in other cases also when interpreting positive obligations. In other contexts, the Court has emphasized the need to ensure the effectiveness of the Convention when interpreting the term "victim" in Article 25 and when giving the Convention extra-territorial reach under Article 3.

**X. CONSISTENCY OF INTERPRETATION OF THE CONVENTION AS A WHOLE**

In *Stéć v UK*, the Court stated 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". Accordingly, in that case a crucial factor for the Court in ruling that the right to property in Article 1, First Protocol extended to non-contributory as well as contributory benefits was that it had been held that rights to both kinds of benefit were protected by the right to a fair trial in Article 6 of the Convention.

**XI. LIMITS RESULTING FROM THE CLEAR MEANING OF THE TEXT**

Although the Strasbourg authorities rely heavily upon the "object and purpose" of the Convention, they have occasionally found that their freedom to do so is limited by the clear meaning of the text. Thus in *Wemhoff v FRG*, it was held that Article 5(3) does not apply to appeal proceedings because of the wording of Article 5(1)(a). Remarkably, in

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125 See eg. *Ribitsch v Austria* A 336 (1995); 31 EHRR 573.
126 See eg. *X and Y v Netherlands* A 91 (1985); 8 EHRR 235 para 29.
127 See eg. *Van Kuck v Germany* 2003-VII; 37 EHRR 973. See also *Von Hannover v Germany* 2004-VI; 43 EHRR 139.
128 See eg. *Lukanov v Bulgaria* 1997-II; 24 EHRR 121.
130 See eg. *Klass v FRG* A 28 (1978); 2 EHRR 214 para 34 PC.
131 See eg. *Van Kuck v Germany* 2003-VII; 37 EHRR 973. See also *Von Hannover v Germany* 2004-VI; 43 EHRR 139.
132 See eg. *Klass v FRG* A 28 (1978); 2 EHRR 214 para 34 PC.
133 See eg. *Lukanov v Bulgaria* 1997-II; 24 EHRR 121.
135 See eg. *Klass v FRG* A 28 (1978); 2 EHRR 214 para 34 PC.
In the Belilos case, the Court also held that an instrument deposited on signature or ratification may qualify as a reservation even though it is not described as such; it is sufficient that the state intended it to be a reservation. In that case, Switzerland had deposited on ratification what it described as two 'interpretative declarations', including the instrument in issue, and two 'reservations'. The Court held that the 'interpretative declaration' concerned was a reservation for the purposes of (now) Article 57 (although it proved not to be a valid one) in the light of the evidence in the Swiss travaux as to Switzerland's intentions. The Court's approach can be criticized as not taking account of the need for certainty in this regard and the reasonable expectation that a state knows the distinction in international law between a reservation and an interpretative declaration, particularly when it uses both terms in the instrument that it deposits.

7. THE CONVENTION IN NATIONAL LAW

1. THE APPLICATION OF THE CONVENTION BY NATIONAL COURTS

International human rights guarantees are most valuable when they are enforceable in national law. Even in the case of a successful international guarantee as the European Convention on Human Rights, a remedy in a national court will generally be more convenient and efficient than recourse to an international procedure. Accordingly, if the Convention can be relied upon in a party's national courts, an important extra dimension is added to its effectiveness, particularly in a state that lacks its own national bill of rights. Application through national courts is also consistent with the principle of subsidiarity which underlies the Convention, by which the primary responsibility to enforce the Convention falls upon the states parties.

Under Article 1 of the Convention, the parties undertake to 'secure' the rights and freedoms in the Convention to persons within their jurisdiction. This does not require a party to incorporate the Convention into its law. While compliance with this obligation finds 'a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law', a party may satisfy Article 1 instead by ensuring, in whatever manner it chooses, that its law and practice is such that Convention rights are guaranteed. In fact, the Convention has now been incorporated into the law of all the contracting parties.

Note, however, that Article 2(1)(d), Vienna Convention on the Law of Treaties defines a reservation as a 'unilateral statement, however phrased or named'. Italics added.


The UK is one such state. See above, p 13.

See eg Observer and Guardian v UK A 216 (1991); 14 EHRR 153 PC.

Ireland v UK A 25 (1978); 2 EHRR 25 para 216 PC.

'Swedish Engine Drivers Union' Case A 20 (1976); 1 EHRR 617.

See the survey in Blackburn and Polakiewicz, op cit at n 199 above.
Although incorporation of the Convention into national law is desirable, it does not by itself ensure a remedy in a national court for a breach of the Convention. In states following the 'monist' approach to the relationship between international and national law, the Convention will automatically be part of the national law as a result of its ratification. However, in the legal systems of such states, the Convention may only be relied upon in the national courts as the basis for a claim if the Convention guarantee as a whole, or the relevant article or part of it, is regarded by the court concerned as self-executing. By this is meant that the court accepts that the relevant provision creates a right that can be relied upon directly before it without further steps being needed by way of legislative or other state action. National courts following the monist approach have differed in their assessment of the self-executing character of Convention provisions. For example, the Austrian and Swiss courts have generally applied Convention provisions as self-executing. In Belgium, whereas the negative obligation under Article 8 not to interfere with family life was held to be self-executing, the positive obligation to create an appropriate legal status for children born out of wedlock required legislation. The Italian Court of Cassation regards the Convention as a whole as stating only programmatic rules for the guidance of the legislature. Even if a Convention provision is regarded as self-executing, it does not necessarily follow that national courts will actually make use of what is seen as 'foreign' law. Most noticeably, where a state, such as Germany, has its own well-established national bill of rights, the Convention has tended to be given only a limited role, with the local courts preferring to rely upon the bill of rights in the national constitution. In contrast, courts in some states have emphasized the Convention because of its constitutional status (Austria) or the absence of a detailed national bill of rights (Switzerland).

In states following the dualist, not the monist, approach, further legislative action in all cases needs to be taken following ratification for the Convention to be enforceable in the national courts, with the precise way in which it is enforceable being dependent upon the terms of the legislation. Thus, in the case of the United Kingdom, the Human Rights Act 1998 provides for the indirect incorporation of the rights of the Convention into UK law as 'Convention rights'. This has two main consequences. First, if, despite all efforts, primary UK legislation applicable in cases coming before the courts cannot be interpreted compatibly with the Convention, the competent court may make a 'declaration of incompatibility'. This does not affect the validity of the legislation, but alerts the government to the need to amend the law. Second, a victim has a public law right of action for damages or other relief against a public authority (not a private person) which acts inconsistently with a 'Convention right'. The Human Rights Act has greatly increased the powers of the UK courts to provide a remedy nationally for a breach of the Convention.

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206 On the monist and dualist approaches, see Brownlie, Principles of Public International Law, 7th edn, 2008, pp 31–3.
207 Another factor is the precise status that the Convention has in the legal system of the state concerned in relation to other national laws that contradict it. In the law of some parties, the Convention has only the status of an ordinary law. In most—including Central and East European states—it prevails over subsequent as well as prior inconsistent legislation but is subject to the constitution. In Austria, it has the status of constitutional law. See Polakiewicz in Blackburn and Polakiewicz, eds, Fundamental Rights in Europe, 2001, Ch 2. In the Netherlands, the Convention is superior to the constitution; see Oerlemans v Netherlands A 219 (1991), 15 EHRR 561. On Russia, see Koroteev and Golubok, 7 HRLJ 619 (2007).
208 On self-executing treaty provisions, see Brownlie, Principles of Public International Law, 7th edn, 2008, p 48.
209 See Polakiewicz, in Blackburn and Polakiewicz, eds, Fundamental Rights in Europe, 2001, Ch 2 and Polakiewicz and Jacob-Poltzer, 12 HRLJ 65, 136 (1991) from which the examples below are drawn.
210 Vermeiren v Belgium A 214-C (1993); 15 EHRR 488 para 11.
211 See Ress, 40 Texas ILJ 359 at 360 (2005).
with the result that the numbers of both Strasbourg applications and adverse judgments against the United Kingdom has decreased.\textsuperscript{213}

There has generally been a marked increase in reliance upon the Convention in national courts in recent years.\textsuperscript{214} With the dramatic increase in the extent and impact of the European Court's jurisprudence, national courts have become all too aware that their decisions may find their way to Strasbourg to be scrutinized there by reference to Convention standards.\textsuperscript{215} When the Convention is relied upon by a national court, the question arises whether, although not bound to do so, it will follow the interpretation of it that has been adopted at Strasbourg. In practice, national courts have usually done so, although there have been exceptions.\textsuperscript{216} Where a point of interpretation has not been ruled upon in a Strasbourg case, the national courts will have no choice but to adopt their own interpretation. Insofar as they do so, it is possible that courts in different legal systems may interpret the Convention differently, particularly as there is no procedure for the reference of a case to Strasbourg for a definitive ruling.\textsuperscript{217}

Whether a state incorporates the Convention into its law or not, it is required by Article 13 to provide an 'effective remedy' under its national law for a person who has an arguable claim under the Convention. Thus, for example, a wife whose husband has been excluded from a state's territory because of an immigration law that may infringe the Convention must have an effective remedy under national law by which to challenge the legality of the husband's exclusion.\textsuperscript{218} The Court's jurisprudence suggests that a state that does not make the Convention enforceable in its national law is especially at risk of being in breach of Article 13.\textsuperscript{219}

II. THE EXECUTION OF STRASBOURG JUDGMENTS\textsuperscript{220}

A Court judgment is 'essentially declaratory'.\textsuperscript{221} Article 41 of the Convention provides that the Court may award a victim 'just compensation'—a power which has been understood to permit the award of monetary compensation and legal costs.\textsuperscript{222} Otherwise, 'in principle, it is not for the Court to determine what remedial measures may be appropriate


\textsuperscript{214} See Polakiewicz, in Blackburn and Polakiewicz, Fundamental Rights in Europe, 2001, pp 50–2. See also Costa, 38 Texas ILI 455 at 458 (France). Many key UK human rights cases, eg A (PC) v Secretary of State for the Home Department [2004] UKHL 56 and R (application of Al-Skeini) v Secretary of State for Defence [2005] EWCA Civ 1609, would have lacked a legal basis without the Human Rights Act. But the Convention is far less known and used as yet by the courts in most post-communist states parties.

\textsuperscript{215} Cf. Polakiewicz and Jacob-Folzer, 12HRLI 136 at 141.

\textsuperscript{216} Polakiewicz and Jacob-Folzer, ibid. refer to rulings by Austrian, Belgian, and French courts on the scope of Article 6(1) as ones in which exceptionally the Court has been 'openly defied'.

\textsuperscript{217} Contrast the provision made under Article 234, Treaty of Rome for the reference by national courts of cases to the European Court of Justice for the interpretation of European Union law. The Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 201, para 89, considered such a mechanism as 'unsuitable for the Convention.

\textsuperscript{218} Abdulaziz, Cabales and Balkandah v UK A 94 (1985); 7 EHRR 471 para 91 PC.

\textsuperscript{219} The number of applications and adverse judgments against the UK under Article 13 has declined since the Human Rights Act.


\textsuperscript{221} Marks v Belgium A 31 (1979), 2 EHRR 330 para 58 PC. A judgment 'cannot of itself annul or repeal inconsistent national court judgments or national law.\textit{ibid}

\textsuperscript{222} See below, p 856.
to satisfy the respondent state’s obligations; instead it is for that state to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. Whereas, in accordance with this approach, the Court used always to refrain from specifying action that should be taken to comply with its judgments, it has modified its position recently. In some cases, although these remain the exception; it has indicated specific forms of restitution for the victim of a breach of the Convention. Thus it has required the return of the property concerned as an alternative to the payment of compensation for a breach of Article 1, Protocol 1. In the case of the continued detention of an individual contrary to Article 5, the Court has found itself competent to specify, without in this context allowing any alternative, that the individual’s release be secured, on the basis that the ‘very nature’ of the breach does not ‘leave any real choice as to the measures required to remedy it.’ Finally, in cases in which a person has been convicted of a criminal offence in proceedings in breach of Article 6, the Court has stated that a retrial or reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the Court does not have jurisdiction to order a new trial or the quashing of a conviction.

As well as specifying particular forms of restitution for the victim, the Court has, also, but again exceptionally, moved in the direction of giving some indication in its judgments of the steps that a state found in breach of the Convention should take more generally to bring its law or practice into line with its Convention obligations. Whereas formerly the Court had left it entirely to the state concerned to decide what should be done, in Broniowski v Poland the Court introduced the idea of pilot judgments. These are appropriate where there is a breach of the Convention that results from a systematic defect which may give rise to many claims. In such a case, the Court stated, some indication of the general measures that a state should adopt is in order so as not to overburden the Convention system with large numbers of applications deriving from the same cause.

The judgments of the Court arising out of applications to Strasbourg are binding in international law upon the parties to them. However, a national court is not obliged under the Convention to give them direct effect; this is a matter for the national law of the defendant state, which is free to implement Strasbourg judgments in accordance with the rules of its national legal system. Assessments of the record of states in complying with
judgments has until recently been very positive. In 1996, the President of the Court stated that they had 'not only generally but always been complied with by the Contracting States concerned. There have been delays, perhaps even examples of minimal compliance, but no instances of non-compliance'. This was true of the payment of compensation and costs awarded by the Court under (now) Article 41, the steps by way of restitution taken to remedy a wrong done to an individual applicant and the amendment of legislative and administrative practices found contrary to the Convention. In a number of cases, a Strasbourg judgment has provided a government with a lever to help overcome local opposition to law reform, as with the change in the law on homosexuality in Northern Ireland following Dudgeon v UK. But sometimes it is uncertain whether the steps taken by the defendant state go far enough. In other cases, a state may be slow in putting the necessary measures in place because of constitutional difficulties. Thus it took fifteen years before the Isle of Man Tynwald enacted the Criminal Justice (Penalties, etc) Act 1993 to abolish judicial corporal punishment, thereby bringing the United Kingdom fully into line with its obligations under Article 3 following the Tyrer case. Prior to the 1993 legislation, in the context of the special constitutional position of the Isle of Man, the UK government had informed the Manx government after the Tyrer case that judicial corporal punishment would be contrary to the Convention and the case was brought to the attention of the local courts by the Manx authorities. Although this was considered sufficient by the Committee of Ministers, acting under what is now Article 46(2), to comply with the Tyrer judgment, it would appear that the United Kingdom's obligation to secure the rights and freedoms in the Convention required that it go further and for the relevant law to be amended.

While the record of state compliance with judgments remains generally good, recent reviews have been more critical. Central and East European states have found particular difficulty in complying with some judgments against them, although they have...
not been alone in this respect. A result is that the role of the Committee of Ministers in
supervising the execution of judgments has become more demanding and important. Unfortunately, the Committee, being a political body composed of representatives of member states, is not the best equipped or motivated body to question whether the steps taken go far enough.

8. THE CONVENTION AND THE EUROPEAN UNION

The European Union (EU) has legislative and executive jurisdiction by which it may act against member states or private persons in a way that impacts upon their Convention obligations and rights respectively. When exercising jurisdiction in these ways, it is possible that EU institutions may infringe Convention rights. The question therefore arises whether these institutions must comply with the Convention when they act. A related question is whether member states are responsible under the Convention for the effect on private persons of their national legislative or other public acts that are a consequence of EU membership.

As to the position of the EU, an application may not be made to Strasbourg against it under the Convention for any conduct on the part of its institutions because the EU is not a party thereto. Following much debate and hesitation over many years, the Treaty on European Union (TEU), as amended by the Treaty of Lisbon, provides that the EU 'shall accede' to the Convention. The Convention does, however, control EU conduct within its own legal order as the Convention has been incorporated into EU law. The TEU states that the 'Union shall respect fundamental rights, as guaranteed by

243 On Central and East European states and on the systemic problems in Italy, see Green, European Convention, pp 103ff
244 On the role of the Committee of Ministers, see below, pp 87ff See also Lambert-Abdelgawad, op cit at n 220, pp 32-9 For earlier literature, see Klerk, 45 NLR 65 (1996), MacDonald, Valticos Melanges, 417, Tomkins, 1995 EHRLR 49 The Parliamentary Assembly has also assumed a role The Assembly's Committee on Legal Affairs and Human Rights prepares excellent periodic reports on 'Implementation of Judgments of the European Court of Human Rights' see Lambert-Abdelgawad, ibid, pp 59-62
245 See Leuprecht, European System, Ch 35 at p 795 Former Judge Martens concludes that the Committee of Ministers exercises only a light or 'prima facie control' Martens, in Buttimer and Kuyper, eds, Compliance with Judgments of International Courts Scheiner Symposium, 1996, p 77
247 The term European Union is used to refer to the European Union generally and to the European Community in particular
248 Eg, by requiring them to take certain action see the Roshposhos Airways case, at n 257 below
249 Eg, to impose a fine see the facts of Matthews v UK 1999-1-29 ECHR 361 GC The same is true of other European institutions Hemz v Contracting States also Parties to the European Patent Convention No 21090/92, 76A DR 125 (1994), 18 ECHR CD 168 (European Patent Office)
250 Article 6(3) (Treaty of Lisbon amendments not yet in force) The ECJ had earlier opined that the EU was not competent to accede to the Convention without an EU treaty amendment empowering it to do so Opinion 294 [1996] ECR I-1759 Article 17, Protocol 14, Convention amends Article 59, Convention to permit the EU to accede
251 Article 6(2) (The same provision is repeated, with drafting changes, in Article 63), TEU, as amended by the Treaty of Lisbon (not yet in force) ECJ case law is to the same effect, see eg, ERT v DEP and Satinos Kouvelas, Case C-260/89 [1991] ECR I-3925 See also the 2000 EU Charter of Fundamental Rights, Preamble and Article 52(3) See Peers and Ward, eds, The EU Charter of Fundamental Rights, 2004. The Charter is not legally
IZED IN VARIOUS DISSENTING OPINIONS AS INADEQUATE, POSSIBLY ILOGICAL, AND UNWORKABLE WHEN TRYING TO DETERMINE WHETHER A PERSON IN CUSTODY HAS BEEN ILL-TREATED.286

VIII. PILOT JUDGMENTS207

A pilot judgment is the Court's recently developed response to the recurring problem of repetitive or 'clone cases', ie large numbers of cases raising essentially the same issue. In the 1980s the problem was reflected in the large number of cases brought against Italy concerning length of procedure. Since the establishment of the new Court in 1998 a large volume of repetitive cases have been brought against many different countries concerning not only length of civil and criminal proceedings but many other issues including non-enforcement of domestic judgments, delays in payment following expropriation, and access to property in northern Cyprus.

The Court itself proposed the introduction of a 'pilot judgment procedure' in cases which were related to a systemic or structural problem in the country concerned.208 It was envisaged that the pilot judgment would give rise to an accelerated execution procedure before the Committee of Ministers and would impose on the state an obligation to address the structural problem and thereby provide domestic redress in respect of applications pending in Strasbourg.

The 'pilot judgment procedure' was applied for the first time in the case of Bronowski v Poland.209 In the operative part of the judgment the Court held that the violation of Article 1 of Protocol 1 found in the case originated 'in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit" of Bug River claimants'. The Court enjoined the state to secure the implementation of the property right in question in respect not only of the applicant but also of the remaining Bug River claimants. In the judgment the Court had noted that some 80,000 people were affected by the systemic problem. Following a friendly settlement concerning the setting-up of a compensation scheme for all those affected, the case was eventually struck off the Court's list. The compensation scheme later set up by the Polish authorities was subsequently accepted by the Court as providing a remedy which satisfied the principal Bronowski judgment210 A further pilot judgment was adopted by the Court in the case of Hutten-Czapska v Poland211 which concerned failure of Polish law to secure a 'decent profit' for landlords. In its judgment on the merits, the Grand Chamber held that 'in order to put an end to the systemic violation identified in the present case, the respondent Government must through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interests of the community, in accordance with the standards of protection of property rights under

206 See eg, the dissenting opinion of eight judges in Labita v Italy 2000-IV, 46 EHRR 1228 GC and the dissent of Judge Bonello in Veznedaroglu v Turkey hudoc 2000; 33 EHRR 1412.
207 See Colendra, 7 HRLR 397 (2007); Garlicki, in Calisch et al, eds. Liber Amicorum Luzius Wildhaber, 2007, pp 177-92; Leach, 2009 EHRLR 148. The Human Rights and Social Justice Research Institute at London Metropolitan University are carrying out a research project into the pilot judgment procedure in the course of 2008-09. See also p 885 below.
211 2006-VIII, 45 EHRR 52 GC.
the Convention. This case was also struck out following a friendly settlement concerning the general measures adopted by Poland in response to the Court's judgment.\textsuperscript{212}

In the case of \textit{Lukenda v Slovenia}\textsuperscript{213} the Court noted there were some 500 Slovenian length of proceedings cases pending before it. This was identified as a systemic problem resulting from inadequate legislation and inefficiency in the administration of justice. The Court urged the Slovenian government to amend the existing range of legal remedies in order to secure genuinely effective address for such violations. The introduction of a remedy in Slovenia for length of proceedings subsequently enabled the Court to dispose of large numbers of such cases.

The category of pilot judgments also includes judgments which stop short of requiring the state to introduce corrective measures in the operative part of the judgment but nevertheless relate to structural problems and propose that measures be taken by the state to address them.\textsuperscript{214}

The pilot judgment procedure has been endorsed by the Committee of Ministers,\textsuperscript{215} the Woolf Report,\textsuperscript{216} and the Wise Persons Group.\textsuperscript{217} The Court itself has set up a sub-committee to examine how the procedure can best be utilized in the future as well as the types of cases that may be appropriately dealt with by this procedure. They have most significantly concerned specific structural problems arising in the area of property rights. The question arises whether such judgments can also be used to deal with common endemic problems in many contracting parties such as non-enforcement of judgments or cases concerning length of civil and criminal procedure, detention on remand, and prison conditions. Some commentators have suggested that a measure of circumspection in resorting to the procedure may be desirable and that an inflation of pilot judgments would be counter-productive.\textsuperscript{218} This is undoubtedly the case since such a judgment requires the state to remedy often deeply-entrenched legal or socio-economic problems in its national system that may not admit of an easy legislative resolution.\textsuperscript{219} While the procedure offers a useful tool to bring about such structural change, an excessive recourse to the procedure could lead to judgments that were not complied with. This in turn would undermine the usefulness of the procedure. Nevertheless there has been a general acceptance by governments of the utility of the procedure as a sensible method of dealing with repetitive complaints and only one government so far has actually challenged the legal basis of such a procedure under the Convention.\textsuperscript{220}

The pilot judgment procedure reflects the view of the Court that its role should not be to act as a claims commission examining large numbers of repetitive cases and, further, that states must assume their responsibilities to tackle the root problems underlying repetitive complaints. It also evidences the reality that the Court is not capable of dealing with such large numbers of frequently well-founded complaints. The essential challenge facing the Court is to ensure that the root problems are addressed by the state within a reasonable time-frame and that pending cases which have been adjourned pending the outcome of the pilot procedure can be repatriated following the introduction

\textsuperscript{212} \textit{Hutten-Czapska v Poland} \textit{hudoc} (2008) GC and the separate opinions of Judges Zagrebelsky, Jaeger, and Ziemele for critical remarks on the settlement.

\textsuperscript{213} 2005-X. See also the section pilot judgment of 15 January 2009 in \textit{Burdov v Russia} (No 2) No 33509/04 \textit{hudoc} (2009) concerning the recurrent problem of non-enforcement of court judgments in Russia.

\textsuperscript{214} See eg, \textit{Xenides-Arestis v Turkey} \textit{hudoc} (2005) and \textit{Scordino v Italy} (No 1) 2006-V; 45 EHRR 207 GC.\textsuperscript{17}

\textsuperscript{215} Committee of Ministers' Resolution (2004) 3 on Judgments Revealing an Underlying Systemic Problem.


\textsuperscript{217} Report of the Group of Wise Persons to the Committee of Ministers, Council of Europe, November 2006 at paras 100-5.

\textsuperscript{218} Garlicki, in \textit{Liber Amicorum Luzius Wildhaber}, p 191.

\textsuperscript{219} See, in this context, Judge Zagrebelsky's dissenting opinion in \textit{Lukenda v Slovenia} \textit{hudoc} (2005).

\textsuperscript{220} See the argument of the Italian government in \textit{Sidanius v Italy} 2006-IV GC.
of satisfactory corrective measures. To date the negotiation of friendly settlements in Broniowski and Hutten-Czapska whereby agreement is reached on a series of general measures which seek to tackle the structural problems underlying the case have essentially relieved the Committee of Ministers of the thorny problem of implementation. However it may be questioned whether friendly settlement is, in all circumstances, the most appropriate manner of implementing such judgments and whether the Committee should be deprived of the opportunity of expressing a view on the nature of the general measures adopted. Be that as it may, the future of this procedure is ultimately in the hands of the Committee of Ministers since it is the successful enforcement of such judgments that will validate the Court's continued recourse to them.

IX. THIRD PARTY INTERVENTIONS

Article 36 of the Convention makes provision for third parties to intervene in proceedings. Indeed this is a frequent occurrence in the Court's higher profile cases where there may be points of general importance at stake. According to Rule 44 of the Rules of Court requests should be submitted within twelve weeks of the communication of an application to the respondent government. In Article 36, two types of intervention must be distinguished. First, when the application is brought by the national of one state against another contracting party, the state of which the applicant is a national has the right to intervene under Article 36(1), reflecting the traditional right of diplomatic protection. Second, under Article 36(2), the President of the Court may, in the interests of the proper administration of justice, invite any other contracting party or any other person concerned to submit written comments.

In respect of the first, this right also extends to appearing before the Court in oral hearings. Accordingly, states in this category are in a considerably stronger legal position than an NGO seeking leave to intervene. They can, for example, insist on having access to the entire case file. However the Court has decided that they cannot insist on the right to appoint an ad hoc judge since they are not parties to the case stricto sensu; nor do they have a right to comment on the terms of any friendly settlement that has been reached although they will usually be sent the settlement for information. It must be stressed that this is a right but not a duty and states can and do decline to take part in the proceedings, especially when there is no wider principle at stake or the national link between applicant and state is wholly incidental.

221 Is it appropriate, for example, that the discussion about general measures in friendly settlement meetings take place only between the applicant and the government—without the presence of other interested parties such as NGOs or other groups directly affected by the proposed legislation?

222 For a survey of third party interventions before the Court see Mahoney and Sicidianos, in Ruiz Fabri and Sorel, eds, La tiers à l'instance devant les juridictions internationales, 2005.

223 This is made easier by the Court's decision to publish details of most communicated cases on its website as well as cases accepted for reference to the Grand Chamber by the panel and cases where jurisdiction has been relinquished to the Grand Chamber. See 'Communicated Cases Collection' at <http://www.echr.coe.int/echr/en/budoc>.

225 See eg, the Russian government's intervention in Sereika v Latvia 2003-XI; 39 ECHR 490 GC (concerning the rights of Russian-speaking settled immigrants to regular residence status); or the Cypriot government's intervention in Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey budoc (2003); 39 ECHR 772 (concerning access to property in northern Cyprus, and the intervention by the government of Serbia and Montenegro (as it then was) in Markovic v Italy 2006-XIV; 44 ECHR 1045 GC (concerning the unsuccessful attempts of Serbian nationals to obtain compensation through the Italian courts for an air strike by NATO).

225 See eg, G v Luxembourg budoc (2000); 30 ECHR 710, Krombach v France 2001-II, and Fogarty v UK 2001-IX. 34 ECHR 302 GC, where, respectively, the Danish, German, and Irish governments declined to intervene.
also invite interventions of its own motion. This, where the applicants complained that a freedom of association under Article 41 and the observations to stating that there was no violation to the TUC to submit comments and to appear as it did, albeit in support of the argument that the Convention.

There is no doubt that the Court has been greatly assisted over the years by third party interventions particularly by NGOs who have been able to provide much relevant information concerning comparative and international law and practice. Such a contribution not only brings to the Court’s attention relevant judicial authorities but also greatly assists the Court in determining whether there exists a common ground within the contracting parties on particular issues. The liberal practice that the new Court has developed over the years is thus based on its own desire to have as much relevant information at its disposal as possible when deciding a case. It also reflects an understanding that many NGOs have a wealth of knowledge and expertise at their disposal which can enrich the deliberations in a case. While Young, James and Webster was exceptional in its day, the Court can be expected to reach out more frequently of its own accord—a possibility which is open to it under Rule 44—and invite particular interveners to file comments when it has received no requests to intervene and the case is of general importance.

4. ARTICLE 41: JUST SATISFACTION

Article 41 reads:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial redress to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The case law under Article 41 (which replaces Article 50) is characterized by the lack of a consistently applied law of damages at the level of detail which one would find in national systems and which permit specific calculations to be made on the basis of precedent for injury, loss of life, unlawful imprisonment, and loss of property. The Court applies a series of general principles—as set out below—to the facts of each case when a violation has been found. Given the existence of five Sections and a Grand Chamber all taking decisions on just satisfaction, problems of consistency of awards have inevitably crept in. However the precedential value of awards in Grand Chamber cases and the setting up of an Article 41 Unit with the Registry of the Court to advise the Chambers on the not parties to the proceedings but have been permitted to lodge comments in what are and remain individual applications.

244 A 44 (1981) para 8 PC. The Chamber in Andrejjeva v Latvia No 55707/00 hudoc (2006), (currently pending before the Grand Chamber following relinquishment of jurisdiction) invited the Russian and Ukrainian governments to intervene, the applicant having worked in both countries. The issue concerns a pension dispute. The invitation was not accepted.

245 For commentaries on the Court’s practice, see Shelton, Remedies in International Human Rights Law, 2005, pp 294 et seq; Bernhardt, Schuchter Collection, p. 243; Costa, in Fairgrieve et al, eds. Tort Liability of Public Authorities in Comparative Perspective, 2002; Myjer, in Vandenbergh et al, eds. Property and Human Rights; 2006; Leach, Taking a Case to the European Court of Human Rights, 2nd edn, pp 397ff; and Loucaides, 2 EHRLR 182 (2008). For a highly critical view of the case law on Article 41 see Tavernier, 72 RDH 945 (2007).
appropriate level of awards in similar cases show that attempts are being made within the Court to strive for greater consistency. One particular difficulty is that, unlike a national court, the Court must have regard to the standard of living applicable in the country concerned. Since the contracting parties encompass countries with a very low gross national income to countries with a high GDP awards made in respect of similar violations will vary in consequence.

Despite the wording of Article 41 (that the Court shall afford just satisfaction 'if the internal law of the High Contracting Party concerned allows only partial reparation') the Court does not require an applicant who has won his case to avail of national procedures to secure compensation even if these were available. The Court has indicated that it would not be compatible with the effective protection of human rights to require an applicant who has already exhausted domestic remedies to initiate further proceedings. When it finds one or more violations of the Convention, it will, in the same judgment consider what, if any, just satisfaction to award the applicant under Article 41 of the Convention. The award of just satisfaction is not a right when a violation has been found. It is a matter entirely within the Court's discretion. Part of the explanation for this is that Article 46 requires states to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. A judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects. Hence the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.

Thus the Court may and frequently does decide to hold that the finding of a violation is, in itself, sufficient vindication of the applicant's rights and limits its award to costs and expenses. The Court will not make an award of its own motion where no claim has been made or where a claim is made out of time. In a minority of cases and in accordance with Rule 75 of the Rules of Court, the Court may decide that the question of just satisfaction is not ready for decision and reserve its decision in whole or in part on the question. This occurs most frequently in cases concerning Article 1 of Protocol 1 when the calculation of pecuniary loss may be complex and require further deliberation. When it does so, and when the matter is ready for decision (usually after further observations from the parties) it will render a separate judgment if the parties have not managed to settle the issue themselves. If there is a settlement the Court will verify the 'equitable nature' of the agreement and, if satisfied, strike the case out of its list. It has been the practice of the Court occasionally to reserve Article 41 when it indicates general measures under Article 46.

The Court makes awards under three headings: costs and expenses, awards for pecuniary damage, and awards for non-pecuniary damage. It may also in certain circumstances indicate particular individual or general measures contracting parties must take.

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245 Barberà, Messegue and Jabardo v Spain A 285-C (1994) para 17 PC.
247 Scozzari and Giunta v Italy 2000-VIII, 35 EHRR 243 paras 248-50 GC.
249 Rule 75(4). See section on friendly settlement above pp 829-33.
250 See Bromowski v Poland 2004-V; 40 EHRR 495 GC.
in order to remedy the violation found, although in general these stop short of specific consequential measures, for example, that the state is required to take penal or administrative action in regard to the persons responsible for the infringement. In the operative provisions of the judgment the Court will provide that just satisfaction is to be paid within three months failing which default interest is payable at a particular rate.

The process of considering the application of Article 41 will start when the Court sends the government's observations to the applicant's legal representative for comment. At the same time, the representative will be invited to submit his claims for just satisfaction. Where the joint procedure is used under Article 29(3) (ie in most cases) the Article 41 claims must be submitted with the observations in reply on both the admissibility and merits of the application. The representative will be reminded of Rule 60 of the Rules of Court which provides that an applicant who wishes to obtain an award of just satisfaction under Article 41 must make a specific claim to that effect. The same rule states that the applicant must submit itemized particulars of all claims, together with any relevant supporting documents. The claims are then sent to the respondent government for comment.

I. COSTS AND EXPENSES

As regards costs and expenses, the Court is normally strict with representatives and frequently finds that they have either failed to itemize their costs properly or that the number of hours billed is excessive or that the hourly rate is excessive. Time limits for the submission of claims should be respected and the Court will not usually grant extensions of time limits in respect of Article 41 submissions unless good cause is shown for the delay. As it frequently states, an applicant is entitled to reimbursement of his costs and expenses only insofar as it has been shown that these relate to the violation(s) found, have been actually and necessarily incurred, and are reasonable as to quantum. Nonetheless, the costs of a full legal team can be claimed provided each of the representatives' costs are within these bounds and are properly itemized. Thus for a complex case, there will be no bar on claiming the costs of an instructing solicitor and both senior and junior counsel, though this must not involve an unnecessary duplication of work. Additionally, the Court may award a lump sum to the applicant, which may prove problematic when this is a percentage of what is claimed and there are several legal representatives seeking to recover their fees. The Court is not bound by the scale of fees applied in national law but these may be used by the Court as a benchmark for its calculation. Costs will not be awarded where a lawyer has acted free of charge. Expenses will be considered under the same rubric, save for when the applicant obtains leave to represent himself in which case he may claim expenses but not costs for the time he or she has spent working on the case. Expenses incurred in respect of translation costs, photocopies, and the use of

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251 See below p 862.
252 For example in Dickson v UK (2007) 46 EHRR 927 para 88 GC, the Court refused to order the government to provide artificial insemination facilities to a prisoner despite having found that the failure of the UK prison authorities was a breach of his and his wife's Article 8 rights.
253 Rule 60 is supplemented by a Practice Direction, available at: <http://www.echr.coe.int>.
254 Eg, in Sahin v Germany 2001-VIII para 105 GC. They are also only recoverable insofar as they relate to the violation found: see Beyeler v Italy (2002) GC.
255 Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK (2007); 45 EHRR 793 para 60.
256 Steel and Morris v UK (2005-II); 41 EHRR 403 para 112 (and references thereon) and Bhandari v UK (2007) paras 28–30.
expert testimony may be recoverable if such expenses have been actually and reasonably incurred.\textsuperscript{257} It is in principle open to applicants to seek recovery of costs and expenses incurred before the domestic courts, the Court will only make such an award where these proceedings were concerned with preventing or seeking redress for the alleged violation of the Convention.\textsuperscript{258} Where the Court finds that there is only a violation as regards part of the case presented, this may result in the Court reducing the amount awarded for costs and expenses. Finally Rule 43(4) provides that an award of costs may be made by the Court in respect of an application that has been struck out. This provision was added to the Rules in recognition of the work done by a legal representative in a case which may be struck out because the proceedings have led to some form of redress being given.\textsuperscript{259}

II. PECUNIARY AND NON-PECUNIARY DAMAGE\textsuperscript{260}

For an award of pecuniary damage to be made the applicant must demonstrate to the Court's satisfaction, that there is causal link between the violation and any financial loss alleged. This is seen as a matter of proof rather than speculation. It is easily established when there has been a taking of property but significantly more difficult in other contexts. For example, a finding of a violation of Article 6 in the context of a criminal trial will not allow the applicant to claim lost earnings for any time he has spent in prison. However, the Court has been prepared to compensate for lost earnings in other situations, notably in right to life cases when the applicant is the widow or another dependent of the deceased\textsuperscript{261} or where there have been lost earnings flowing from the Convention breach.\textsuperscript{262} Claims for pecuniary damage will normally arise in cases involving property under Article 1 of Protocol 1.\textsuperscript{263} Where the Court has found a violation, this can often give rise to complex calculations of how much to award, especially when the property in question is of significant value.\textsuperscript{264} The amount awarded in these cases is rarely the market value. In the Former King of Greece case,\textsuperscript{265} the Court found that less than full compensation could be justified where the taking of property had been intended to complete 'such fundamental changes of a country's constitutional system as the transition from monarchy to republic'.\textsuperscript{266}

\begin{itemize}
\item[257] Fg. Saldonsson v Sweden hudoc (2002), Frette v France 2002-1, 38 EHRR 438 para 56
\item[258] King v UK hudoc (2004), 41 FHRR 11 para 52, Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK, loc. cit. at n 255 above, para 58, T.I. GMR and AKF v UK hudoc (2001)
\item[259] Pisano v Italy hudoc (2002) paras 51–6 GC, although the same rules on submitting specific claims and schedules of costs apply also Stojewski and Others v Latvia hudoc (2007), 45 ERHR 753 paras 133 and 134 GC. Cf, Doe v Sweden 1997 VII, where the former Court struck out an Article 3 case concerning expulsion to Peru after the applicant had been allowed to stay in Sweden and after extensive examination of the case by the Commission which expressed the view that there would be no violation in sending him back. At that time the rules did not allow an award in such circumstances
\item[260] See Reid, A Practitioner's Guide to the ECHR, 3rd edn, 2008, pp 608–62 for detailed tables of awards made by the Court for pecuniary and non-pecuniary loss
\item[261] Brusa v Russia 2006-XIII para 213, Çakici v Turkey 1999-IV para 127, 31 EHRR 133 GC
\item[262] Lustig-Pront and Beckett v UK hudoc (2000), 31 EHRR 601, Young, James and Webster v UK A 55 (1982) para 11
\item[264] Fg. in Former King of Greece and Others v Greece hudoc, (2002) GC (see also the principal judgment 2000 XII, 33 EHRR 516) about the expropriation of the former king's properties after his deposition, the final award ran to over €13 million
\item[265] Ibid
\item[266] (d, para 87)
\end{itemize}
In deciding how much to award, the Court will follow a number of steps. First, it will decide whether *restitutio in integrum* is possible. If it is not or if national law only allows partial reparation, the Court will consider making an award. In property cases, it will then consider whether the parties can agree on the value of the property and, if so, whether they can agree to a settlement of the matter. If they cannot agree to either, the Court may place the valuation in the hands of an independent expert and then, basing itself on the expert’s report, award pecuniary damages on the usual equitable basis.

The Court will award non-pecuniary damages (or moral damages) on the basis of equitable considerations more readily than it awards pecuniary damages, although there is usually little explanation as to how it reaches the sums awarded. This head of damage covers such matters as pain and suffering, anguish and distress, and loss of opportunity. For the most part, the amount awarded under this head will be in proportion to the seriousness of the violation (or violations) and its effect on the applicant. The highest awards will therefore tend to be made in relation to violations of Articles 2 and 3 of the Convention. However, given that the Court always rules on an equitable basis and that there is some adjustment according to the cost of living in each member state, past awards are not always reliable predictors of future awards. This is especially so when the violation turns on the particular facts of the application as is frequently the case with Articles 8, 9, 10, and 11 of the Convention. Nonetheless, there is greater consistency in such awards as regards most repetitive cases whether they are particular types of applications from one country (such as non-enforcement of court judgments) or the Court’s most common type of application, the length of civil or criminal proceedings. For instance, for the latter, the Court will normally make an award based on the number of years the proceedings lasted as against the number of instances (levels of jurisdiction) before which they took place. In this type of case, the Court is guided by a set of tables which have been prepared within the Registry in respect of a number of countries as a tool to ensure consistency. For the time being such tables are not accessible to the public but the Court is considering making them available in order to serve as a guide for national courts in calculating damages.

As to who can claim non-pecuniary damages, this now appears to be virtually commensurate with victim status under Article 34. There were indications that only individuals and not, say, companies or other legal persons, were eligible for non-pecuniary damages. However, in *Comnigersoll SA v Portugal*, a length of proceedings case, the Court found that this possibility could not be excluded. The unreasonable length of the

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262 *Former King of Greece and Others v Greece* cited above para 114, *Beggler (just satisfaction)* cited above para 126.
263 *Pasqua v Italy*.
264 The case law for loss of opportunity is not always consistent—eg, *Bonich v Austria* A103 (1996), 13 EHRR 409, and *Wicks v UK* A145 A (1988), 13 EHRR 475 para 13 PC, *Fla v UK* A136 B (1998) PC where awards under this head were made. In other cases the Court has refused to speculate whether there were such losses—eg, *Parks and Others v UK* (1999), 30 EHRR 33, where the applicant was unrepresented before a magistrates’ court which sentenced him to a prison term.
265 At the time of writing a typical Article 2 award was around €20,000 per death (cf, *Ramsahai and Others v Netherlands*), 46 EHRR 983 GC, the death of one family member giving rise to an award of €20,000 and *Bitlina and Others v Russia* (2007), the death of four family members giving rise to an award of €95,000. The awards seem unaffected by the number of relatives of the deceased who apply to the Court.
266 This was recommended by the Woolf Report (the Review of the Working Methods of the European Court of Human Rights, December 2005) See p 41 of the report available at <http://www.echr.coe.int>.
267 2000 IV, 31 EHRR 772 paras 32-7 GC. In assessing this issue, account should be taken of the company’s reputation, uncertainty in decision planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team’ id, para 35. See also *Rylander, 74 RYII 409* (2003).
proceedings had caused inconvenience and prolonged uncertainty to the company, its
directors, and shareholders justifying an award of damages.275

It is always open to the Court to hold that the finding of a violation is sufficient just
satisfaction.274 This has happened regularly in the context of the due process rights set out
in Articles 5 and 6 of the Convention where the Court has stated that it would not make
an award on the speculative basis that the applicant would not have been convicted if he
had had the benefit of the guarantees of Article 5 or 6 of the Convention.275 It will also
take this approach when the focus of the application is having one's rights vindicated
rather than seeking damages per se. For example in Hirst v UK (No 2),276 in finding a
violation stemming from legislation prohibiting prisoners from voting in elections, the
Grand Chamber found that the government would be required to secure the right to vote
in compliance with its judgment. In the circumstances, it considered that this could be
regarded as providing the applicant with just satisfaction.

It is also open to the Court, in the exercise of its discretion, to decline to make an
award on public policy grounds. This happens rarely but did occur in McCann and Others
v UK277 concerning the shooting of three terrorist suspects in Gibraltar by British special
forces. The Court had regard to the fact that the deceased had been intending to plant a
bomb in Gibraltar and so stated that it did not consider it appropriate to make an award
under this head.

The Court has also had to consider whether the sums of money it awards under Article 41
can be accompanied by orders or directions that the money should be freely enjoyed by
the applicant without attachment or other consequences for the applicant's existing financial
situation. The matter first arose in Allenet de Ribemont v France,278 where the applicant
asked that any sums awarded to him be free from attachment to avoid enforcement of an
outstanding French civil judgment. The Court declined this request, holding that it had
no jurisdiction to issue such an order to a state. In Velikova v Bulgaria,279 concerning the
death of the applicant's husband in police custody the applicant requested the Court to
order that there should be no negative consequences for her, such as reduction in social
benefits due to her, as a result of the receipt of any non-pecuniary damages. The Court
noted that it would be incongruous to award the applicant an amount in compensation
for, inter alia, deprivation of life constituting a violation of Article 2 of the Convention
if the state itself were then allowed to attach this amount. The purpose of compensa­
tion for non-pecuniary damage would inevitably be frustrated and the Article 41 system
perverted, if such a situation were to be deemed satisfactory. However, the Court again
found it had no power to make such an order and left the matter to the discretion of the
Bulgarian authorities.280

274 This has come in for robust criticism by some of the judges, Judge Bonello in Nikolova v Bulgaria 1999-1;
31 EHRR 64 GC stated: 'I do not share the Court's view. I consider it wholly inadequate and unacceptable that
a court of justice should 'satisfy' the victim of a breach of fundamental rights with a mere handout of legal
idiom. The first time the Court appears to have resorted to this hapless formula was in the Golder case of 1975...
Disregarding its own practice that full reasoning should be given for all decisions, the Court failed to suggest
one single reason why the finding should also double up as the remedy. Since then, propelled by the irresistible
force of inertia, that formula has resurfaced regularly. In few of the many judgments which relied on it did the
Court seem eager to upset the rule that it has to give neither reasons nor explanations.'
275 For Article 5 see eg, Thompson v UK hudoc (2004); 40 EHRR 245 para 50. For Article 6, the standard
formula is to state that it is impossible speculate as to the outcome of the criminal trial had the violation of
Article 6(1) of the Convention not occurred (see eg, Findlay v UK 1997-I; 24 EHRR 221 paras 85 and 88).
276 2005-I; 42 EHRR 849 para 60 GC. 277 A 324 (1995); 21 EHRR 97 Para 219 GC.
280 See also the earlier case of Setmouni v France 1999-V; 29 EHRR 403 paras 132 and 133 GC, where the
Court made a similar observation and finding in respect of sums awarded in respect of a violation of Article 3.
Article 46(1) provides: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case where they are parties.' As noted above the Court has traditionally been reluctant to make 'consequential orders' in the form of directions or recommendations to the state to take a particular course of action. Thus, for example, in Ireland v UK[8], it refused the request by the Irish government to order that criminal prosecutions be brought against those responsible for ill-treatment in breach of Article 3. On other occasions it has rejected invitations to require the state to undertake that children will not be corporally punished or to take steps to prevent such breaches in the future. This approach was based on the view that the Court only possesses powers to make an award of compensation.

However the Court has gradually become more adventurous in its judgments in giving indications under Article 46 as to the most appropriate individual and general measures needed to provide redress. The most common instance has been in expropriation cases where the Court has given states the choice to return the property or to pay the value of it in compensation to the applicant. Recently more innovative examples have appeared. In Assandize v Georgia[288] the Court having found the applicant’s detention to be illegal held that Georgia had to secure his release at the earliest possible date. It was considered that, the nature of the violation was such as to leave no real choice as to the measures required to remedy it: A similar direction was made in the case of Illascu and Others v Moldova and Russia[289].

The Court has gone even further in various pilot judgments. Thus in Broniowski v Poland[290] the Court noted that the violation was a result of a malfunctioning of Polish legislation and administrative practice affecting a large but identifiable class of citizens and that general measures were called-for at the national level. In the operative part of the judgment it held that Poland ‘must, through appropriate measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants’. Similar general measures were indicated in Hütten-Czapska v Poland where the Court had found a system of rent control in Poland to be in violation of Article 1 of Protocol 1[291].

In Gjurca v Moldova[292] the Court found the applicant’s Article 6 rights had been violated by the hearing of her civil claim by a tribunal that was not established by law (the term of office of one of the judges having expired). The Court noted the most appropriate form of relief would be to ensure that the applicant was granted in due course a re-hearing of the case by an independent and impartial tribunal. This was aided by the fact that the possibility existed under Moldovan law for the applicant, if she so requested, to obtain a re-hearing of her civil case in the light of the Court’s finding that the proceedings did not comply with Article 6 guarantees. It was content therefore to make no award of damages and let the case take this course[293].
The possibility of having domestic proceedings re-opened as a result of a judgment of the Court has led it to indicate that applicants, especially in criminal cases, be given a re-trial if they so request. Where proceedings are still pending, the Court may make indications in respect of them. In *Naime Doğan and Others v Turkey*, after finding a violation of Article 6(1) in respect of the length of civil proceedings that were ongoing, the Court indicated that the subsequent expedition and resolution of those proceedings within the shortest possible period of time offered appropriate redress for the violation. In *L v Lithuania*, the applicant had started gender reassignment surgery but could not complete the surgery because there was no domestic law enabling him to do so. The Court found a violation of Article 8. Turning to Article 41 (taken without Article 46), the Court considered that the applicant's claim for pecuniary damage would be satisfied by the enactment of the legislation within three months of the judgment becoming final. If that proved impossible, the Court was of the view that the applicant could have the final stages of the necessary surgery performed abroad and financed, at least in part, by the state. Consequently, as an alternative in the absence of any such subsidiary legislation, the Court would award the applicant 40,000 euros in pecuniary damage.

In two recent Albanian judgments the Court simultaneously indicated two sets of measures: individual measures under Article 41 and general measures under Article 46. In *Driza v Albania*, the issue was the repeat non-enforcement of court judgments awarding compensation for the taking of property. The Court considered this to be a systemic problem and stated that its concern was 'to facilitate the rapid and effective suppression of a malfunctioning found in the national system of human-rights protection'. To this end, it considered that Albania had to remove all obstacles to the award of compensation and went on to give examples of what measures it had to take as a matter of urgency. In respect of the individual applicant, under Article 41 it indicated, *inter alia*, that returning one of the plots of land in question and the additional payment of compensation would put the applicant as far as possible in a situation equivalent to the one in which he would have been if there had not been a breach of the Convention. In the second judgment, *Dybeku v Albania*, the Court examined conditions of detention and in particular the detention of the applicant who suffered from paranoid schizophrenia. The Court found a violation of Article 3 and moved to consider Articles 41 and 46. Under the former it awarded 5,000 euros non-pecuniary damage to the applicant but, before doing so, it considered that it was incumbent upon Albania as a matter of urgency to take necessary measures to secure appropriate conditions of detention and adequate medical treatment, in particular, for prisoners, like the applicant, who needed special care owing to their state of health.

6. PROTOCOL 14

Protocol 14 was opened for signature on 13 May 2005 and at the time of writing has been ratified by forty-six of the forty-seven contracting parties to the Convention, but not by Russia. Although many of the Protocol's provisions, such as the single-judge procedure...

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289 *Krasniki v Czech Republic* <https://hudoc.coe.int> (2006) para 93. For instances where it has been done under Article 46, see *Seplovic v Italy* 2006-I para 119 et seq GC; *Ocalan v Turkey* 2005-I; 41 EHRR 985 para 210 GC. Prior to such cases, such indications were only noted under Article 41: *Gencel v Turkey* <https://hudoc.coe.int> (2003) para 27; *Tahir Duran v Turkey* <https://hudoc.coe.int> (2004) para 23; *Somogyi v Italy* 2004-I para 86.

290 *Hudoc* (2007) para 34.

291 *Hudoc* (2007) para 74, as well as points 5 and 6 of the operative part of the judgment.


293 Id, para 125.

294 Hudoc (2007).