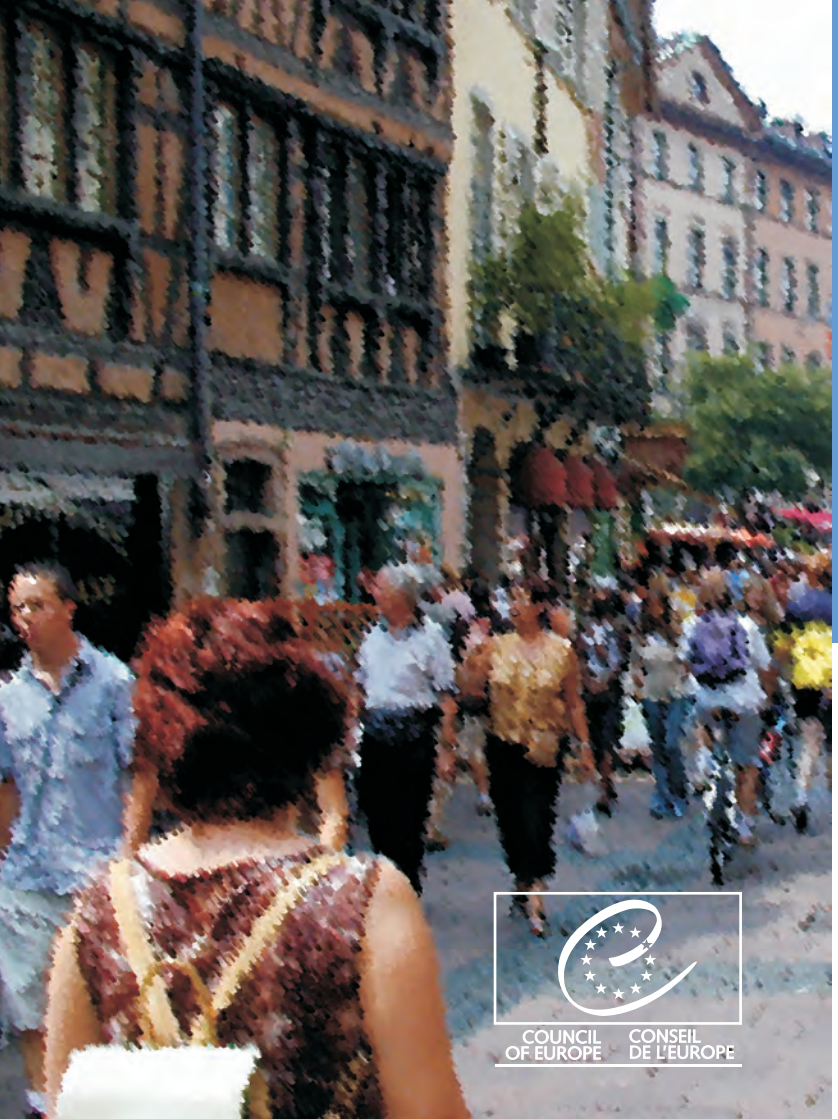

Positive obligations under the European Convention on Human Rights

A guide to the implementation of the European Convention on Human Rights

Jean-François Akandji-Kombe

Human rights handbooks, No. 7

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Notice

This booklet is aimed at legal practitioners who may be required to implement the European Convention on Human Rights ("the Convention"), to cite its provisions or to train others to do so. Unlike the other booklets in this series, it does not deal with an individual right or article. Rather, it covers a specific category of obligations which result from the substantive provisions of the Convention taken as a whole. These are the *positive obligations*. Like the negative obligations, they form part of the rights guaranteed; and observing these rights goes hand in hand with observing the Convention. It is therefore essential to be familiar with these obligations and what they involve.

Introduction

While it is the purpose of all international instruments for the protection of the human person primarily to set forth rights, that protection depends – apart from the guarantee mechanisms put in place – on the obligations on the states parties. It is therefore not surprising that the international control bodies pay particular attention to their identification, delimitation and scope. It may even be argued that this attention is keener in the human rights field, having regard to the principles applying here, foremost among which is the principle of effectiveness. The latter principle requires that the undertakings given be interpreted in the sense which best protects the person. Where obligations are concerned, it also requires that the relevant conventions be interpreted in the light of social developments. Hence the progressive character of the case-law in this sphere.

A variety of means are employed by the control bodies to define the extent and scope of states' undertakings. One of the most interesting is to consider that every right may entail three kinds of obligation: the "obligation to respect", which requires the state's organs and agents not to commit violations themselves; the "obligation to protect", which requires the state to protect the owners of rights against interference by third parties and to punish the perpetrators; and finally the "obligation to implement", which calls for specific positive measures to give full realisation and full effect to the right. This approach, it is true, is the one preferred rather by the bodies responsible for overseeing the proper application of the instruments devoted to economic, social and cultural rights; it is not true of the European Court of Human Rights which is of course concerned with civil and political rights.

The European Court of Human Rights has for its part opted for a simpler, two-pronged approach, dividing states' obligations into two categories: (*a*) negative obligations and (*b*) positive obligations. As will be seen, although different, this approach has much in common with the preceding one. On this basis, the Court today ensures broader protection for the rights secured in the Convention of which it is the ultimate guardian.[1]

While the negative obligations, which essentially require states not to interfere in the exercise of rights, have always been regarded as inherent in the European Convention, the same is not true of the positive obligations. A number of these – in fact very few – are of course laid down from the outset, in the text itself. But the concept as such, and the "machinery" for obligations of this kind, did not make their appearance until the late 1960s, under the impetus of the *Belgian linguistic case*.[2] From the time of that remarkable decision, the European Court has constantly broadened this category

1. The following are two important studies on the subject: Frédéric Sudre, "Les obligations positives dans la jurisprudence européenne des droits de l'homme", *Revue trimestrielle des Droits de l'homme*, 1995, pp. 363 ff.; A.R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford – Portland Oregon, 2004.
2. Judgment of 23 July 1968.

with the addition of new elements, to the point where virtually all the standard-setting provisions of the Convention now have a dual aspect in terms of their requirements, one negative and the other positive. So here we are faced with an essentially judge-made opus or structure. It is also a major work which has been seen, and rightly so, as a "decisive weapon"[3] serving to give effect to the Convention rights. In fact, resorting to the concept of positive obligation has enabled the Court to strengthen, and sometimes extend, the substantive requirements of the European text and to link them to procedural obligations which are independent of Articles 6 and 13 and additional to those covered by those articles. The aim is to guarantee individuals the effective enjoyment of the rights secured.

This guide sets out to list those obligations in the spirit of the "Human rights handbooks" series. This will be done clause by clause, or at least by grouping provisions according to their purpose. Thus we shall look in turn at protection of life and physical integrity (II), private and family life (III), pluralism (IV), the guarantee of economic, social and cultural rights (V), promotion of equality (VI) and, lastly, the positive obligations arising from the procedural safeguards (VII).[4]

Before proceeding further, however, it is important to circumscribe the concept and identify the general issues (I). This means not only defining and clarifying the implications of the positive obligations, but also clarifying their relationship to the negative obligations and their possible connection with the so-called horizontal effect of the Convention. In this part we shall also seek to establish a typology of these obligations and examine the ways in which the European Court exercises control. The aim of all this is to afford an overall understanding of the subject, to provide a systematic picture of the function of this kind of obligation in the Convention system and how they affect contentious issues. In this way it is hoped to furnish the essential keys to an understanding of the relevant case-law and its internal application.

3. The term was coined by Professor J.-P. Marguénaud in *La Cour européenne des Droits de l'Homme*, Dalloz, Paris, coll. Connaissance du droit, 2nd edition, p. 36.

4. The classification employed here is largely borrowed from the one devised by Professor F. Sudre, *Droit international et européen des droits de l'homme*, Presses universitaires de France, coll. droit fondamental, 7th edition, 2005.

I. The general issues

The concepts surrounding the notion of positive obligations

Definition

While a systematic picture of the relevant case-law can be found in the Court's judgments, such as the judgment in the *Siliadin v. France*[5] case, these decisions do not provide a general definition of the concept of positive obligation. However, such a definition can easily be reconstituted from individual cases. In the *Belgian linguistic case*,[6] the applicants, taking this as the basis for their complaints, argued that such obligations should be recognised as "obligations to do something". The Court declined to endorse this judicial view and preferred to find that the provision relied on – Article 2 of Protocol No. 1 – required by its very nature regulation by the state. That position was subsequently kept to. In the view of the European Court, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right[7] or, more precisely, to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.[8] Such measures may be judicial.[9] This is so where the state is expected to lay down sanctions for individuals infringing the Convention, whether it issues legal rules for a kind of activity or for a category of persons. But they may also consist of practical measures. According to a general Court finding which applies to both negative and positive obligations, "hindrance in fact can contravene the Convention just like a legal impediment".[10] Think, for example, of the measures which prison authorities are required to take in certain cases to prevent prisoner suicides or to prevent prisoners inflicting on others treatment at variance with the European Convention. The two kinds of measure – legal and practical – may even prove necessary at the same time. It is a question of circumstances.

Basis

Bearing in mind that in most cases positive obligations have the effect of extending the requirements which states have to satisfy, the question of their legal basis is of major importance. As a consequence of the general principle of attribution, which means that the Court is not competent to protect rights which do not have their basis in the Convention,[11] the European judges have endeav-

5. Judgment of 26 June 2005.
6. Cited above, p. 5.
7. *Hokkanen v. Finland*, 24 August 1994.
8. *López-Ostra v. Spain*, 9 December 1994.
9. In particular, *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 September 2001. The Court refers there to the obligation to pass domestic legislation.
10. *Airey v. Ireland*, 11 September 1979, §25.
11. For example, *Johnston and others v. the United Kingdom*, 27 September 1986.

oured to link every positive obligation to a clause of the Convention. Case-law has evolved in this respect.

It was possible initially to draw a distinction according as the obligation was substantive or procedural in character. In the former case, positive obligations were deemed to stem from the actual clause setting out the substantive right. This is quite certainly so where the obligation in question is contained as such in a specific provision. For example, the first sentence of Article 2 paragraph 1 provides for positive judicial intervention by the state in order to protect the right to life ("Everyone's right to life shall be protected by law").[12] The situation – by far the most common – in which, while not being explicit, a given provision of the Convention will be interpreted as creating a positive obligation must be placed in the same category. This applies in particular to Article 8, the European Court arguing mainly on the basis that it prescribes "respect" for private and family life, home and correspondence.[13] More broadly, the same will logically apply to all the Convention's other provisions if they entail a substantive obligation inherent by definition in the Convention rule whose observance is to be ensured.[14] The picture appeared different where procedural positive obligations were concerned – those very ones which the Court inferred from Articles 2 (the right to life), 3 (prohibition of ill-treatment) or 4 (prohibition of slavery, servitude or forced labour). As is repeatedly emphasised in case-law, it is in conjunction with Article 1 of the Convention that these provisions can generate such obligations.[15] So the latter derive from the practical application of the general duty on states to "secure to everyone within their jurisdiction the rights and freedoms defined", a duty which implies that "the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their "jurisdiction" – or competence – at the time of the violation".[16] Thus the theory of positive obligations came to have general effect: it could apply, in its procedural aspect, to any provision – in particular any standard-setting provision – of the Convention.

Recent case-law reflects a new tendency whereby the Court appears systematically to base the positive obligations which it lays down, whether substantive or procedural, on a combination of the standard-setting provisions of the European text and Article 1 of that text. Thus the obligation to take necessary measures to protect freedom of expression is drawn from Article 10 in conjunction with Article 1,[17] the obligation to protect property from the combination of the same Article 1 and Article 1 of Protocol No. 1.[18,19] Here there is clearly a change of direction, not unrelated to the reassessment of the overall economy of the Convention that can be seen in some recent decisions. One may think in particular

12. See below for further details relating to this provision and the others along the same lines.
13. Case-law on this is constant. See below.
14. For example, *Marckx v. Belgium*, 27 April 1979.
15. For example, with regard to Article 3, *Assenov v. Bulgaria*, 28 October 1998.
16. *Assanidzé v. Georgia*, 8 April 2004.
17. For example, *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 September 2001.
18. For example, *Broniowski v. Poland,* 22 June 2004.
19. Note, conversely, that the obligation to protect persons from ill-treatment continues to be based solely on Article 3: *Farbuths v. Latvia*, 2 December 2004.

of the *Assanidzé v. Georgia*[20] and *Ilaşcu and others v. Moldova and Russia*[21] judgments. With these decisions, Article 1 of the Convention is seen more than ever as the cornerstone of the Convention system, to the point that it constitutes an independent source of general obligations – which are also positive obligations – on states. For example, in the *Assanidzé* judgment, the Court found that Article 1 implied and required the implementation of a state system such as to guarantee the Convention system over all its territory and with regard to every individual; and in the *Ilaşcu* judgment it considered that in cases where part of its territory, by reason of a separatist regime, escaped its control and authority, the state nevertheless continued to bear in respect of the population in that territory the positive obligations placed on it by Article 1: it was required to take the measures necessary, on the one hand to restore its control over that territory and, on the other, to protect the persons living there. These general obligations may be described as quasi-autonomous. They are autonomous in so far as they arise solely by virtue of Article 1 of the Convention. But they are not wholly so, because their observance can be tested only on the occasion of an application alleging violation of one of the substantive rights secured by the European Convention. So they appear context-dependent, since they will necessarily have to be examined through the lens of a particular standard.[22] Consequently, from this standpoint, Article 1 should be systematically coupled with the standard-setting provisions.

There is a still more recent tendency in case-law that must be noted, *viz* the tendency to infer positive obligations from a combination of standard-setting provisions and the general principle of the "rule of law" or "state governed by the rule of law", which the Court regards as "one of the fundamental principles of a democratic society" and as "inherent in all the articles of the Convention".[23] In view of this affirmation of the inherent nature of this principle, one may wonder whether we are not moving towards the autonomy of each provision as regards the conditions of its internal guarantee.

Purpose

Whether based on a particular standard-setting provision or on a combination of that provision with Article 1 of the Convention or with general principles of European law, all positive obligations pursue the same goal, which is the effective application of the European Convention and the effectiveness of the rights it secures. The *Airey* judgment[24] is still the perfect illustration of this today. The applicant, who wished to obtain a separation, had chosen to do so via the judicial course open to her under Irish law. In view of her low income and the fact that there was no system of legal aid in Ireland at the relevant time, the applicant finally had to

20. Judgment of 8 April 2004.
21. Judgment of 8 July 2004.
22. See the Court's approach in the *Broniowski* judgment cited above.
23. *Matheus v. France*, 31 March 2005, especially §70 ; and for the emergence of this approach, the *Broniowski* judgment cited above.
24. Judgment cited above, p. 7.

abandon her application, since she believed, having regard to the complexity of the procedure, that she could not defend herself alone without the assistance of legal counsel. Before the European Court of Human Rights she alleged in particular that the state had violated Article 6 paragraph 1 by failing to make an effective remedy available to her. The European Court finally accepted her complaints. But the main thing to highlight here is the considerations on the basis of which it reached that decision. It began by observing, in wording that has remained famous, that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". So it is not enough for legal remedies to exist: it must also be possible for them to be really and usefully exercised. According to the Court, this may entail recognising to such an individual an economic and social right, in this case the right to free legal aid,[25] for "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature". There is therefore "no water-tight division" separating the sphere of economic and social rights from the field covered by the Convention.

The scope of the positive obligations seems remarkably stable. The Court constantly emphasises it in the relevant judgments.[26] It follows that the positive obligations tend in essence to ensure the tangible material and judicial conditions for genuine exercise of the rights protected by the Convention.

Positive and negative obligations

Are positive and negative obligations exclusive?

The positive obligations, as conceived, are additional to the negative obligations. But can it be said that together they occupy the entire field of the Convention? The reply to that question should be a negative one if one refers to the *Pla and Puncernau v. Andorra* judgment,[27] which suggests that there may be a third approach. In that case, the responsibility of the Andorran state was argued on the basis of Article 8 by reason of a judicial interpretation, the law applied by the domestic court having been adjudged to comply in all respects with the requirements of that article. The Court held that "the Andorran authorities cannot be held liable for any interference with the applicants' private and family life any more than the Andorran State can be held liable for a breach of any positive obligations to ensure effective respect for family life". It continues: "The applicants confined themselves to challenging a judicial decision …". The finding is a curious one,[28] even if it can be ascribed to the Court's attachment to the independence of the judiciary (a principle moreover enshrined in the Convention, in Article 6). At all events, it seems to establish a generic type of violation of the Convention which would not be classed as a failure to meet one of the known forms of obligation. However, that analysis

25. In European jurisprudence this right is far from absolute. See below, pp. 61 ff.
26. For recent examples, see in particular *Öneryıldız v. Turkey,* 18 June 2002; *Ouranio and others v. Greece*, 20 October 2005.
27. Judgment of 13 July 2004.

is not convincing and will not be adopted here.[29] Every violation of the Convention must be the result only of non-compliance by the state with an accepted obligation which can only be either positive or negative.[30]

Returning therefore to this fundamental dichotomy, the question is how each element stands relative to the other. On the basis of the case-law, we may offer two propositions:

- the two kinds of obligation are different in kind;
- however, they sometimes have the same implications.

Obligations which are different in kind

What distinguishes positive obligations from negative obligations is that the former require positive intervention by the state, whereas the latter require it to refrain from interference. Violation of the Convention will result in the first case from inaction, i.e. passivity, on the part of the national authorities, and in the second case from their preventing or limiting the exercise of the right through positive action.

This difference is sometimes obvious in practice. It can be illustrated in the following way. Let us suppose that Mr X takes part in an unauthorised gathering on the public highway and meets his death there. Suppose that his death is the result of blows and wounds inflicted by police officers with instructions to disperse the demonstration. The question of observance of the Convention will arise, whether in relation to Article 11 (freedom of assembly) or Article 2 (the right to life) in terms of compliance with the obligation of non-interference in the exercise of those rights. And if the state is held responsible for this death, it will be by reason of a *positive act* because, through the actions of its agents, it intervened (disproportionately) where the Convention required it to abstain. But let us suppose that the same Mr X was beaten to death by counter-demonstrators in the presence of police forces who remained passive. If one accepted that Articles 2 and 11 imposed only negative obligations, there would in any case be no violation of the Convention, since the police did not intervene. By contrast, if one considers – as one should in view of the case-law – that the Convention imposes an obligation to protect Mr X's life through positive intervention, the *passivity* of the police officers would be such as to render the state responsible. To quote the Court, if Mr X's relatives complained about his death, "the substance of [the applicant's] complaint [would be] not that the State has acted but that it has failed to act".[31]

28. One may indeed wonder where the state's accountability lies. In the absence of any failure on its part, it is hard to see what could justify bringing its international responsibility into play. It is clear in this case that the finding against the state is implicitly based on the fact that the violation was committed by one of its organs. Therefore the Court could have tested that violation against paragraph 2 of Article 8, without affecting the independence of the judges. Here we probably have one of the undesirable consequences of the extension, described below, of the theory of positive obligations to relations between emanations of the state and private individuals (see pp. 15 ff.)
29. Unless it is considered that the distinction between positive and negative obligation reappears in this hypothesis according as the violation of the Convention is the result of the judge's withdrawal, or even of a miscarriage of justice or a judicial act.
30. See below, p. 14.

Nonetheless, there are situations in which this difference is not self-evident, where the boundary between the two kinds of obligation is blurred, even though it never disappears entirely.

Overlapping obligations in practice

It is not uncommon for the Court's deliberations to focus firstly on the obligation which the applicant alleges has been breached and which the European Court is led to reclassify. An example is the *Cossey v. the United Kingdom* case,[32] in which the applicant argued that the refusal to amend her civil status following a sex change operation amounted to interference in her private life, in so far as it obliged her to disclose details of her private life whenever she had to produce an identity document. The Court did not share that opinion. It considered that "what the applicant is arguing is not that the State should abstain from acting but rather that it should take steps to modify its existing system. The question is, therefore, whether an effective respect for Miss Cossey's private life imposes a positive obligation on the United Kingdom in this regard". While such situations do not necessarily reflect serious difficulties of classification, they do at the very least demonstrate that it is not always simple to draw a distinction between the two kinds of obligation. The Court has itself admitted this, stressing on several occasions that "the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition".[33] Case-law shows clearly the degree to which the two can overlap in practice.

Firstly, there is the case in which elements of abstention and action coexist in the conduct of the state, or even overlap. For example, where the state is blamed for the breakdown in a family relationship as the result of an adoption which was possible only because, on the one hand, domestic law afforded the biological father insufficient protection and, on the other hand, the state was itself a party to the adoption procedure through the competent bodies.[34] Another example is where it is alleged that the state has prevented an owner from enjoying his possessions, both actively through obstructive manoeuvres and practices to circumvent the law, and passively through lack of due diligence.[35]

Then there are cases in which the question arises how the same act attributable to the state is to be classified. We see this, for example, in cases concerning the law relating to foreigners from the standpoint of Article 8, when the applicant argues that refusal of entry or refusal to issue a residence permit, in so far as it prevents him from living with his family on the territory of that state, constitutes failure to comply with paragraph 1 of that article. It is interesting to note that in these cases, the complaint is examined by the

31. *Gaskin v. the United Kingdom*, 23 June 1989, §41. The same type of wording is found in the *Sheffield and Horsham v. the United Kingdom* judgment of 30 June 1998: "the issue raised by the applicants before the Court is not that the respondent State should abstain from acting to their detriment but that it has failed to take positive steps to modify a system which they claim operates to their prejudice." (§51).
32. Judgment of 29 August 1990.
33. See for example *Keegan v. Ireland*, 19 April 1994, §49; and *Hokkanen v. Finland*, 24 August 1994, §55.
34. *Keegan*, cited above.
35. *Broniowski v. Poland*, 22 June 2004.

Court sometimes from the standpoint of positive obligations[36] and sometimes from that of negative obligations.[37] The fact is that in these cases, everything depends on the point of view adopted. Either one considers that the breakdown or impediment to family life is the consequence of the refusal, and then there is interference which has to be judged in relation to Article 8 paragraph 2. Or one considers that it is the result of the fact that the authorities did not act to authorise the entry or residence, in which case it is the merits of that failure that will be examined. Another illustration is provided by the *Powell and Rayner v. the United Kingdom* judgment.[38] The applicants, who lived close to London Heathrow international airport, complained of unacceptable noise levels which they considered constituted a violation of their right to private life as secured by Article 8, and argued that the state was responsible for this. The Court chose in this case not to decide the question whether the applicants were complaining of a violation of a negative obligation or of a positive obligation, and resorted to the now classic wording: "Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar". So what was the state blamed for? For having permitted the emergence of such nuisances, through its regulations – in particular the noise control and abatement measures and the setting of the relevant standards – but also, concomitantly, for not having taken adequate measures. This has to be emphasised. For there to be a violation of a positive obligation, the state does not necessarily have to be entirely passive. It may have intervened, but not have taken all the necessary measures[39] and this will be deemed a "partial failure to act"[40] which renders the state liable in terms of its positive obligations.

Another situation in which negative obligations and positive obligations overlap while remaining distinct is where the state in question has undoubtedly committed an interference but where the assessment of the proportionality of that interference brings positive obligations into play. This applies quite particularly from the standpoint of Articles 2, 3 and 5. Faced with circumstances in which death is caused by agents of the state – usually belonging to the police or security forces – the European Court will want to verify with regard to the first of these provisions whether at an earlier stage, during preparation and control of the operations, the competent authorities took all appropriate measures, in other words whether death was not due to a failure of preparation or of stringent control of execution.[41] Furthermore, one sometimes sees the Court, when deciding on a placement in custody or detention

36. For example, *Ciliz v. the Netherlands*, 11 July 2000, and *Sisojeva and others v. Latvia*, 16 June 2005.
37. For example, *Ahmut v. the Netherlands*, 26 October 1996, and *Sen v. the Netherlands*, 21 December 2001.
38. Judgment of 24 January 1990.
39. A case in point is *Hatton and others v. the United Kingdom*, 8 July 2003.
40. The expression employed by the Court in the *Ilaşcu* judgment cited above, §334.
41. For the leading case on this, see *McCann and others v. the United Kingdom*, 27 September 1995. For further details, see below, p. 23 ff.

or alleged ill-treatment by police or prison officers, i.e. cases of alleged interference[42] with the rights secured by Articles 5 and 3, setting out the positive obligations on the public authorities in such circumstances before going on to consider whether they have been satisfied.[43] This hypothesis, it must be stressed, is an interesting pointer to the level of European control. It indicates the thoroughness of that control – thorough to the point where the Court is able to move beyond its position of principle whereby states are free to choose the measures that will meet the Convention requirements. However, its scope should not be overstated. In judgments where the Court finds against the state for interference, its view of the positive measures to be taken can always be discerned.

Positive obligations and the horizontal effect of the Convention

It is clear from what has been said that the positive obligations stem from the duty to protect persons placed under the jurisdiction of the state. The state will perform that duty mainly by guaranteeing observance of the Convention in relations between individuals. Thus the theory of positive obligations is underpinning the very marked trend towards extending the scope of the Convention to private relationships between individuals which is called the "horizontal effect".[44] It also makes it possible – and here lies its value – to activate the international arbitration mechanism by introducing the notion of State responsibility. In other words, the mere fact that an individual has infringed a provision of the Convention cannot lead to a finding against the state. It is necessary for the conduct of the private individual to be seen as originating in a failing on the part of the state itself or as tolerated by it. In practical terms, it is because the state has been unable legally or materially to prevent the violation of the right by individuals, and otherwise because it has not made it possible for the perpetrators to be punished, that it risks being held responsible by the European Court.

That finding is therefore justified as a general rule by a failure on the part of the state: what is held against it is that it has not taken steps. What then happens when the violation of the Convention has been made possible, not by the lack of measures in the domestic order but by existing provisions which are manifestly at vari-

42. This line of reasoning is valid subject to the observation that Article 3 normally permits of no derogation, so that any interference should be regarded as a violation of this provision, unlike Article 5.

43. See, for example, the *Algür v. Turkey* judgment of 22 October 2002, which sets out a number of procedural obligations in relation to persons placed in custody: "Strict application, from the very start of the deprivation of liberty, of the fundamental safeguards such as the right to request examination by a doctor of one's choosing in addition to any examination by a doctor called in by the police authorities, and access to a lawyer and to a family member, backed up by prompt judicial intervention, may effectively lead to the detection and prevention of ill-treatment which may, as in the instant case, be inflicted on persons detained, in particular in order to extract confessions from them" (§44).

44. This extension has continued despite the statement that: "The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se" (*Vgt Verein Gegen Tierfabriken v. Switzerland,* 28 September 2001, §46).

ance with the European text? The Court has been faced with this question in a number of cases.[45] The grounds given for its decisions may have given the impression that the issues lay outside the problem of positive obligations and that, consequently, the horizontal effect of the Convention was partly independent of them. Indeed, in these cases the finding of a violation was based on the fact that provisions incompatible with the European text were kept in the domestic legal order, without the Court referring expressly to the concept of positive obligation. However, it eventually did so in a later judgment, *Odièvre v. France*.[46]

As the law stands at present, then, it may be said that the establishment and development of the horizontal effect of the Convention by the European Court is, in its entirety, a consequence of the theory of positive obligations. The state becomes responsible for violations committed between individuals because there has been a failure in the legal order, amounting sometimes to an absence of legal intervention pure and simple, sometimes to inadequate intervention, and sometimes to a lack of measures designed to change a legal situation contrary to the Convention. As may be seen again with these last two hypotheses, the dividing line with negative obligations becomes very tenuous.

But while the positive obligations do cover the entire field of the theory of the Convention's horizontal effect, they are not confined to it. The state also has the obligation to protect in the context of its own relations with persons under its jurisdiction. In other words, it is bound by a kind of "duty of schizophrenia" – the duty to take measures necessary to prevent or punish infringements committed by its own agents, representatives or emanations.

There is rightly room for doubt as to whether, from the strictly judicial point of view, it is necessary to resort to the theory of positive obligations in order to establish the responsibility of the states parties in such situations. When committed by persons exercising public authority, a violation of the Convention will obviously be the result of state interference. Looking to see whether another person exercising that same authority, the legislative or the executive power, for example, failed to act to prevent the infringement being committed seems objectively superfluous, since no such inquiry is needed to establish non-compliance with the European instrument.

However, the Court has seen fit to cover this ground and has laid down a series of obligations on states to take action, based on a principle of which the *Assanidzé v. Georgia* judgment contains one of the clearest statements.[47] The Court emphasises that:

> *the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate*

45. In particular *Young, James and Webster v. the United Kingdom*, 13 August 1981; *Sigurður A. Sigurjonsson v. Iceland*, 30 June 1993; *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 June 2001.
46. Judgment of 13 February 2003.
47. Judgment of 8 April 2004.

levels. The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected.

Types of positive obligation: the "procedural" and the "substantive"

Another fundamental distinction made by the European Court is that between "procedural" obligations and "substantive" obligations.[48]

The criterion underlying the distinction here appears to lie in the substance of the action expected of the state.[49] Substantial obligations are therefore those which requires the basic measures needed for full enjoyment of the rights guaranteed, for example laying down proper rules governing intervention by the police, prohibiting ill-treatment or forced labour, equipping prisons, giving legal recognition to the status of transsexuals, incorporating the Convention rules into adoption procedures or more broadly into family law, etc.[50] As for procedural obligations, they are those that call for the organisation of domestic procedures to ensure better protection of persons, those that ultimately require the provision of sufficient remedies for violations of rights. This provides the background against which the right of individuals (alleging violation of their rights) to an effective investigation and, in the wider context, the duty of the state to enact criminal legislation which is both dissuasive and effective, must be seen; and also, in the particular context of Article 8, the requirement that parents participate in proceedings which may affect their family life (adoption proceedings, placement of children, decisions about custody or visiting rights, etc.).[51]

In practice, the interplay of the obligations in question seems rather complex. It will be noted that the combination of them has made it possible considerably to broaden the range of European scrutiny. The typical cases which follow give an idea of the wealth of interactions between substantive and procedural obligations and to illustrate – though not exhaustively – the formidable resource which they offer the European Court.

The commonest case is where compliance with a given provision of the Convention is assessed in turn on two levels, i.e. is subject to twofold scrutiny. Here, provided that the parties enable it to do so by formulating their complaints accordingly, the Court will not be content to check whether a substantive right (for example, a property right) has been infringed: it will also check whether the domestic authorities have conducted an effective investigation into the facts complained of as infringing that right or whether

48. It is explicitly stated in the *Öneryıldız v. Turkey* judgment [GC], 30 November 2004, §§97 ff.
49. Even though the Court does emphasise quite specifically that the positive obligation aims to "prevent" or "remedy" violations of the Convention (*Assanidzé v. Georgia*, §146), this distinction – based essentially on the aim pursued – cannot be seen as the key to understanding the distinction between substantial and procedural obligations. The former do not necessarily in all cases have a preventive purpose, and the latter are not confined to remedial measures.
50. See below, p. 44, for further details.
51. See also below, p. 44, for further details.

they afforded effective domestic remedies to the presumed victim(s). And it may find a violation of the provision relied on – Article 1 of Protocol No. 1, first sentence – on one level or both.

But compliance or non-compliance with the procedural requirement can also play a part in the assessment of alleged violations of the substantive right. The *Tanis and others v. Turkey* judgment[52] offers an example; here, the Court found, in particular on the basis of shortcomings in the domestic judicial proceedings and the lack of due diligence on the part of the authorities in the conduct of an investigation, that the life of a person who had disappeared had been interfered with.

A defect in the procedural action required of the state – for example, conducting an effective investigation – may moreover lead the Court to find the state responsible both for a violation of the substantive right and for failure to comply with its procedural obligation. This is a particular hypothesis which is encountered in the framework of the application of Article 3 since the *Kurt v. Turkey* judgment.[53] Here, the lack of an effective investigation constitutes non-compliance *per se*. But when it affects the family of a person who has disappeared, it may *in addition* amount to inhuman and/or degrading treatment.

Lastly, it must be added that the multiplicity of the grounds for verification is also the result of the increasingly demanding view of positive procedural obligations being taken by the European Court, a view which ultimately moves the requirements of Articles 6 §1 and 13 into the frame of the Convention's substantive provisions, while at the same time the latter remain applicable. This often leads to one and the same complaint being examined from two standpoints in turn, the violation of the Convention being found in both cases. This cascade effect of the procedural obligations is perfectly illustrated by the afore-mentioned *Tanis* judgment. In that judgment, compliance or non-compliance with these obligations was examined, as has already been said, as part of the examination of the merits of the complaint that the right to life had been violated, but also and successively in relation to the procedural obligations (mainly the obligation to investigate) deriving from Article 2, in relation to ill-treatment (of relatives) prohibited by Article 3 and, finally, on the basis of Article 13. And it is interesting to note that the Court reached a finding of violation in every case.

Ensuring compliance with positive obligations

If the Court is to be believed, verification of the positive obligations presents no really specific characteristics. This was stated firstly in the context of Article 8, in the following terms (taken from the *Powell and Rayner v. the United Kingdom* judgment):[54]

> *Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures*

52. Judgment of 2 August 2005.
53. Judgment of 25 May 1998.
54. Judgment of 24 January 1990, §41. This judgment consolidated the findings in the *Rees v. the United Kingdom* (25 September 1985), *Leander v. Sweden* (26 March 1987) and *Gaskin v. the United Kingdom* (23 June 1989) judgments.

to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph, in striking [the required] balance the aims mentioned in the second paragraph … may be of a certain relevance.

It will be observed that the principle of unity of the European control machinery set out above is now accepted as a general principle, applicable whatever the provision considered. This is strikingly borne out by the *Broniowski v. Poland* judgment,[55] in which the European Court conducts an overall examination, in relation to Article 1 of Protocol No. 1, of a domestic situation which in its view involved the problem of interference in the exercise of a right (the right to property in this instance) as much as prejudicial abstention.

But if that is indeed the principle, practice is not so clear-cut. First of all, the underlying spirit of verification is not entirely the same, by reason of the very nature of the obligations in question – the fact that they lead the Court to prescribe measures to be taken by the state, and not just to examine the lawfulness of abstention. Now as everyone knows, the Court usually rules that the subsidiary nature of the European machinery requires that states be left to choose the appropriate means of ensuring compliance with the Convention on their own territory[56] and, consequently, allowed to decide between the "the needs and resources of the community and of individuals".[57] Being obliged to intervene in the "preserve" of domestic authorities where positive obligations are concerned, it will therefore proceed with a degree of circumspection that is rarely found in the framework of a review of negative obligations, and will seek in particular not to "impose an impossible or disproportionate burden on the authorities".[58] As a result, states enjoy a margin of appreciation here which, although varying from one case to another, is necessarily wider.

55. Judgment cited above, p. 12, footnote 35.

56. In this connection, see *Stjerna v. Finland* (24 October 1994) in which the Court says that "The Court's task is not to substitute itself for the competent Finnish authorities in determining the most appropriate policy for regulating changes of surnames in Finland" (§39); or again the *Powell and Rayner* judgment (cited above) where it notes that "It is certainly not for … the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere". (§44). Consolidating its various stances on the subject, the Grand Chamber stated in its *Hatton and others v. the United Kingdom* judgment (8 July 2003): "the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are … better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight" (§97).
57. For example, *Johnston and others v. the United Kingdom*, 27 November 1986, §55.
58. For example, *Osman v. the United Kingdom*, 28 October 1998, §116; *Kilic v. Turkey*, 28 March 2000, §63; *Denizci and others v. Cyprus*, 23 July 2001, §375.

However that may be, the European Court has had to devise a specific method for reviewing compliance with positive obligations, being unable to apply in full the methods envisaged by the Convention for reviewing interference.[59] It is true that it drew heavily on the latter when devising the former, though ultimately this goes no further than inspiration. This method is that of the "fair balance". As the Court has repeatedly stated since the *Belgian linguistic case*,[60] it has to find "a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights".

This method will lead the European Court to concern itself primarily with justifications for abstention by the domestic authorities and the underlying public interest. The first stage of review will involve assessing the relevancy of the grounds invoked by the state, i.e. their legitimate general interest character. This examination is not conducted in every case, but it is subjacent. This is demonstrated by the fact that in some cases the Court sees fit to pronounce on this point. For example, in the case of *Gaskin v. the United Kingdom*, where it considered that the reason given by the state for its inaction, namely the confidentiality of the documents on file to which the applicant sought access "contributed to the effective operation of the child-care system and, to that extent, served a legitimate aim, by protecting not only the rights of contributors ("informers") but also of the children in need of care".[61] More recently, in the case of *Odièvre v. France*, it found that the domestic legislation whose application had prevented the applicant from gaining access to information about her origins pursued a legitimate aim of general interest.[62]

At the second review stage, which is unquestionably the more important, the Court will assess the appropriateness of the state's attitude. This assessment is certainly analogous to the review of the necessity and proportionality of restrictive measures. In any case it is here that the fate of the "fair balance" is decided. It is the outcome of the Court's combined examination of various factors: the importance of the public interest at stake and the state's margin of appreciation, the rule of law and the practice of the states parties with regard to the question at issue – for example, legal recognition of transsexualism[63] or punishment for rape[64] – the importance of the right at issue, the requirement to protect the rights of third parties, etc. It will be observed that this examination comprises a good deal of mystery, which accounts for the variability of the European Court's decisions, constantly veering

59. The method which serves mainly – though not only – on the basis of paragraphs 2 of Articles 8 to 11, leading the Court to examine in turn (1) whether the interference is provided for in law, (2) whether it pursues one of the legitimate aims set forth in these provisions, such as public safety (note that these aims vary depending on the provision considered), and (3) whether the interference is proportionate to the aim pursued.
60. Cited above, p. 7.
61. Judgment of 23 June 1989, §43.
62. Judgment of 17 February 2003, in particular §45.
63. The following judgments are especially relevant in this connection: *Rees, Cossey, X, Y and Z* (cited above), *B v. France* (24 January 1992), *Sheffield and Horsham v. the United Kingdom* (30 July 1998), and *Christine Goodwin v. the United Kingdom* (11 July 2002).
64. *M.C. v. Bulgaria* (4 December 2003) is very significant in this connection.

between boldness and restraint. It is in any event far less rigorous than the case-law based on paragraphs 2 of Articles 8 to 11. Nevertheless, it is important to stress that this assessment is necessarily evolutive, not only because it takes account of social change but also, and above all, because, as the Court points out in its *Siliadin v. France* judgment (cited above, p. 7), paraphrasing its *Selmouni v. France* judgment:[65]

> *the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.*[66]

Of course, the method described above applies only where rights to which the Convention permits of restrictions are at issue. It will not apply to others, in particular Articles 2, 3 and 4. But in essence it nonetheless holds true: it is the details that are different, not the principle of a review which is analogous in spirit to that which attends non-compliance through interference. The full implications will be apparent from the following paragraphs.

Similarly, it must be observed that the principle of "fair balance" governs only very remotely, or not at all, the examination of alleged non-compliance with certain procedural obligations, especially those relating to the conduct of domestic proceedings.[67] On this matter no justification seems acceptable to the Court, and it appears to leave the states no margin for appreciation.

65. Judgment of 28 July 1999. Similarly, *Hénaf v. France,* 27 November 2003, §56.
66. §148 of the *Siliadin* judgment (cited above, p. 7).
67. The obligation to organise civil or penal proceedings, and thus to legislate, is among the issues discussed above.

II. Protection of personal life and integrity

The right to life and integrity of the person, as well as the right to private and family life, are undoubtedly a special area for the development of positive obligations. The paramount nature of this right, which is of course inviolable, is unquestionably strengthened as a result.

While the right to life is the subject of a specific article of the Convention (Article 2), the right to integrity is contained in a number of provisions. Article 3 affords protection against torture and inhuman or degrading treatment or punishment. It is the principal provision in this context, if only by reason of the contentious proceedings it generates. However, Article 4 is not to be overlooked. It sets out the prohibition of slavery, servitude and forced labour, which is a particular form of assault on personal integrity. We must moreover mention Article 8 which, although it protects

the right to private and family life, has been interpreted by the Court, in particular in the "private life" aspect, as giving protection against certain forms of assaults on physical integrity such as rape. For the states parties, these three articles are the platform which supports positive obligations, both substantive and procedural.

Substantive obligations

If there is one feature which distinguishes Article 2 from the other articles cited earlier, it is the fact that it expressly places a substantive positive obligation on the parties. Paragraph 1 provides that "Everyone's right to life *shall be protected by law*".[68] Article 8 can be likened to it in so far as it prescribes "respect" for private life, a term which the European Court interprets as implying the duty to take positive measures. In the case of Articles 3 and 4, which mainly contain prohibitions, the assertion of such a duty is mainly judge-made.

Protection of life by law

According to constant case-law, "the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".[69] That being so, the domestic authorities have as their "primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person", but also the duty "to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[70] However, that duty is not absolute. The Court considers itself bound to take into account the difficulties inherent in carrying out police duties, the operational choices made by the domestic authorities and the unpredictability of human behaviour. So, as it stated in the *Osman v. the United Kingdom* judgment, "not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising".[71]

This duty to protect is lies on the state in various situations: where death is caused by agents of the state, where it is the result of risks arising from the activity of public authorities, where it is caused by third parties, or again by the victim himself or herself. Before examining these cases, it should be noted that certain factors are excluded from the scope of Article 2 §1.

Factors excluded from the positive obligation to protect life

The right to die

While it is understood that the right to life is essentially positive in the sense that it obliges the state to protect persons from being killed, can one consider that it also has a negative aspect which would oblige the domestic authorities to take positive measures to

68. Emphasis added.
69. Firstly, the *L.C.B. v. the United Kingdom* judgment, 9 June 1998, §36.
70. *Osman v. the United Kingdom*, 28 October 1998, §115.
71. §116 of the judgment.

assist a person to end his/her own life? That was the question raised in the case of *Pretty v. the United Kingdom*.[72] The Court's answer was resolutely negative.

Mrs Pretty was suffering from a progressive neuro-degenerative illness – motor neurone disease – which had progressed very rapidly to a point where she was wholly paralysed and unable to feed herself. As there was no specific treatment, she was sure to die within a matter of months. It was also certain that her death would occur after terrible suffering and loss of dignity on Mrs Pretty's part. Therefore she had decided in agreement with her husband that he would bring about her death before that happened. Such an act being criminal in English law, Mrs Pretty wished to obtain impunity for her husband while she was alive and had sought an undertaking from the competent judicial authorities not to prosecute him. That request was refused, and the refusal was upheld by the English courts.

Before the Court, Mrs Pretty argued mainly, in relation to Article 2, that this refusal infringed the positive obligation to protect the right to choose to cease to live, a right which in her opinion meant that, in the circumstances of the case, she should be authorised to end her life in any way she wished. That line of argument was rejected by the European Court. The latter ruled that the right to life secured by Article 2 cannot be "interpreted as involving a negative aspect" and that "no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from [it]".[73] Therefore, in the Court's opinion, Article 2 had not been infringed. It follows that the right to life does not comprise a negative dimension and that the state does not have a positive obligation in this respect.

72. Judgment of 29 July 2002.

The foetus's right to life

The question has also arisen before the Court as to the point from which life is protected by the Convention and whether Article 2, including the positive obligations attaching to it, is applicable to the foetus. This question was examined and dealt with in turn in the *Boso v. Italy*[74] and *Vo v. France*.[75] The first case raised the question of termination of pregnancy in relation to Article 2. The second was more complex. The question was whether the provisions of French criminal law applicable in the event of a medical error causing an undesired abortion were in keeping with the Convention requirements – a procedural question to which we shall return later. Ultimately, however, the Court was also asked to say whether abortion – forced in this case – could be regarded as an infringement of the right to life of the foetus. In both cases it declined to decide, considering that, in view of the diversity of legal conceptions and cultures existing in Europe, determining the point at which life begins must be subject to a margin of appreciation for states, which it moreover refers to as "considerable discretion".[76] In other words, as the law now stands, the foetus cannot,

73. §§39 and 40 of the judgment.
74. Judgment of 5 September 2002.
75. Judgment of 8 July 2004.
76. *Vo v. France* judgment, §125.

from the standpoint of the Convention, be regarded as a protected legal person towards whom the state has obligations. Rather curiously, however, that finding did not prevent the European Court from examining the complaints of non-compliance with procedural obligations arising from Article 2. The case-law is certainly inconsistent on this. But that is how the law stands.

Protection needed in the framework of action by law enforcement agencies

In principle, when a person is killed by agents of the state, in particular in the course of police or security operations, the state is held responsible for failing in its duty of non-interference. To this negative duty case-law has added a positive obligation, essentially linked to the supervision of operations of this kind. It will be noted that this obligation does not arise autonomously but operates in the framework of the review of necessity which the European Court conducts in such circumstances. It has two major implications.

The first is that the state has a duty to organise its legal system so as to strictly supervise the action of law enforcement agencies and permit effective control of them.

If the lack of such a framework has been a recurrent argument used by applicants since the *McCann v. the United Kingdom* case,[77] it must be noted that it has succeeded only recently. In the *McCann* case, the Court considered that

> *the Convention does not oblige Contracting Parties to incorporate its provisions into national law … Furthermore, it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention.*[78]

This reluctance was partly overcome in the Chamber judgment in *Nachova and others v. Bulgaria*,[79] but it was mainly with the *Makaratzis v. Greece* judgment[80] that the Court overcame it entirely. In that case, the driver of a car had been shot and killed by the police forces in the course of a car chase during which the latter had made massive use of automatic weapons (revolvers, pistols, submachine guns). While agreeing, in view of the circumstances, that recourse to the use of deadly force was legitimate, the European Court nonetheless considered that its use had been excessive in the instant case and that the excess was, over and above factors connected with the operation itself, due to shortcomings in the legal framework, which did not set out rules on the use of firearms by law enforcement agencies. The Court ruled that "unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident".[81]

77. Judgment of 5 September 1995.

78. §153 of the judgment.
79. Judgment of 26 February 2004.
80. Judgment of 20 December 2004.

These principles were subsequently upheld in their entirety by the Grand Chamber, deciding in the *Nachova* case.[82] The European Court went even further and set forth an obligation to provide suitable training for members of the police and security services, who "must be trained to assess whether or not there is an absolute necessity to use firearms not only on the basis of the letter of the relevant regulations but also with due regard to the pre-eminence of respect for human life as a fundamental value".[83]

The supervision of police operations implies, secondly, preparation and control of such operations "so as to minimise, to the greatest extent possible, recourse to lethal force".[84] This requirement generally leads the Court to examine "extremely closely" the general context of the operation, the forces deployed and the measures taken, the orders given and the information supplied to agents in the field and, more broadly, the links between them and the hierarchy, the conduct of operations etc. If shortcomings are noted, it will inevitably conclude that there was no "absolute necessity" for the use of force within the meaning of Article 2 paragraph 2 of the Convention and that this provision has therefore been violated.[85]

81. §58 of the judgment.
82. Judgment of 6 July 2005.
83. §97 of the judgment.
84. *McCann*, cited above, p. 23, §194.
85. Examples are *Ergi v. Turkey,* 28 July 1998; *Nachova* and *Makaratzis,* cited above, p. 23. Conversely, for a finding of non-violation, *McCann*, cited above, p. 23.

Protection from risks arising from the acts of public authorities

The state may also be held responsible for a failure of prevention where a risk of death materialises in connection with the activities of the public authorities or in the framework of public policy. The Court has dealt with several such cases.

The *L.C.B. v. the United Kingdom*[86] and *Öneryıldız v. Turkey*[87] judgments illustrate the hypothesis of a dangerous activity directly controlled by the public authorities. The former case concerned nuclear tests carried out by the British government. The applicant, the daughter of a soldier who had served on Christmas Island at the time of the tests, complained that the United Kingdom had failed to inform her father of the radiation doses he had received at that time and about the likely consequences, which would have made it possible to diagnose his illness sooner and treat it. In the second case, the Court examined the fatal consequences of an explosion at a public refuse tip run by a municipality. The Court considers that in such circumstances – where the public authorities themselves engage in dangerous activities – they incur certain obligations to safeguard people's lives. The first of these is to adopt suitable regulations governing the licensing, setting up, operation, security and supervision of the activity and making it compulsory for all those concerned to take the necessary practical measures.[88] The second is to inform the public of the risks incurred.[89] How-

86. Judgment of 9 June 1998.
87. Judgment of 9 June 1998; the judgment of the Grand Chamber was handed down on 6 July 2005.
88. *Öneryıldız v. Turkey* judgment, GC, §90.

ever, the state will not be held responsible in either case, in particular with regard to the duty of information, unless it appears that the authorities were or ought to have been aware of the risks and did not act.[90] In the *Öneryıldız* case, that condition was unquestionably met. Consequently, the European Court considered that the Turkish government was not justified in arguing that the victim was at fault, still less that there was a legitimate interest in respecting the homes and lives of persons.

In the *Mastromatteo v. Italy* case[91] the issue at stake was the policy of reintegration of prisoners. The applicant argued that his son's death had resulted from it. The latter had been killed by persons serving prison sentences for criminal offences, during prison leave granted by the judge in charge of execution of sentences. The complaint raised the question, firstly, whether a policy of social reintegration of convicted persons sentenced to imprisonment could of itself render a state party responsible. The Court's answer is by implication positive. It scrutinised the relevant Italian legislation and concluded that it was not at variance with the Convention requirements. However, even if the European Court does not say so explicitly, states appear to enjoy a wide margin of appreciation here. The second question was whether negligence or lack of precautions in implementing decisions on prison leave or a semi-custodial regime could constitute infringements of Article 2. Here also the answer is clearly affirmative. In a case such as this, the domestic authorities must "do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge".[92] They have a duty of diligence which, in the Court's opinion, was not infringed in the case in point, because there was nothing to suggest that the prisoners in question, once outside prison, would commit the crimes they did commit and, in particular, take the life of the applicant's son.

The last hypothesis – dealt with by the Court – concerns health policy. The Court has stressed, notably in the cases of *Calvelli and Ciglio v. Italy*[93] and *Vo v. France,*[94] that the principles set forth in the *L.C.B.* case also applied in the sphere of public health, where they mainly entailed legal intervention by the state "to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives".[95]

Protection from third parties

The obligation on the state to protect individuals in their relations with others was first confirmed by the Court in its *Osman v. the United Kingdom* judgment.[96] Moreover, that judgment enabled it to set forth the applicable criteria. They are three in number, and raise the following questions: Was the victim threatened in a real and immediate way? Did the authorities know this, or ought they

89. *Ibid*.
90. In this connection, see in particular the *L.C.B.* judgment.
91. Judgment of 24 October 2002.
92. §74 of the judgment.
93. Judgment of 17 January 2002
94. Judgment of 8 July 2004.
95. §§49 and 89 of the respective judgments.
96. Judgment of 28 October 1998.

to have known it? Did they take reasonable measures to counter that risk? The state will be held responsible if these three questions can be answered in the affirmative. But if just one of the answers is negative, the European Court will find that Article 2 has not been violated.

This was so in the *Osman* case. The applicants complained that their husband and father had been killed by the teacher of the latter's son. Having regard to the exclusive "attachment" which the teacher had towards his pupil and the many brushes he had had with the Osman family,[97] of which the police had been informed;[98] they considered that the family ought to have been specially protected by the authorities. The Court observed that the various clues provided by the person's behaviour did not suggest that he would make an attempt on the life of a member of the Osman family. And even if the authorities had been properly informed, the risk of death did not seem sufficiently real or immediate at the material time. It therefore found no violation of Article 2. It reached the same conclusion in other cases, such as *Denizci v. Cyprus,*[99] but because the police had not been informed and because, in the circumstances of the case, without such information the authorities could not be deemed to know.

In a series of Turkish cases,[100] by contrast, the Court found the state responsible. But the circumstances here were quite singular. In all these cases persons had been killed by unidentified individuals in south-eastern Turkey, a particularly troubled region at the time where an anti-PKK counter-guerrilla force was active, with the connivance of the security force, murdering persons suspected of belonging to that party. These practices were common knowledge, even though the exact perpetrators were not known. The Court was therefore only able to find, on one hand that the danger to persons regarded as PKK activists or sympathisers was real and imminent and, on the other, that the authorities must be aware of the risk. There was no response at all from the authorities. Not only were no positive steps taken to protect persons in the areas concerned, but it was widespread practice for the prosecuting authorities not to investigate complaints about such incidents.

Prevention of suicide

The question also arises whether the first sentence of Article 2, paragraph 1 of the Convention applies to suicide. As to the principle, as we have seen, the Court has ruled that this provision does not imply recognition of a right to end one's own life,[101] But at the

97. In particular, the teacher had threatened a colleague of the pupil Osman whom he suspected of wishing to obstruct his relationship with him, had stolen Osman's school records, was probably the perpetrator of obscene graffiti discovered on a wall near the family home and of damage to the latter's property, had changed his name to that of Osman, etc.
98. The murderer himself exclaimed when arrested: "Why didn't you stop me before I did it, I gave you all the warning signs?"(§57).
99. Judgment of 23 July 2001.
100. *Kaya*, 19 February 1998; *Ergi*, 28 July 1998; *Yaşa*, 2 September 1998; *Cakici*, 8 July 1999; *Tanrikulu*, 8 July 1999; *Kiliç*, 28 March 2000; *Mahmut Kaya*, 28 March 2000; *Akkoç*, 10 October 2000.
101. *Pretty*, cited above, p. 22.

same time, as the case-law stands at present, it does not seem that this can be interpreted as imposing on the state a general obligation to prevent all suicides in society,[102] The question will only arise in a different way if the person concerned is under surveillance or in the care of the public authorities. This applies to persons on remand or in custody.[103] It also applies, since a recent case, to persons doing military service.[104] In all these cases, individuals were placed by the state in situations likely to make them vulnerable or increase their vulnerability. In such circumstances Article 2 may be regarded as imposing a special duty of vigilance.

As regards persons in custody, to date the Court has concluded that Article 2 is not violated; it has considered either that the authorities, knowing the risk of the person's making an attempt on his/her own life, had taken all the reasonable measures required (in particular close surveillance measures),[105] or that there was nothing to cause them to foresee such an outcome.[106] In the latter case, it does nevertheless check that there has not been negligence on the part of these authorities or warders.[107] It will, for example, inquire whether routine formalities have been conducted (search of the prisoner, removal of sharp objects or tools which could serve as ropes, etc.), whether there was a minimum of normal surveillance and so forth.

The only case concerning the suicide of a conscripted soldier which the Court has examined to date (*Kilinç v. Turkey)* led to a finding of violation. The Court also took the opportunity to augment its case-law and clarify it in terms of the measures to be taken by the state. Firstly, it must not only "put in place a legislative and administrative framework aimed at effective prevention" but also "adopt "regulations suited to the level of risk to life which might result, not only from the nature of certain military activities and missions but also by reason of the human factor which comes into play when a state decides to call ordinary citizens up for military service". Secondly, it must order the military authorities to take "practical measures designed to give effective protection to conscripts who might find themselves exposed to the dangers inherent in military life and provide for suitable procedures to determine any shortcomings and errors which might be committed in this regard by the persons responsible at the various levels". The practical measures must include suitable regulations governing the health establishments responsible for medical supervision of conscripts.[108] The Court's review here will likewise cover the extent to which the authorities are aware of the risk, and then the prevention measures taken. In the case in point, Turkey was found wanting in the latter respect.

102. For an analysis of suicide prevention in terms of interference in private life, see the same judgment, §§68 ff.
103. *Tanribilir v. Turkey*, 16 November 2000; *Keenan v. the United Kingdom*, 3 April 2001; *Akdoğdu v. Turkey*, 18 October 2005.
104. *Kilinç v. Turkey*, 7 June 2005.
105. *Keenan*, cited above.
106. *Tanribilir* and *Akdoğdu*, cited above.
107. *Ibid*.
108. §§41 and 42 of the *Kilinç* judgment.

Prevention of ill-treatment

Prevention of ill-treatment is a requirement which the European Court has inferred from the prohibition of torture and inhuman or degrading treatment or punishment under Article 3. There is another legal basis in Article 8 where it protects private life. But this is an additional, or even subsidiary, basis, which tends to be eclipsed by Article 3.

The basis of Article 3

It is a constant of case-law that

> *the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.*[109]

This requirement has both substantive and procedural implications. In its substantive dimension, it has been invoked to protect the most vulnerable persons – mainly children, detainees and the close relatives of persons who have disappeared. As regards protection of foreigners, in particular against expulsion, this will not be discussed here. Moreover, it is only a marginal aspect of the general question of positive obligations. More precisely, the review conducted is a classical review of interference (of the expulsion or extradition measure). And it is only when assessing the proportionality of the measure constituting that interference that the Court will positively inform states what the Convention expects of them.

Protection of minors

The obligation positively to protect minors applies mainly in the private sphere, in particular within the family. Not that violations committed in the public sphere are not the responsibility of the state: they certainly are, but to the extent that the requirements of Article 3 are actively disregarded. This is the finding, for example, in the *Campbell and Cosans* and *Costello-Roberts* judgments.[110]

The question of violation of the substantive positive obligations stemming from Article 3 will arise in particular:

- where the violation was rendered possible by deficient and inadequately protective legislation.[111] This was so in the case of *A. v. the United Kingdom*[112], where the father-in-law of the victim, who was under age at the material time, although it was established that he regularly beat her, was nevertheless

109. In particular, *A. v. the United Kingdom*, 23 September 1998.

110. Judgments of 29 January 1982 and 23 February 1993. Both applications were brought against the United Kingdom. Note that the Court even emphasises in the second judgment that *"the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals"*, so that it could be held responsible on the basis of acts imputable to the directors of a school, whether public or private.

111. This hypothesis if of course also relevant to the question of procedural positive obligations.

112. Judgment of 23 September 1998.

acquitted by the court in accordance with English law, which envisages the defence of "reasonable chastisement";

- where, although the law offers sufficient protection, the authorities have been informed about the ill-treatment but have remained passive, have not reacted effectively or reacted too late. For example, in the case of *Z v. the United Kingdom,*[113] the social services did not decide on the placement of mistreated children until four-and-a-half years after being apprised of the odious practices perpetrated in the family setting.

Protection of persons deprived of their liberty

The protection secured by Article 3 also extends to persons deprived of their liberty in the broad sense – those on remand, in custody or detained in psychiatric institutions. It is even conceivable that the case-law concerning them may apply to other persons who, while not deprived of their liberty, are placed in the charge of the state or another public authority (minors under placement orders, for example).

This protection implies, first of all, that the authorities concerned ensure that the integrity of these persons is not harmed by others. The principles applicable here are similar to those at work in the above-mentioned *A* and *Z* judgments. Thus Romania was found responsible by the Court for serious injuries inflicted on one prisoner by a fellow-prisoner, first because not all necessary precautions had been taken to prevent a foreseeable occurrence, and secondly because, when informed of the aggression under way, the warders were late in intervening.[114]

But the most important innovation in case-law for our present purposes is that relating to conditions of detention.[115] They may entail a violation of Article 3 if they constitute degrading treatment. It should be made clear from the start that what the European Court does to improve these conditions is not founded just on the theory of positive obligations. When the Court examines an application from this standpoint, it takes into account all the facts impugned, whether the prison staff intervene of fail to intervene. It then, in its own words, carries out an "overall assessment"[116] and takes account of "the cumulative effects of those conditions, as well as the specific allegations made by the applicant"[117]. This method is not unrelated to the objectivisation of the "degrading treatment" criteria that is seen in case-law.[118] While traditionally the European Court has defined such treatment as one which affects the personality of the victim by creating feelings of despair and inferiority in him/her and seeking to humiliate and belittle him/her,[119] the last of these criteria – intention – which can only be satisfied most of the time by active infringements of law,

113. Judgment of 10 May 2001.

114. *Pantea v. Romania*, 3 June 2003.
115. For an overview of the relevant case-law, see *Slimani v. France*, 27 July 2004.
116. *Matencio v. France*, 15 January 2004, §89.
117. *Kalashnikov v. Russia*, 15 July 2002, §95.
118. The link is made by the Court itself in the *Farbthus v. Latvia* judgment of 2 December 2004 (§58).
119. For example, *Raininen v. Finland*, 16 December 1997.

has been gradually marginalised[120] to the point where it is almost irrelevant when detention conditions are at issue.

The observance of Article 8 presupposes that material conditions of detention respectful of human dignity be set in place. The Court itself has not laid down any positive rules on the matter. But those drawn up by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment clearly constitute the frame of reference. What the case-law provides, on the other hand, is a fairly concrete picture of the situations that do not meet the requirements of Article 3 – a kind of litany of the unmentionable! Some examples are:

- the situation where a detainee was forced for several months (two in the actual case) to spend a large part of the day on his bed, in a cell without windows or ventilation, where the heat sometimes became unbearable and where he was obliged to use the toilet in the presence of his fellow-detainee;[121]
- the situation where a prisoner sharing a cell designed for eight persons with twenty-three others was forced to share a bed with two other prisoners, which meant sleeping in shifts, added to which the cell was excessively noisy, the light was constantly on, rats were present, the area for smokers was not ventilated, etc.;[122]
- the situation where the prison was overcrowded (each prisoner having at most 2.51 square metres of room), added to which cells were insalubrious (dirty, infested by cockroaches, lice and bugs, windows covered up) and prisoners were confined almost round the clock.[123]

Note that the prisoner's condition may be a factor in assessing material conditions of detention. The deterioration of his health, and the occurrence and frequency of certain illnesses due to lack of hygiene, are all negative indicators.[124]

The provision of material conditions of detention which respect human dignity is one particular aspect of the state's duty to adapt the prison environment to the physical condition of individuals.

This applies first of all to persons suffering from serious illness or infirmity. In the *Price v. the United Kingdom* case,[125] the Court regarded as degrading treatment the detention of a disabled, four-limb deficient person with serious kidney problems in unsuitable cells where she could not get into bed, use the toilets or carry out ordinary acts of hygiene without the help of other persons and where, in addition, it was cold, plus the fact that she had difficulty in drinking. In that case the Court stated very clearly that the court which convicted her, the officers at the police station where Mrs Price was held initially and the prison authorities ought to

120. This has been so since the *Peers v. Greece* judgment of 19 April 2001.
121. *Peers,* cited above; see also *Dougoz v. Greece*, 6 March 2001.
122. *Kalashnikov v. Russia*, cited above.
123. *Mayzit v. Russia*, 20 January 2005. For other examples, *Nezmerzhitsky v. Ukraine*, 5 April 2005.
124. Examples are *Farbtuhs* (cited above, p. 29, footnote 118) and *Kehayov v. Bulgaria*, 18 January 2005.
125. Judgment of 10 July 2001.

have taken action: the court by ascertaining that installations suited to her severe handicap existed,[126] and the others by transferring her to a suitable place or releasing her.[127] As for the obligations of the judicial authorities, the European Court stated in the previously cited *Farbtuhs* case that when they "decide to place and keep such a person in prison, they must ensure particularly strictly that the conditions of his/her detention correspond to the specific needs arising from his/her infirmity". The Court has also found violations of Article 3 resulting from the conditions in which a person gravely ill with cancer was detained and transferred,[128] and resulting from shortcomings in the treatment of a sick prisoner.[129]

The age of the detainee has also to be taken into account in such a context.[130]

According to the present case-law, Article 3 does not entitle the person concerned to be released in every case. Such release is called for only as a last resort, where no other possibility exists. It is to be noted that the European Court sometimes appeals to the state's "humanitarian" sensitivities. But the fact remains that in doing so it is not taking a decision but rather making a request, to which the state is free to respond or not to respond.

126. In the *Farbtuhs* case cited above, p. 29, footnote 118.
127. Mrs Price had been sentenced to seven days' imprisonment for contempt of court during civil proceedings.
128. *Mouisel v. France*, 14 November 2002.
129. *McGlinchey and others v. the United Kingdom*, 29 April 2003.
130. The decision of the Commission in *Papon v. France* (7 June 2001) and the *Farbtuhs* judgment (cited above, p. 29, footnote 118) are relevant here.

Protection of close relatives of persons who have disappeared

The family members of a person who has disappeared – whether that disappearance is examined from the standpoint of Article 2 or Article 3 – can also claim the protection of Article 3, since the *Kurt v. Turkey* judgment.[131] This protection operates only in the sphere of positive obligations. The means employed by the European Court to attain this goal is the obligation to investigate. Usually and as a matter of principle, this is a procedural obligation whose function is to afford a remedy to the violation of a right. From this point of view, its application is independent of the violation of the substantive rule, except in respect of the family circle in only this hypothesis. Here, the failure to comply with the obligation to investigate may be interpreted as an infringement of the substantive requirement of Article 3, i.e. as degrading treatment, inhuman treatment or torture, depending on the intensity of the suffering. Note that these issues have so far arisen only in cases involving Turkey.

In order to determine the suffering of the close relative, and thus the extent of the violation of Article 3, the Court takes four kind of factor into account:[132]

131. Judgment of 25 May 1998.
132. For the manner in which these factors come into play, reference is made in particular, as well as to the *Kurt* judgment (cited above), to the *Akdeniz* judgment of 31 May 2001; the *Cyprus v. Turkey* judgment of 10 May 2001; the *Ohran* judgment of 18 June 2002; the *Ülkü Ekinci* judgment of 16 July 2002, the *Tahsin Acar* judgment of 8 April 2004; the *Akdeniz* judgment of 31 May 2005; and the *Tanis* judgment of 2 August 2005.

- the relationship between the applicant and the person who has disappeared: in this context, case-law favours the parent-child relationship;
- the circumstances of the disappearance: the strongest cases before the European Court are those in which the applicant assisted in arresting the person who subsequently "disappeared";
- the parent's attitude: he/she must have shown diligence and determination in seeking to obtain information from the authorities;
- and of course the uncooperative or obstructive attitude of the said authorities.

The interplay of Articles 3 and 8

As already noted, Article 3 is not the only article which protects persons against ill-treatment. The Court considered, firstly in the case of *X and Y* and subsequently in the *Stubbings* case[133] that Article 8 could serve the same purpose where the said treatment gravely infringe the person's private life. Sexual abuse, and specifically rape, come into this category. Recently, however, in the case of *M.C. v. Bulgaria,*[134] the European Court based its decision against the state on Articles 8 and 3 in conjunction.

133. Judgments of 27 February 1985 and 24 September 1996, on applications brought against the United Kingdom.
134. Judgment of 4 December 2003.

In these cases, the states concerned were held responsible for violations of the obligation either to pass criminal legislation or to interpret the criminal law in accordance with the Convention requirements. We shall come back to this later.

Protection against servitude, slavery and forced labour

To complete the picture, let us mention Article 4, which prohibits servitude, slavery and forced labour. As the European Court observed in the *Siliadin v. France* judgment, this article, together with Articles 2 and 3, enshrines one of the basic values of the democratic societies making up the Council of Europe.[135] While the importance of this judgment, the first to offer a consistent interpretation of the provision in question, lies mainly in the sphere of positive obligations, the Court nonetheless upheld the principle of the existence of substantive obligations on this basis. The case did not enable the Court to clarify their nature. We shall therefore have to await further decisions.

Procedural obligations

In order to ensure effective enjoyment of the rights secured by Articles 2 to 4, the case-law has matched procedural requirements to them. The one most often referred to is the investigation requirement. It will however be observed that it forms part of a broader obligation, recently set forth in the case-law: the obligation to put an effective judicial system in place.

135. Judgment of 26 July 2005, §82.

The investigation obligation

The importance and purpose of the obligation

By requiring the domestic authorities to carry out an investigation into cases of violent death or allegations of torture, the European Court seeks above all to make it possible to bring a prosecution or engage in the necessary judicial proceedings where the Convention is violated. As the Court sees it, in cases of this type it is often organs or agents of the state which possess the requisite information for the initiation of such proceedings.[136] This does not mean, however, that this obligation only holds good for cases where the facts impugned are imputable to the public authorities. It also applies where the presumed non-compliance with Articles 2 and 3 originates with individuals.[137] The purpose of such an investigation, as the case-law repeatedly stresses, is to ensure the effective implementation of the protection provisions of domestic law and "in those cases involving State agents or bodies, to ensure their accountability" for facts occurring under their responsibility.[138]

The initiation of the investigation

The manner in which the investigation is initiated will depend on whether the facts at issue come under Article 2 or Article 3.

In cases of violent or suspicious death, the authorities are required to act *ex officio* once the facts are brought to their attention, without waiting for a formal complaint by the relatives.[139]

Conversely, under Article 3, it is settled case-law that they are not obliged to act until the point in time when they are in receipt of allegations of ill-treatment by the victim or close relatives. It is further required that these allegations be *justifiable*. An allegation will be deemed justifiable if it is plausibly made about ill-treatment suffered by the victim. That is not so in the case of a prisoner on whom the prison authorities have imposed a disciplinary sanction and who simply denounces the grounds for the sanction together with merely inappropriate behaviour on the part of the warders.[140] On the other hand, complaints contained in an application to the prosecuting authorities and corroborated by other applications raising the same complaints and by accusations by other state authorities certainly meet this condition.[141] But the case-law is not so demanding. The Court readily admits denunciations which are not part of a strictly judicial procedure. Provided the complaints are addressed to the authorities, they may be presented in any form whatever. Nor is a high probability of ill-treat-

136. In particular, *Makaratzis v. Greece*, 20 December 2004.
137. See *M.C. v. Bulgaria*, cited above (Article 3).
138. See in particular *Mastromatteo v. Italy*, 24 October 2000, §89; *Nachova and others v. Bulgaria*, 26 February 2004, §110.
139. For an account of the principle, which is constant, see for example the *Akdoğdu v. Turkey* judgment, 18 October 2005.
140. *Valasinas v. Lithuania*, 24 July 2001. In rejecting the complaint, the Court also had regard to the fact that the applicant had had an opportunity to appeal to the ombudsman, that he actually did so and that the latter's conclusions had been taken into account by the prison authorities (for which reason the Court found that this appeal satisfied the requirements of Article 3 in the circumstances of the case).
141. *Indelicato v. Italy*, 18 October 2001.

ment within the meaning of Article 3 required. The Court may examine the complaint of failure to investigate even when it has already found that there is no substantive violation of Article 3[142], and may even accept the complaint in such circumstances[143].

Characteristics of the investigation

The principles applicable here are common. The investigation required by Articles 2 and 3 – and potentially by Article 4 – must be "effective". This is so if three conditions are met.

The first is that the persons responsible for the investigation and those carrying out the inquiries are independent of those involved in the events, which presupposes "not only a lack of hierarchical or institutional connection but also a practical independence"[144]. This criterion is manifestly not met where an investigation is conducted by military prosecutors when, according to law, they are part of the military structure in the same way as the police officers being investigated[145] and, *a fortiori*, by an investigation in which the evidence is taken and witnesses are heard by police officers belonging to the same force in the same town as the officers being investigated.[146] Nor are the requirements of Articles 2 and 3 satisfied in a situation where the investigation focuses on law enforcement agents and is placed in the hands of administrative boards under the authority of a prefect who is also responsible for the security forces, and where these investigations are carried out by police officers from units involved in the incident.[147] An investigation conducted by the prison authorities into allegations by a prisoner likewise infringes the requirements of Article 3 if it does not involve any outside person or body.[148]

The second condition is that the investigation be prompt, speedy and thorough. On this point, even though it has stated that it is not possible to reduce the range of situations that may arise to a mere list of acts of investigation or other simplified criteria, the Court does not hesitate to verify in detail the measures taken by investigators, from which it is easy to deduce by elimination what operations should be conducted according to the circumstances.[149] We shall simply note that the European Court requires this investigation to comply with European standards and, in particular, where death has been caused by public officials, to adopt the criterion of "absolute necessity" which is a condition, under Article 2, of the legitimate use of lethal force.[150]

The last condition is that the investigation must lead to the identification and punishment of the persons responsible. This, according to the Court, "is not an obligation of result, but of means":[151]

142. *Valasinas v. Lithuania*, cited above.
143. For example, *Poltoratski v. Ukraine*, 29 April 2003; *Martínez Sala and others v. Spain*, 2 November 2004.
144. In particular, *Barbu Anghelescu v. Romania*, 5 October 2004; *Bursuc v. Romania*, 12 October 2004; *Nachova v. Bulgaria* [GC], 6 July 2005.
145. *Barbu Anghelescu*.
146. *Bursuc*.
147. Of numerous judgments, see for example *Akkok v. Turkey*, 10 October 2004.
148. *Kuznetsov v. Ukraine*, 29 April 2003.
149. See particularly the *Nachova* [GC] judgment of 6 July 2005 in this connection.
150. *Ibid*.
151. *Ibid*.

the authorities must have taken the measures that were reasonably open to them for evidence to be taken, including –according to the European Court – where homicide is concerned, the taking of statements from eye-witnesses, reports by forensic police and, if necessary, an autopsy affording an exact description of injuries sustained and a reliable explanation of the causes of death.[152]

To these basic conditions, which one might call traditional, recent case-law has now added another, relating, if not to the public nature of the investigation, at least to its transparency. To quote the Court in the above-cited *Nachova* judgment, "There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts".[153]

The obligation to take judicial action

As has been said, the investigation is expected to prepare for the judicial stage, because the Court's view is that violations of life and physical integrity must be sanctioned judicially. The sanction must be a penal one in the case of particularly serious intentional violations. For example, the European Court considers that where rape has been committed, such a response is required regardless of any compensation machinery.[154] The same conclusion has been reached in cases of taking life,[155] torture and inhuman and degrading treatment.[156] However, where the violation of Articles 2 and 3 is the result of negligence or errors of judgment, the Court considers that the Convention does not necessarily require a criminal prosecution. A civil action may suffice, for example in cases of medical negligence.[157] But everything depends on the circumstances of the particular case, and in deciding whether the penal solution should or should not be precluded, account must always be taken of the nature of the activity, the number and status of the authorities which have been found wanting and the number of persons who have died as a result of the risk in question.[158]

It will be noted that, with regard to the judicial proceedings themselves, apart from the obligation to observe the procedural rules set out in Articles 6 and 13 of the Convention, states must also observe a specific duty of diligence, thoroughness and efficacy. In this regard the tendency is for the European Court to conduct a detailed review, scrutinising the investigatory and procedural acts as well as the final decision, in particular the interpretation of the texts, and its execution.

To conclude, one may observe that the Court's case-law on the protection of life and physical integrity of persons is not lacking in consistency or, above all, in a sense of balance. The state's obligations may be listed, in order, as follows:

152. *Akdoğdu v. Turkey*, cited above (p. 33, footnote 139).
153. Judgment of 26 February 2004, §119.
154. *X and Y v. the United Kingdom, Stubbings,* and *M.C. v. Bulgaria,* cited above, p. 32.
155. In particular, *Öneryıldız v. Turkey* [GC], 30 November 2004.
156. In particular, *Krastanov v. Bulgaria*, 30 September 2004.
157. *Calvelli and Ciglio*, 17 January 2002; *Vo v. France*, 8 July 2004.
158. *Öneryıldız v. Turkey* [GC], *loc. cit.*

- prevent violations (as far as possible)
- actively seek the guilty (where prevention has failed)
- punish the guilty (in the most suitable way)
- apply the penalty humanely (respecting the dignity of the persons concerned).

III. Protection of private and family life

General issues

The (positive) protection of private and family life under the European Convention on Human Rights operates, as everyone knows, in the framework of two articles, Article 8 and Article 12, which state respectively that "Everyone has the right to respect for his private and family life, his home and his correspondence" (paragraph 1) and that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". However, in both theory and practice Article 8 occupies the centre ground.

As far back as the *Marckx v. Belgium* judgment[159] the Court inferred from the term "respect", as used in the first paragraph of this article, that it places positive obligations on states in addition to the duty of non-interference in private and family life. But it is important to note at the outset that the viewpoint is different from that of Articles 2 to 4. The specific nature of Article 8 has led the Court to allow states a wide margin of appreciation. First of all, there is the fact that the Convention itself provides that the right to private and family life may be subject to restrictions (Article 8, paragraph 2). Then there is the fact that, as is emphasised in the case-law, "the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case".[160] Finally, the fact is that in cases involving Article 8 the states parties, and then the Court, are bound to arbitrate between the rights of the applicant and those of other persons. Consequently – but this is no surprise – the attitude of the European Court here, if not less militant, is at least less prescriptive. Most of the time it will merely say that a particular shortcoming on the part of the state is contrary to the Convention in that it has not struck a fair balance between the interests involved. Only in exceptional cases does it go so far as to indicate appropriate positive measures.

159. Judgment of 21 April 1979.

160. *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, §52.

The sphere of protection of Article 8 has grown much more complex as case-law has developed. For our present purposes we shall keep to simplified categories and distinguish between private life, family life, home and correspondence. In view of the case-law, however, special attention will be paid to the right to a healthy environment.

The positive aspect of respect for private life

As the Court frequently points out, "the concept of "private life" is a broad term not susceptible to exhaustive definition".[161] As the case-law now stands, it covers:[162]

- the physical and moral integrity of the person
- the physical and social identity of the individual, including his sexual identity
- the right to personal development or fulfilment
- the right to have relationships with other human beings and the outside world.

The theory of positive obligations extends in each of these directions. We have seen how they apply from the standpoint of protection of physical and moral integrity. It remains for us to examine the manner in which it develops from other aspects of private life.

Recognition of the identity of the person

The – positive – protection of persons' identity has given rise to particular developments with regard mainly to sexual identity, the right to know one's origins and the right to one's image. Note that the European Court has so far declined to rule that states have positive obligations as regards the choice of one's name.[163]

Sexual identity

While it is true that the Court has also been concerned, from this standpoint, to extend the Convention's safeguards to persons engaging in different heterosexual practices, to homosexuals and to transsexuals, it is mainly – indeed exclusively – in order to protect the latter category that it has resorted to the theory of positive obligations.

The first case in which it considered the claims of transsexuals to protection under the Convention was that of *Rees v. the United Kingdom*.[164] The applicant complained that the United Kingdom government had not taken steps to recognise in law his new status (as a man) following a sex change operation. More precisely, he considered that Article 8 required the government to amend, or at the very least annotate, the civil status register to include his sexual change therein. He also believed that the government was obliged to issue him with a new birth certificate corresponding to his new status. The Court did not accede to this claim. Basing itself on scientific uncertainties in the matter and on differences in the legislation and practice of states parties, it decided that "it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of trans-

161. For example, *Van Kück v. Germany*, 12 September 2003, §69.
162. For a review of the case-law, see the same judgment.
163. See in particular *Stjerna v. Finland*, 24 October 1994, §32.
164. Judgment of 17 October 1986.

sexuals" and that, in any event, Article 8 could not be interpreted as requiring the contracting parties to alter their civil status registers, even partially. In fact, this stance did not totally preclude the possibility of states' assuming positive obligations towards transsexuals. The attitude of the British government, which, while ruling out legal recognition, accepted sexual self-determination and had taken steps to minimise the drawbacks of the lack of legal recognition, had carried some weight.[165] This is moreover borne out by the *B v. France* judgment.[166] While the Court found a violation of the Convention, in a quite similar set of circumstances, it was because it considered that the facts corroborated the applicant's complaints that the French legal system, unlike that of the United Kingdom, did not even acknowledge the appearance assumed by a transsexual.

This position changed radically with the *I v. the United Kingdom* and *Christine Goodwin v. the United Kingdom* judgments.[167] Taking into consideration the development of scientific knowledge and international practice, the need for consistency of legal systems, and also the increasing drawbacks to the persons in question resulting from their continuing non-recognition in law, the Court shifted its position. It now considers that states no longer have a margin of appreciation as regards recognition. In other words, they are bound to grant it. They still have a certain freedom of movement only where recognition procedures are concerned. The resultant obligation on the states also falls on their courts. They must respect the right of transsexuals to sexual self-determination, and not make recognition of their right to reimbursement of the medical costs of a sex change operation conditional on proof of the therapeutic necessity of that operation.[168]

The right to know one's origins

The states parties also have a duty to act to enable individuals to access information about their origins, in other words, to quote the Court, "everyone should be able to establish details of their identity as individual human beings".[169]

In the *Gaskin v. the United Kingdom* case[170] the applicant, who suffered from psychological disorders the origin of which, according to him, dated back to the time when he was taken into care by the welfare authorities, complained that the respondent state, arguing the confidential nature of the case file, had not allowed him access to all the personal information relating to that period. While recognising the legitimacy of the aim pursued by the public authorities, the Court considered that "persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development". In the case in point, to the extent that denial of access to documents was linked to the fact

165. See also *Cossey*, 29 August 1990; *Sheffield and Horsham v. the United Kingdom*, 30 July 1998).
166. Judgment of 24 January 1992.
167. Judgments of 11 July 2002.
168. *Van Kück*, cited above, p. 37.
169. *Gaskin v. the United Kingdom*, 23 June 1989.
170. *Ibid*.

that certain "informers" refused to relinquish their anonymity, the European Court believed that the United Kingdom should set up an independent body with responsibility for deciding on requests for access.

Similarly, it ruled in the *Mikuli v. Croatia* judgment[171] that, in the context of a procedure to establish paternity, domestic law should provide for the possibility of compelling a reluctant putative father to undergo a DNA test or, failing this, provide other means enabling the interested party to apply to an independent authority for his action to be decided.

This right of access is not absolute, however. This is shown by the fact that, in the *Gaskin* and *Mikulic* cases, the Court did not accept that it had been infringed until a detailed examination against the public interests at stake had been conducted. This is even more so where, in addition, the applicant's right to private life conflicts with that of third parties. This was precisely what happened in the case of *Odièvre v. France*[172] in which the person concerned, whose birth had been registered anonymously *("née sous X")* and who had been adopted, sought to obtain information that would have enabled her to know her natural family.[173] As the Court stressed, various competing interests came into conflict here. Apart from those of the applicant, there were those of her adoptive family and, above all, those of the members of her natural family. In this particular case the European Court finally decided that the fact that the French authorities had not supplied the information sought was not at variance with the requirements of Article 8. That conclusion flowed from the finding that the procedural obligation set out in the aforementioned judgments had been satisfied: in France, a new law (the law of 22 January 2002), immediately applicable, had just been passed enabling persons in the applicant's situation to ask an independent body to examine their request and, where appropriate, decide to lift the secrecy surrounding the mother's identity.

The right to one's image

Supplementing its case-law on the – positive – protection of persons' identity, the European Court has also ruled, in particular in the *Von Hannover v. Germany* case,[174] that it is incumbent on states to ensure that the right of persons under their jurisdiction to their image is respected by third parties, including journalists. This triumph of the right to privacy over freedom of expression, which the Court is constantly repeating is one of the essential foundations of democratic society, is all the more remarkable – and has been all the more remarked on – as it concerned Princess Caroline, a member of Monaco's ruling family. However, that family relationship did not appear decisive to the European Court. In its view, the decisive factors were the fact that the person concerned did not hold any official position in or on behalf of the

171. Judgment of 7 February 2002.
172. Judgment of 17 February 2003.
173. Note that, in the opinion of the Court, the requests of the applicants in the *Mikulic* and *Odièvre* cases did not relate to family life but rather to the private life of the child from the standpoint of the right to identity and personal fulfilment.
174. Judgment of 24 June 2004.

Monegasque state, that the photographs taken mainly related to details of her private life, even though she was in places frequented by the public, and the fact that they were taken by paparazzi, without her knowledge or consent. The Court found that "in these conditions freedom of expression calls for a narrower interpretation".[175] It therefore emphasised

> *the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension … anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life.*[176]

But what was the substance of the German state's obligation to protect in this case? Firstly, a duty to clarify its legislation with regard to the distinction it draws between "figures of contemporary society *par excellence*", whose private life is to be protected only in their private sphere, and "relatively" public figures who are entitled to broader protection. The criteria underlying this distinction must be clearly stated. For their part, the domestic courts, even constitutional courts as in the case in question, must interpret domestic law in a manner which matches it to the Convention requirements.

175. §66 of the judgment.
176. §69 of the judgment.

Protection of "social private life"

While the case-law is both prolix and "generous" with regard to positive obligations aimed at ensuring the effective exercise of the right to one's identity, it is by contrast less forthcoming and more circumspect where the social dimension of private life is concerned. We shall cite just two judgments here, though their contribution is slight.

The first of them is the well-known, but also very disappointing, *Botta v. Italy* judgment,[177] in which the Court found that the complaints of a disabled person that the national authorities had failed to provide a suitable ramp to allow him access to the beach did not fall within the scope of Article 8. It considered that the right asserted concerned interpersonal relations of such broad and indeterminate scope that there could be no direct link with the measures the State was urged to take in order to make good the omissions of the private bathing establishments.

The second judgment, *Sisojeva and others v. Latvia*,[178] does represent a definite step forward in the case-law, since it lays down that a deportation order issued against a foreigner may violate Article 8 if it is apparent that the person concerned has formed strong personal, social and economic ties in the state. In certain respects, however, it is unclear what standpoint the European Court adopts in reaching this conclusion. On the one hand, some parts of the

177. Judgment of 14 February 1998.
178. Judgment of 16 June 2005.

judgment might suggest that we are in the sphere of positive obligations, in particular where the Court states:

> *it is not enough for the host State to refrain from deporting the person concerned; it must also, by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question [secured by Article 8] without interference.*[179]

But on the other hand, this statement is contradicted by the European Court's general approach, which traditionally confined itself to reviewing the deportation measure in relation to Article 8 paragraph 2.

The positive aspect of respect for family life

From the standpoint of family life, the case-law has in essence established two general obligations, applied in particular ways according to the sphere under consideration. These are the obligation to give legal recognition to family ties and the obligation to act to preserve family life.

Legal recognition of family ties

Affiliation

In this field and in general, it is clear from the case-law that Article 8 of the Convention requires that "where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed This entails legal protection that

> *renders possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family.*[180]

Legal recognition must first of all be established through legislation. This requirement has been asserted by the Court, in particular with regard to a Belgian law which did not accept full maternal affiliation from the moment of birth and obliged unmarried mothers desiring such legal affiliation to resort to a recognition procedure which, although it brought about that result, also entailed disadvantage to the recognised child, whose entitlement to a share of the estate was reduced.[181] That solution was logical in the sense that the Convention draws no distinction between the legitimate family and the natural family. Moreover, the same solution was applied in a case where the law permitted formal recognition by the natural father of a child born in adultery only if the mother's husband (the putative father) did not object[182] and, above all, on the express condition that the biological father married her.[183]

However, passing a law meeting the requirements of Article 8 is not enough in itself. It must also be properly enforced and properly interpreted by the domestic courts.[184] In this connection, the case-law virtually creates an obligation on the domestic courts to interpret the domestic law in accordance with the Convention. It

179. §104 of the judgment.

180. See in particular *Kroon and others v. the Netherlands*, 20 September 1994, §32.
181. *Marckx v. Belgium*, 27 April 1979.
182. The two having divorced in the meanwhile.
183. *Kroon*, cited above.
184. *Pla and Puncernau v. Andorra*, 13 July 2004.

must however be noted that the state's responsibility under the Convention system will not be engaged in every case. For it to be so, the domestic courts must have committed a manifest error of interpretation, in other words only "if the national courts' assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention".[185]

The question also arises today whether the above requirements would apply to the children of a couple at least one of whose members was transsexual. While recognising that Article 8 was applicable in a case involving such a couple and their child conceived through artificial insemination, the Court considered in 1997 that the absence of legal recognition of family ties between the putative father, who was transsexual, and the child did not infringe that provision.[186] But this solution has to be seen in the jurisprudential context of the time, when the Court was still uncertain about the degree to which the persons in question had changed. The context now having radically altered with the *I* and *Goodwin* judgments,[187] it may be wondered whether the Court would reach the same conclusion if faced with a case of the same kind today.

185. §46 of the judgment cited above.
186. *X, Y and Z v. the United Kingdom*, 20 March 1997.
187. Judgments cited above, p. 38, footnote 167.

Marriage … and divorce?

Granting of the possibility of legal recognition of family life also holds good for marriage. As everyone knows, this question, or at least the discussion of it, has come into sharper focus in recent decades with the demands of homosexuals and transsexuals. As regards the latter, the Court refused prior to the *I* and *Goodwin* judgments to admit that Article 12 was applicable to the union of a transsexual and a person of the opposite sex to his/her new sex. That refusal was bound to surprise, in view of the legal doctrine obtaining at the time on the protection of the private life of this category of persons. With the two above-mentioned judgments, the Court shifted its position and now considers that the acceptance in domestic legislation only of the "biological" sex recorded at birth for the purposes of marriage infringes the substance of the right to marry.

There remains the issue of divorce. The Court's position on this is that neither Article 12 nor Article 8 secure a right to divorce, even where remarriage is envisaged. So states have no positive obligation in this regard.[188] But respect for the right to private life may in certain circumstances, in particular where life as a couple has become impossible, require recognition of a right to separation. In such a situation, as in the case of *Airey v. Ireland,*[189] the domestic law must afford the persons concerned effective access to the

188. *Johnston and others v. the United Kingdom*, 27 November 1986.
189. Judgment of 11 September 1979.

courts if one of the couple intends to bring an action for that purpose.

And family reunification?

What then of family reunification? The question has arisen in the European Court, principally, as to whether foreigners have a claim, on the basis of Article 8 of the Convention, to obtain from the state permission to enter and/or reside on the latter's territory in order to join and remain with their relatives. The answer to this question in case-law is mainly negative.[190] True, the Court does admit that Article 8 is applicable in its family component, but it has concluded most of the time that the treatment accorded to these persons did not violate this provision, regard being had to their situation and the general interest. The overriding consideration here is that they are foreigners, that is to say a category in respect of whom states enjoy, under international law, as is stressed in all the relevant decisions, a virtually absolute right of control over entry into their territory and discretionary power in the matter of admission and residence. In concrete terms, the European Court believes that the state could not be obliged under the Convention to accept these persons and permit them to settle except in cases where family life could not be lived elsewhere than on its soil. In the great majority of cases, it has pointed out that such family life could flourish in another country.

In two cases, however, namely *Sen v. the Netherlands*[191] and *Tuquabo-tekle v. the Netherlands,*[192] the Court reached a different conclusion. It took into account the particulars of the two cases and considered that admitting the foreigner to the territory of the state in question was the most appropriate way of developing the family life of the person concerned and that, by not taking such a decision to admit, the national authorities had failed to meet the positive obligation which Article 8 placed on them. The situation here is that of a parent who leaves her country of origin, leaving behind a child whom she later seeks to have join her in the receiving country. It will however be observed that, if the Court found that the state party to the Convention had an obligation to admit the said child, that was because, in the circumstances of both cases, the parent's decision to leave her country of origin without the child had been motivated by special circumstances or overriding reasons – to join her husband who had settled in the state party (*Sen*); and to seek refuge in another country against a background of internal armed conflict during which her husband had been killed (*Tuquabo-tekle*); and:

- The parent had forged strong ties, including family ties, in the host country; she had been given permission to reside there, had a stable job and, above all, had contracted marriage (or rejoined her husband) and borne children who had always

190. See, *inter alia: Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 24 April 1985; *Gül v. Switzerland*, 22 January 1996; *Ahmut v. the Netherlands*, 26 October 1996; *Ciliz v. the Netherlands*, 11 July 2000; *Sen v. the Netherlands*, 21 December 2001.

191. Judgment of 21 December 2001.
192. Judgment of 1 December 2005.

lived in the host country, attended school there and consequently had few ties with the country of origin.

- The integration of the children concerned into the family unit could be regarded as necessary to their development in view of their young age (nine years in the case of *Sen* and fifteen years in the case of *Tuquabo-tekle*), regardless of the fact that such child had always lived in the linguistic and cultural environment of the country of origin and had family members there (uncles and aunts, grandparents, etc.).

All in all, the state's positive obligation to allow family reunification on its soil applies only in exceptional situations and seems to be limited, as the case-law stands at present, to the circumstances described above.

Action to preserve family ties

In the above cases involving foreigners, the European Court adopted the principle that, by the very fact of its birth, the child has a right to continuous ties with its parents and that only exceptional events should be able to break them.[193] Of course, that does not at all mean that the Convention forbids separation or divorce. It simply objects to such events causing a breakdown in parent/child relationships. The relevant case-law has set forth the various obligations, including positive obligations, on states in this connection. In essence they are procedural and relate to (i) procedures which may result in separation of family members and (ii) the execution of decisions on custody and visiting rights.

193. Especially *Gül*, §32.

Establishment of procedures which may affect family life

From the standpoint of European case-law, decisions to remove children from their parents and decisions on placement and adoption, determination of custody and visiting rights constitute serious interference in the exercise of the right to family life within the meaning of Article 8, especially as they can create irreversible situations. This aspect doubtless explains the particular attention which the Court pays to prior procedures, though it recognises itself that the Convention "contains no explicit procedural requirements".[194]

It is now a constant of case-law that the parents must be associated in procedures of this kind, and must play a sufficiently important part for their interests to be properly taken into account. The procedures in question may be either judicial[195] or administrative.[196] The degree of involvement required may vary from case to case: it will mainly depend on the seriousness of the measure to be taken. Lastly, it will be noted that the Court does not specify the manner of participation of the parents, leaving this to states' margin of appreciation.

Execution of decisions on custody and visiting rights

The international responsibility of the state may also be engaged if judicial decisions assigning custody or visiting rights are not exe-

194. *B v. the United Kingdom*, §63.
195. For example, *Ignoccolo-Zenide v. Romania*, 25 January 2000.
196. See especially the series of judgments concerning the United Kingdom: *B*, 26 May 1987; *W*, 8 July 1987; *McMichael*, 24 February 1995; *P, C and S*, 16 October 2002.

cuted. The situation is one where one of the parents, or even grandparents, object(s) to the exercise of such right by the other parent. The charge against the state then is that it has not ordered and enforced execution of the court decision. Generally speaking, the position of the European Court on this question is a very moderate one. It does accept that the state has an obligation deriving from Article 8 in this regard. But it also considers that this obligation is not absolute and, in particular, that it has to be balanced against the "superior interest of the child" and the latter's rights under Article 8. In every case, provided that the domestic authorities have done the necessary minimum to obtain the cooperation of the parents in executing the court decisions, the Court has found no violation of Article 8.[197] The only decisions that derogate from this conclusion relate to international abduction of children. The finding of violation here is based both on shortcomings in the domestic law and on failure by the domestic authorities to use the machinery of the Hague Convention of 25 October 1980[198] to obtain the repatriation of a child unlawfully kept by one parent.[199]

197. Among other cases, *Hokkanen v. Finland*, 24 August 1994; *Nuutinen v. Finland*, 27 June 2000; *Pini and Bertani* and *Manera and Atripaldi v. Romania*, 22 June 2004; *Voleski v. the Czech Republic,* 29 June 2004; *Bove v. Italy*, 30 June 2005.
198. Convention concerning the civil aspects of international child abduction.
199. See *Iglesias Gil and A.U.I. v. Spain*, 29 April 2003 and *Maire v. Portugal*, 29 April 2003.

The positive aspect of respect for the home and correspondence

The positive protection of home and correspondence has not given rise to much case-law, unlike private and family life. The substance of it is nonetheless important.

Home

The (rare) questions with which the Court has so far been confronted concern infringements of the right to one's home by third parties or persons exercising public authority.

Regarding infringements by the public authorities, the Court had already stated that it was not its function to examine *in abstracto* national legislation and policy even where it had repercussions on the housing of a specific category of persons (gypsies in the case in point).[200] The outcome of this, at the very least, is that the state cannot be required to implement a given policy on housing.

Two cases – *Surugiu v. Romania*[201] *and Novoseletskiy v. Ukraine*[202] – concerning private violations of the home provided the Court with an opportunity to develop interesting aspects of its case-law. In both cases the facts complained of – consisting of violations and deprivations of the home – had been made possible by the administration's failure to apply the law, lack of diligence and rigour on the part of the domestic courts and non-execution of certain court decisions. The Court considers that respect for the

200. *Chapman v. the United Kingdom*, 18 January 2001.
201. Judgment of 20 April 2004.
202. Judgment of 22 February 2005.

home calls for positive measures on the part of the state, and in particular:

- diligent and rigorous application of the law by the domestic courts (in this respect, the *Novoseletskiy* judgment demonstrates the European Court's determination to conduct a detailed review in this sphere, scrutinising both the investigation phase and the judgment and also focusing on the interpretations adopted);
- prompt execution of the final court decisions confirming the right of ownership or occupancy (in this connection, it is stressed in the judgment that "the administration constitutes an element of the rule of law, whose interest is identical with that of the proper administration of justice, and if the administration refuses or omits to execute a decision, or delays such execution, the safeguards which the individual has enjoyed during the judicial stage of the proceedings lose all raison d'être").[203]

Another judgment of relevance here is that in *Moreno v. Spain*[204] concerning excessive noise suffered because of proximity to numerous nightclubs. This judgment is remarkable, firstly in that, unlike the *López Ostra* and *Hatton* cases, the applicant's complaints and the Court's assessment relate solely to the right to respect for one's home.[205] It is also remarkable by reason of the statements of principle made by the European Court. These relate primarily to the right to respect for one's home as secured by Article 8: it is to be understood as "not just the right to the actual physical area, but also to the quiet enjoyment of that area". As regards infringements of that right, they are to be seen broadly as "not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference".[206]

In that case the applicant complained, not that the domestic authorities had directly interfered in the exercise of his right but rather that they remained passive with regard to the severe loss of amenity caused by the nightclubs. It was in fact established that the creation of these establishments had been authorised by the municipality, that an expert opinion commissioned by the latter had concluded that there was a situation of "acoustic saturation" generated by a noise level far in excess of the legal limits, and that despite these conclusions the municipality had not taken action over several years. In the circumstances, the Court concluded logically that Article 8 had been violated.

Correspondence

It is apparent from the *Cotley v. Romania* judgment[207] that in certain circumstances Article 8 places a positive obligation on the prison authorities to provide a detainee with the wherewithal to correspond with the Court. Bearing in mind the reasons given for

203. §65 of the *Surugiu* judgment.
204. Judgment of 16 November 2004.
205. See below, pp. 46 ff.
206. §53 of the judgment.
207. Judgment of 3 September 2003.

the judgment, this obligation must be seen as relative. The European Court has been careful to point out that the Convention does not oblige states to bear the postage costs of all prisoners' correspondence or guarantee them a choice of writing materials. So it is only in particular circumstances such as in the case in point, where rules on correspondence were not laid down in the internal regulations, where paper and envelopes were supplied in quite insufficient quantity (two envelopes per month) and where repeated requests were ignored, that a violation of Article 8 will be found.

The right to a healthy environment

The right to a healthy environment occupies a special place in the overall economy of Article 8. The first reason for this is that it is not set forth as an independent right. The second is that it is linked to several elements safeguarded by this provision. As is stated in the *López Ostra v. Spain* judgment,[208] "severe environmental pollution may affect individuals' well-being *and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*".[209]

The case-law offers a variety of situations where the environment is harmed in a way which raises issues under Article 8: dangerous activities engaged in by the state (for example, nuclear tests)[210] and likely to affect persons' health; activities of private individuals authorised by the state causing pollution harmful to residents' health and well-being;[211] activities of private persons causing loss of amenity to nearby residents.[212]

The positive obligations on states – and the corresponding rights of individuals – in such situations are of several kinds.

- firstly, where the activity contravenes domestic rules, the authorities must take the necessary steps to end it or ensure that it conforms to the rules in force;
- in all cases, the persons concerned are entitled, subject to any overriding public interest, to have access to information which will enable them to assess the risk incurred, and the state must establish "an effective and accessible procedure … which enables such persons to seek all relevant and appropriate information";[213]
- where the state defines an economic and social policy which, by harming the environment, is susceptible of affecting the right of a group of persons to respect for their homes, but also for their private and family life, it must first carry out appropriate inquiries and studies so that the interests of the persons concerned may be taken into account;[214]and if any of those

208. Judgment of 23 November 2004.
209. §51 of the judgment (emphasis added).
210. *McGinley v. the United Kingdom*, 9 June 1998.
211. *López Ostra v. Spain*, *Guerra and others v. Italy*, 19 April 1998 (a waste treatment plant causing pollution harmful to the health of persons in the vicinity; a chemical products factory producing the same effects on its surroundings).
212. *Hatton and others v. the United Kingdom* [GC], 8 July 2003; noise pollution caused by an airport. Note an earlier judgment relating to similar facts: *Powell and Rayner v. the United Kingdom*, 24 January 1990. See also *Moreno*, concerning noise pollution caused by nightclubs (above, p. 46).
213. *McGinley*, §101.

persons wish to escape the harmful effects of that policy by moving house, they must be able to do so without financial loss. This is the counterpart of the wide margin of appreciation accorded to the domestic authorities in economic and social matters.[215]

214. The *Buckley v. the United Kingdom* judgment (25 September 1996) concerning refusal of planning permission shows that such an obligation exists whenever the domestic authorities are allowed a margin of appreciation in taking a decision which may constitute interference with the exercise of a protected right (see in particular §76 of the judgment).

215. *Hatton*, cited above.

IV. Protection of pluralism

Various of the rights secured by the system of the European Court of Human Rights are affected by the issue of pluralism which characterises European democratic society. They are the right to free elections (Article 3 of Protocol No. 1); freedom of expression (Article 10); freedom of thought, conscience and religion (Article 9); and freedom of assembly and association (Article 11). They are, moreover, closely linked in the Court's case-law.

Positive obligations actually play little part in the European Court's scrutiny of respect for these rights. Having regard to the very structure of the rights in question, and leaving aside for the time being the right to free elections, disputes over their violation are essentially disputes about the restrictions imposed by states on their exercise. And if such obligations exist – which they nonetheless do – they remain exceptional and are not systematised to the extent seen in the context of the articles already examined (Articles 2, 3, 4 and 8).

The holding of free elections

According to Article 3 of Protocol No. 1, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The Court was asked to interpret this provision for the first time in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, and observed that "the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections".[216] One may therefore be tempted to regard the entire "substance" of Article 3 as coming within the set of issues which concerns us here.

216. Judgment of 28 January 1987, §50.

In fact, that holds true only as regards the institutional dimension of the right to free elections. Here the Court will be led to find that positive intervention by the state to hold elections in order to form this or that assembly is necessary. The lever employed is the notion of "legislature", which it interprets broadly. Apart from national parliaments, the Court has thus ruled that Article 3 of Protocol No. 1 also applies to certain regional deliberative bodies – the community councils and Walloon regional council in Belgium,[217] the Congress in New Caledonia (France)[218] – but also to the European Parliament.[219]

However, the development of positive obligations on the basis of Article 3 of Protocol No. 1 goes no further than this. In the first place, with regard to election procedure, the Court considers that this provision does not require states to implement a specific system. So they have a wide margin of discretion in adapting their domestic situations to the requirements expressed in the terms "free", "at reasonable intervals", "secret ballot" and "under conditions which will ensure the free expression of the opinion of the people",[220] though these terms are conditions of the democratic character of elections. This discretion is certainly not excluded from European scrutiny, but it is evident that the latter does not culminate in the definition of a positive European content binding on the states. Secondly, it will also be noted that the European case-law is resolutely aimed at the protection of individual rights under cover of this Convention provision. This judicial construction is in essence cast in the traditional mould, the public authorities being required above all to abstain from interfering. In fact, the European review machinery tends principally to sanction such interference with the exercise of the right to vote and to stand for election – interference which may be constituted by provisions or measures which have the effect of excluding certain persons from the exercise of these rights, for example those which set age limits and residential conditions,[221] which allow the disenfranchisement of a category of persons (convicted prisoners, for example),[222] which establish ineligibility (for example, by reason of ignorance of the official language of the state[223] or of the political past of the person concerned,[224] etc.

In sum, while Article 3 of Protocol No. 1, as originally conceived, is indeed a command to the public authorities to act, that aspect has faded considerably in actual case-law.

217. *Mathieu-Mohin and Clerfayt*, cited above. The *Zdanoka v. Latvia* judgment of 16 March 2006 is also relevant to the systematisation of the Court's approach.
218. *Py v. France*, 11 January 2005.
219. *Matthews v. the United Kingdom,* 18 February 1999.
220. *Mathieu-Mohin and Clerfayt*, cited above.
221. For a case in which the Court finds such conditions legitimate, see *Hilbe v. Liechtenstein*, 7 September 1999 (decision on admissibility); for a case in which such restrictions are found incompatible with the Convention, see *Melnichenko v. Ukraine*, 19 October 2004.
222. *Hirst v. the United Kingdom (No. 2)*, 6 October 2005.
223. *Podkolzina v. Latvia*, 9 April 2002.
224. *Zdanoka v. Latvia*, 16 March 2006.

Freedom of expression

The scope of the positive obligations stemming from Article 10 of the Convention, as it emerges from the case-law, has to date been confined to relations between individuals. In the *Guerra* case[225] the applicant had tried to argue that the public's right to receive information, deriving from Article 10 and moreover upheld by the European Court,[226] implied a duty on the domestic authorities to collect and distribute information, especially where a dangerous activity constituted a threat to individuals' health and private and family life. The Court considered, however, that no such right could be inferred from this provision of the European Convention.

Infringements of freedom of expression in private relationships can take different forms. The case-law offers some examples: dismissal of a journalist by his employer for offensive remarks;[227] attacks on journalists, distributors and places of distribution of a newspaper;[228] refusal of a private broadcasting company to broadcast an association's advertising.[229]

The principles applicable remain the same nonetheless. In the first place, the protection of freedom of expression in relation to the actions of individuals primarily involves adapting the judicial framework. A state will have failed in this obligation if the infringement of freedom was rendered possible by the legislation in force.[230] Secondly, where there are known threats to the exercise of that freedom, the domestic authorities must take the necessary steps, including practical measures, to protect persons and property.[231] That being so, does the state have a positive obligation to safeguard the exercise of freedom of expression on private premises open to the public? This was the question raised by the *Appleby and others v. the United Kingdom* case,[232] concerning the refusal of a company to allow a stand to be set up to distribute leaflets in its shopping centre. The Court replied in the negative, ruling that the right to one's possessions (Article 1 of Protocol No. 1) should prevail.

Freedom of thought, conscience and religion

To date, the European Court has not yet pronounced as to whether Article 9 of the Convention, which protects freedom of thought, conscience and religion from state interference, also places positive obligations on it. Yet it has had the opportunity to do so, for example in the *Vergos v. Greece* case,[233] where the domestic authorities were principally blamed for not having designated an area for the building of a house of prayer. On each

225. Judgment of 19 February 1998.
226. *Gaskin v. the United Kingdom*, 22 June 1989.
227. *Fuentes Bobo v. Spain*, 29 February 2000.
228. *Özgür Gündem v. Turkey*, 16 May 2000.
229. *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 September 2001.
230. See in particular the judgment in *Vgt Verein Gegen Tierfabriken v. Switzerland*. In the *Fuentes Bobo* case, the Court found no violation, in particular because it considered the state of the domestic legislation and its application by the national courts satisfactory.
231. See in particular *Özgür Gündem*, p. 50, footnote 228.
232. Judgment of 24 September 2003.
233. Judgment of 24 June 2004.

occasion it has preferred to class as interference what might have been seen as a failure to act.

Logically, however, it should be admitted that the issues discussed in relation to Article 10 are transposable here, in particular as regards infringements of freedom of thought, conscience and religion by a private individual, in the professional framework, for example.

Freedom of assembly and freedom of association

Freedom of assembly and freedom of association are linked in paragraph 1 of Article 11, which provides that "Everyone has the right to freedom of peaceful assembly and to freedom of association", and likewise in the case-law, mainly because they both require the same protection from violent acts by individuals seeking to restrict or prevent their exercise. Like Article 11, moreover, the case-law places particular emphasis, where the obligations of states are concerned, on trade union freedom, which is of course a specific manifestation of freedom of association.

Protection against violent demonstrations

The principle that the state must not only prevent interference but also provide protection was asserted initially in respect of freedom of association.[234] It was strikingly confirmed recently, this time in the sphere of freedom of assembly.[235] In both cases the aim was to ensure that these freedoms can be exercised unimpeded by the violent action of private individuals. In the *Plattform "Ärzte für das Leben"* case, the applicant complained of the violent acts of counter-demonstrators; and in the *Ouranio Toxo* case, of various actions including an attack by a group of individuals on the headquarters of the political party which lodged the application.

The principal obligation of the authorities is to take the practical protection measures required by the situation. It is not an obligation of results but of means, and the Convention demands only "reasonable and appropriate measures".[236] The choice of means and the tactics to be employed are matters for the states. In the first of these cases, noting that the authorities had acted, firstly by banning the two demonstrations which were likely to degenerate and by posting police officers along the route, the Court concluded that Article 11 had not been violated; and if the conclusion in the second case is the opposite, that is because indeed no preventive measures had been taken.

To this principal requirement must be added two others which stem from recent case-law. The first might be described as an obligation of neutrality, or even an obligation to ease tensions. In the *Ouranio Toxo* case, where the principal representatives of the municipal majority had publicly called for a protest against the party in question, the Court stated that "the role of State authorities is to defend and promote the values inherent in a democratic system, such as pluralism, tolerance and social cohesion" and that they should therefore "advocate a conciliatory stance".[237] The

234. *Plattform "Ärzte für das Leben" v. Austria*, 25 May 1988.
235. *Ouranio Toxo and others v. Greece*, 20 October 2005.
236. *Plattform "Ärzte für das Leben" v. Austria*, 25 May 1988, §34.

second requirement is to carry out an effective investigation. That investigation must be decided *ex officio.*[238]

Giving practical effect to trade union freedom

The attitude of the European Court has always been less bold in the matter of trade union freedom than in other fields. This excessive caution is also evident when it comes to upholding and developing positive obligations. In the *Schmidt and Dahlström v. Sweden* case, the Court ruled that:

> *[Article 11 paragraph 1] … does not secure any particular treatment of trade union members by the State, such as the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement.*

It went on to conclude:

> *Such a right, which is enunciated neither in Article 11 para. 1 nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention.*[239]

It also excluded, initially, the notion of an obligation deriving from Article 11 which would require states to consult trade unions[240] or organise collective bargaining.[241]

The case-law has, however, evolved on these different points and the Court, drawing in particular on the provisions of the European Social Charter and decisions of the European Committee of Social Rights,[242] has broadened the protection given by Article 11 to include negative trade union freedom[243] – the right not to belong to a trade union – and some degree of protection of the right of collective bargaining.[244]

In parallel with this development, the European Court has established the existence of positive obligations derived from Article 11 and consisting in protection of trade union freedom in the broad sense in relations between private individuals. The *Wilson* judgment is very enlightening in this connection. A publishing concern had decided not to renew a collective bargaining agreement governing relations with its workforce when it expired, and had unilaterally adopted alternative arrangements. At the same time the employees had been informed that those who accepted these new arrangements, and only they, would receive a substantial pay increase, this being permitted in English law. The Court regarded this practice as discouraging or restricting recourse by employees to trade union membership in order to protect their interests, which is contrary to the Convention. Above all, it considered that, "by permitting employers to use financial incentives

237. §42 of the judgment.
238. *Ibid.*
239. Judgment of 19 January 1976, §34.
240. *National Union of Belgian Police v. Belgium*, 1 October 1975.
241. *Swedish Engine Drivers' Union v. Sweden*, 19 January 1976.
242. The Court's approach is an encouragement, in a both practical and theoretical sense, to read this case-law in parallel with that of the European Social Charter, in order to understand the solutions adopted and to assess the possibilities.
243. *Sigurður A. Sigurjonsson v. Iceland*, 30 June 1993; *Gustafsson v. Sweden*, 25 April 1996.
244. *Wilson, National Union of Journalists and others v. the United Kingdom*, 2 July 2002.

to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention".

The same reasoning applies to practices such as "closed shop" clauses which aim to force workers to join a particular trade union.[245]

245. See, *mutatis mutandis*, the *Sigurjonsson* and *Gustafsson* judgments cited above.

V. Respect for economic, social and cultural rights

As the Court has often pointed out, the Convention aims to protect civil and political rights. Nonetheless, it does directly secure some rights that are rather economic, social and cultural in kind. The prohibition of forced labour and trade union freedom are among them, although the issues they raise fall into the freedom category. To these must be added those covered by Articles 1 and 2 of Protocol No. 1, namely the right to possessions and the right to education. Each of these two articles sets out the right and the conditions in which domestic law must secure it. For our present purpose, the most important aspect is the manner of its wording. According to Article 1, paragraph 1, first sentence, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions". The first sentence of Article 2 states that "No persons shall be denied the right to education". It is precisely by basing itself on the concepts of "respect" or "peaceful enjoyment" and "the right to" that the Court has increasingly derived positive obligations from these provisions.

Right to property

Compensation for expropriation

The first positive requirement to have been "discovered" by the European Court in the context of Article 1 of Protocol No. 1 is the obligation to compensate victims who have been deprived of their possessions in the public interest (by expropriation or otherwise). The Court has been at pains to guarantee the effectiveness of the right in question. As it stresses in the *James v. the United Kingdom* judgment:

> *the protection of the right of property … would be largely illusory and ineffective in the absence of any equivalent principle" [to that obtaining in the legal systems of the contracting states]*[246]

In order to satisfy the Convention's requirements, compensation must meet two conditions. Firstly, it must be in proportion to the

246. Judgment of 21 February 1986, §54.

value of the property, while not necessarily representing full compensation. Secondly, it must also be paid within a reasonable time.[247]

Note that the obligation to pay compensation does not operate independently and, while it is a condition of the lawfulness of deprivation of property, it is not the only one. In practice, it comes into play as one criterion among others in reviewing the proportionality of such operations.

Protection of property

Case-law has added other obligations to that of compensation, relating to the substantive and procedural protection of property, considered as a matter of the general interest. The Court employs a general formula when such a question arises, to the effect that the public authorities are required to react in good time, correctly and with the utmost consistency.[248]

The obligation to take judicial and practical protection measures

As has been seen in other situations, here too the state is required to take suitable measures to prevent violations of the right to property. These measures must be of a practical kind, in particular where dangerous activities are involved.[249] Here again, it has primarily to adopt suitable legal rules. Two recent decisions illustrate the state of the relevant case-law.

The first is the judgment delivered in the case of *Broniowski v. Poland*.[250] It will be recalled (Grand Chamber decision of 28 September 2005) that the applicant complained, in this decidedly complex case, both of active obstruction and of a degree of inertia on the part of the public authorities, who had prevented him from enjoying his possessions and then of disposing of them. In fact, in his capacity as heir, the applicant had a right of compensation, recognised in law and confirmed by a court decision, for a property which his family had lost at the end of the second world war. As legislation changes came and went, other texts rendered this compensation impossible and then possible by turns, without the administration acting in accordance with favourable laws, until finally a legal text was adopted which extinguished the applicant's claim on the Polish state. The Court considered that the facts set out did not amount to deprivation of property within the meaning of the second sentence of paragraph 1 of Article 1 of Protocol No. 1, nor to the enforcement of property laws within the meaning of the second paragraph of that article, but that they came within the first rule laid down in the first sentence of paragraph 1. As the Court saw it, they constituted as much interference as a presumptive violation of a positive obligation. In the latter context, it then examined the question of "fair balance", taking the opportunity to

247. For more details, see Human rights handbook, No. 4: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Strasbourg, Council of Europe, 2001.
248. *Novoseletskiy v. Ukraine*, 22 February 2005, §102. [Only part of the judgment is available in English.]
249. *Öneryıldız v. Turkey*, 30 November 2004.
250. Judgment of 22 June 2004.

state what the Convention requires in such a situation. The relevant passage reads:

> *The rule of law underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation … it was incumbent on the Polish authorities to remove the existing incompatibility between the letter of the law and the State-operated practice which hindered the effective exercise of the applicant's right of property. Those principles also required the Polish State to fulfil in good time, in an appropriate and consistent manner, the legislative promises it had made in respect of the settlement of the Bug River claims. This was a matter of important public and general interest. As rightly pointed out by the Polish Constitutional Court, the imperative of maintaining citizens' legitimate confidence in the State and the law made by it, inherent in the rule of law, required the authorities to eliminate the dysfunctional provisions from the legal system and to rectify the extra-legal practices.*[251]

The second decision is the *Paduraru v. Romania* judgment[252] concerning a case of non-restitution of property arising from the state of legal uncertainty caused by legislative imprecision and contradictions in the relevant case-law. Here too the Court decided to examine the applicant's complaints from the standpoint of positive obligations. It observes, firstly, that having regard to the complexity of the question relating to restitution of property, states enjoy wide discretion in deciding under what conditions and according to what procedures such an operation can be effected, all the more so in a context of transition from a totalitarian to a democratic system. Nevertheless, it ruled that once a solution had been adopted by a state, it must be implemented with a reasonable degree of clarity and consistency in order to avoid as far as possible legal insecurity and uncertainty for the individuals concerned by the measures taken to implement the solution. Further, it was for each contracting state to equip itself with a proper and sufficient legal arsenal to ensure respect for the positive obligations on it. The Court's sole task was to examine whether the measures taken by the Romanian authorities were proper and sufficient in the instant case.

The obligation of procedural diligence

Alongside the obligation to ensure that domestic law meets the requirements of Article 1 of Protocol No. 1, European case-law in recent years has turned to the assertion of procedural obligations, based on the first sentence of paragraph 1 of this article, which are also tending to become generalised under the Convention system.

There is the obligation to investigate, laid down for example in *Novoseletskiy v. Ukraine*.[253] Domestic authorities are subject to it

251. §184 of the judgment.
252. Judgment of 1 December 2005.
253. Judgment cited above, §35.

whenever they are seized of allegations of violation of property. It will be seen that the case-law relating to Article 1 of Protocol No. 1 does not (yet) make clear the conditions in which the launch of such an investigation is necessary and what its nature may be. On the other hand, it does say what characteristics it must possess: it must be thorough, prompt, impartial and detailed.[254] The requirements are the same here, expressed in different words, as those to be met in connection with other articles of the Convention.

The right to a court is asserted in the same context. It implies, as the European Court observes in the *Sovtransavto v. Ukraine* judgment, "an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons".[255] This obligation applies both to disputes between individuals and to those between individuals and the state. It will be noted that the main requirements of Article 6 of the Convention are thus transposed here.

To complete that transposition, the Court finally inferred from Article 1 of Protocol No. 1 a right to execution of final court decisions establishing ownership.[256]

254. *Ibid*, §103.
255. Judgment of 25 July 2002, §96.
256. In this connection, see in particular *Burdov v. Russia*, 7 May 2002; *Jasiūnienė v. Lithuania*, 6 March 2003; *Sabin Popescu v. Romania*, 2 March 2004; *Matteus v. France*, 31 March 2005.

The right to education

The fact that positive obligations flow from Article 2 of Protocol No. 1 was first established in the Court's decision in the *Belgian linguistic case*[257] by way of an analysis strongly confirmed by the *Layla Sahin v. Turkey* judgment[258] concerning the wearing of the headscarf by young women at university. It is important to remind oneself of the content of the relevant provision before coming on to the European Court's interpretation of it. Apart from stating that "No person shall be denied the right to education" (first sentence), Article 2 also provides that "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their religious and philosophical convictions" (second sentence).

The first sentence, despite its negative wording, does not in the Court's opinion exclude a positive obligation on the state to guarantee the right in question. What, then, does this right consist of? Firstly, of a guarantee, to be provided by the state, of a right of access to the educational establishments that exist at any given time. Next, to ensure that the person entitled is able to derive benefit from the education received, i.e. "the right to obtain, in conformity with the rules in force in each State and in one form or another, the official recognition of studies which have been completed". On the other hand, it imposes neither particular educa-

257. Judgment of 23 July 1968. See also above, p. 7.
258. Judgment of 10 November 2005.

tional means nor a particular organisation, still less a right of educational establishments to receive subsidies.

As for the second sentence, it "does not require of States that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions". More explicitly, it is stated in the *Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment[259] that respect for these convictions presupposes in essence that the parents' choice between public and private education be respected, but also that teaching be neutral. The duty of neutrality is not infringed by the fact that the syllabus contains teaching or knowledge of a religious character. It would only be so if the information and knowledge were dispensed for the purpose of indoctrination. In other words, this duty requires only that this information and knowledge, whatever the content, be communicated in an objective, critical and pluralist manner.

259. Judgment of 5 November 1976.

VI. Promoting equality

If the enjoyment of rights individually requires respect for positive obligations in order to be effective, can it be said that everyone's enjoyment of them requires state interventionism which goes as far as positive discrimination? The answer to this question seems uncertain, whether one refers to Article 14 of the Convention or to Protocol No. 12.

Article 14 stipulates that

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

There is no further need to demonstrate the importance of this provision in the system of the Convention. By combining it with the other clauses in the Convention, the European Court has been able to widen its supervisory role and sometimes to discover new rights, often of a social kind, such as the right to social security.

There is surely no doubt that the rule contained in Article 14 conceals negative obligations. The definition given by the Court in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment,[260] *viz* that there is discrimination "where a person or group is treated, without proper justification, less favourably than another", seems to place the emphasis rather on the active nature of the conduct incompatible with Article 14. In other words, the

260. Judgment of 28 May 1985.

state must not, in its interventions, commit discrimination, *de jure* or *de facto*, in the enjoyment of the rights set forth in the European instrument. Thus any violation should be seen, from this point of view, as an active (and unlawful) impediment to the applicant's right to non-discrimination.

However, the issue of positive obligations is not unconnected with this clause. Firstly, it is established, as the Court expressly found in the *Belgian linguistic case* (cited above, p. 7), that *the principle of non-discrimination applies to all the Convention rights and to all the resulting obligations, including positive obligations.* If one accepts that this principle applies not only to the public authorities but also to private individuals, then it seems fairly obvious, as well as consistent with the case-law, that the state should play its part as guarantor here also: it should ensure that its legal system does not permit discrimination in relations between individuals, and that any violation is duly and effectively sanctioned.

The question remains whether Article 14 also obliges the state to take positive discrimination measures. One might have thought so following the judgment in *Thlimmenos v. Greece*, where the Court stated that Article 14 would also be violated "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[261] Such a solution indeed potentially required the state to act when faced with differences. But this audacious case-law has had no sequel. It even appears to have been abandoned since the European Court, when confronted in the *Chapman v. the United Kingdom* case[262] with an actual situation in which this question of dealing with differences arose, ruled that the applicant could not invoke the Convention to require the respondent state to accord her specific favourable treatment as a member of a (gypsy) minority.

Is Protocol No. 12 capable of altering the basis of European law on this point? That is doubtful. Its contribution consists, on the face of it, only in extending the scope of the non-discrimination principle to include "any right provided for in the law" of a state party. Apart from that, since its wording is virtually the same as that of Article 14, it is fairly obvious that it will not bring any major innovation in case-law.

261. Judgment of 6 April 2000, §44.
262. Judgment of 18 January 2001.

VII. Positive obligations in respect of procedural safeguards

As has been explained above, procedural factors occupy a central place within the category of positive obligations. It is no exaggeration to say that they constitute one of the most important contributions to case-law in recent years. This development, let it be

emphasised, has not had the effect of neutralising the Convention's procedural clauses. Ultimately, the latter tend to be combined with obligation of the same kind deriving from the standard-setting clauses in order to give maximum effect to rights.

The provisions generally described as procedural are spread over several of the Convention's articles. The main ones are definitely Article 6, which guarantees the right to a fair trial, and Article 13, which protects the right to an effective remedy. Nevertheless, Article 5 should be added to these two. True, it is in principle concerned with a substantive right – the right to freedom and security. But its provisions, which are clearly pertinent to the issue of positive obligations, are precisely those which set forth the procedural safeguards specifically applicable to persons deprived of their liberty. We shall also mention certain particular provisions such as those in Article 46 of the Convention or in Protocol No. 7.

The procedural safeguards in question generally represent obligations on the states to take action. It is not possible to examine all of them within the restricted scope of this study. We shall therefore confine ourselves often to a mere mention of them, referring the reader for more details to the publications on the various rights concerned. Only certain characteristic features will be covered more fully here.

General guarantees

With this qualification, we shall consider in turn general safeguards and particular safeguards, that is to say, those that are specific to certain procedures or certain situations. They are the right to a remedy and the right to a fair trial, protected by Article 13 and Article 6 paragraph 1 respectively.

Article 13: the right to an effective remedy

Article 13 is worded as follows:

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

The content of the right and positive requirements

Article 13 may be seen as safeguarding a subsidiarity which is helpful in protecting rights. As establishing and punishing violations of the rights protected by the Convention is the responsibility primarily of the contracting states, it is important that they provide themselves with the means of discharging that function efficiently. That is the purpose of this provision: to enable the domestic system to play its part to the full by obliging states to make provision for the necessary remedies to redress situations at variance with the Convention. Article 13, to use a recurrent formula in case-law, "guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief".[263] As whenever a positive obligation exists, the

Court considers that the parties have a certain margin of appreciation regarding the appropriate means of ensuring that domestic law meets the Convention requirements. However, in accordance with a constant trend in the case-law where procedural safeguards are concerned, this margin is narrower than elsewhere.

In essence,[264] Article 13 requires firstly that states set up "national authorities with the task of deciding on allegations of violations of the rights guaranteed, including complaints of infringement of the right to a hearing within a reasonable time secured by Article 6 §1.[265] Ideally, the authority in question should be judicial, and it may be said that there is a strong incentive in case-law for that to be so. However, a non-judicial authority will also be acceptable from the standpoint of this provision if it presents definite guarantees of independence and impartiality.[266] Note that the effectiveness of the obligation is conditional on the defendability of the allegation, that is to say the fact that it poses a serious problem *a priori* regarding the rights protected by the Convention.[267]

Secondly, it requires that "effective" remedies be available. This requirement has various implications. The main ones are:

- the obligation to carry out an investigation that is diligent, thorough and effective, like those required by respect for certain substantive rights. This obligation, conceived as independent of judicial appeal possibilities, is not absolute and will vary in scope depending on the importance of the right in question. In any event, it arises when there is an allegation of infringement of an intangible right (right to life, prohibition of torture and ill-treatment, etc.);[268]
- the usefulness and efficacy of the procedure, which must enable the competent body to decide on the merits of the complaint of violation of the Convention[269] and to sanction any violation found, but also to guarantee to the victim that the decisions taken will be executed.[270]

Relationship with the procedural requirements inherent in substantive rights

Bearing in mind the content of the right to an effective remedy, one of the questions that arises is that of the relationship between Article 13 and the substantive provisions of the Convention, which, as has been seen, also have procedural implications. In practical terms, the question is when a complaint of non-compliance with a procedural obligation is likely to be upheld both on the basis of Article 2 and on that of Article 13, for example, and when it should rather be confined to one framework or the other.

263. *Kaya v. Turkey*, 19 February 1998, §106.
264. In this connection, see *Silver and others v. the United Kingdom* (25 February 1983), which affords a good summary of the case-law requirements here.
265. In particular, *Kudła v. Poland* (Grand Chamber), 26 October 2000; *Slovak v. Slovakia*, 8 April 2003; *Broca and Texier-Micault v. France*, 21 October 2003.
266. *Klass v. Germany*, 6 September 1978.
267. *Gennadi Naoumenko v. Ukraine*, 10 February 2004, §135.
268. In particular, *Kaya v. Turkey* (right to life); *Bati and others v. Turkey*, 3 June 2004 (ill-treatment).
269. In particular, *Smith and Grady v. the United Kingdom*, 27 September 1999, and *Conka v. Belgium*, 5 February 2002.
270. *Iatrides v. Greece*, 25 March 1999.

In some cases, such as *Kaya v. Turkey*, the Court has asserted that "the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation".[271] The difference is however limited in the case in point. It derives principally from the fact that the investigation required by the former provision must be accessible to the family of the deceased. But this difference is blurred when it is borne in mind that the same result can be achieved by combining the procedural requirements of Article 2 and Article 3, by organising the complaints submitted in this connection in turn from the substantive standpoint (ill-treatment of the relatives of a disappeared person) and from the procedural standpoint (non-compliance with the investigation obligation in the strict sense).[272] To sum up, if there is a difference it is so tiny as not to be worth dwelling on. So the implications of the two kinds of provision must be regarded as virtually identical.

What then explains why in a given case a complaint about a lack of investigation, for example, will be examined in relation to both kinds of provision or in relation to just one? The truth is that the case-law does not offer a reliable objective criterion. Rather, the Court stresses that its choice depends primarily on the circumstances of the case, and in order to obviate discussion it even adds that it is "master of the characterisation to be given in law to the facts of the case".[273] That being so, it is not surprising that applicants submit large numbers of applications, and clearly governments, for their part, have to organise their defence on every count.

271. §107 of the judgment.
272. See above, pp. 33 ff.
273. *Bati*, cited above, p. 60.

Article 6 §1: the general safeguards of a fair trial

General remarks

There are other positive obligations on states by way of general safeguards of a fair trial under Article 6 §1, which reads as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

It is certain that, in order to satisfy the various requirements of a fair trial, the state must act: it must legislate. This applies in particular to the characteristics which the tribunal must possess. On this point, the Court has clearly stated that "As regards the phrase '*tribunal indépendant et impartial établi par la loi*' (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather

than of procedure".[274] The same necessarily applies to the other factors enshrined in the text, in particular the fair and public nature of the proceedings and the reasonable time. Moreover, to the legislative activity of the state we should add that of the courts in this field. It is a task on a scale exceeding the limited compass of this study, and since the question of fair trial is already the subject of a specific work in the collection, we shall simply refer to it.[275]

However, the contribution of case-law is by no means limited to clarifying each of the terms used in Article 6 §1. The European Court has also been at pains to clarify the general economy of its provisions. Above all, it has deduced further implications on which it is helpful to dwell for a moment.[276] They are (i) the right to a court in the sense of the right of access to justice, and (ii) the right to execution of judicial decisions.

The right of access to justice: legal aid in "civil" cases

This is not explicitly mentioned in Article 6 §1. Nevertheless, the right of access to a court constitutes a factor which, according to the case-law,[277] is inherent in this article. Indeed, the Court has observed that "It would be inconceivable…that [this provision] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court".[278]

The right of access to a court in essence prohibits legal and factual impediments to judicial action. Such impediments may result from action by the state, by way of procedural rules. For example, to quote only the principal case which has come before the European Court,[279] it applies to the rules governing time limits on appeals.[280] The situation then is one of infringement of a negative violation. But – and this is the interesting point – the impediment may also result from a shortcoming. It is against this background that the European case-law on legal aid, based on Article 6 §2c, must be seen. Let us observe from the outset that this case-law mainly concerns non-penal matters, for legal aid in penal cases is expressly provided for in Article 6 §2c.

The obligation to grant legal aid was set forth in the *Airey v. Ireland* case,[281] which, as we have seen, concerned divorce proceedings which the applicant had had to relinquish for lack of sufficient means to employ the services of a lawyer. The Court

274. *Golder v. the United Kingdom*, 21 February 1975, §32.
275. The reference, on the essential points, is Human rights handbook, No. 3, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2002.
276. Particularly as these aspects are merely mentioned in the work cited above.
277. *Golder*, cited above.
278. §35 of the same judgment.
279. The Court has also dealt with cases involving a *cautio judicatum solvi (Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1997); conditions of admissibility of appeals in cassation (*de Virgilis v. Italy*, 20 April 1999); *Mohr v. Luxembourg*, 20 April 1999; *Maillet v. France*, 12 November 2002); and the obligation to have recourse to a lawyer (*Gillow v. the United Kingdom*, 24 November 1986). Note that in all these cases it ruled that the restrictions on the right of access were legitimate and justified.
280. On this question, see in particular *Geouffre de la Pradelle v. France*, 16 December 1992; *Zvolsky and Zvolska v. the Czech Republic,* 12 November 2002.
281. Judgment of 9 October 1979. See also above, p. 9.

concluded in this case that Article 6 §1 had been violated. The same conclusion was reached in another case in which the applicant's appeal had been dismissed at the domestic level for failure to deposit the amount awarded in the judgment at first instance, although the applicant had submitted an application for legal aid, which had not even been examined.[282]

The right to aid, thus enshrined, is however not absolute. This emerges, for example, from the *Gnahoré v. France* case.[283] The Court ruled in that case that the rejection of a request for legal aid to lodge an appeal, based on the absence of serious grounds for cassation, was not contrary to Article 6 if the applicants were not obliged to have recourse to a lawyer to put their case. Generally speaking, the European Court considers that the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals",[284] which permits restrictions on legal aid on various grounds, not just those invoked in the *Gnahoré* case.

The obligation to execute judicial decisions

The positive scope of Article 6 §1 has also been extended by the *Hornsby v. Greece* judgment in which the Court, in the interests of the effectiveness of the rights secured by the Convention, stated that "Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6".[285] Failure to execute a judgment will thus constitute non-compliance with this provision. Such non-compliance may, in really exceptional cases, not render the state internationally responsible. That will be so where execution conflicts with a superior interest, as for example the superior interest of a child in the context of Article 8, where decisions on custody or visiting rights following divorce are concerned.[286] In any event, economic difficulties cannot absolve the state of its responsibility for non-execution of a judgment debt.[287] Likewise, in the same case, the state cannot shift to the other side an obligation itself to pursue the execution of the judgment by the authorities.[288]

Article 46: execution of judgments of the European Court of Human Rights

The logic of the above case-law also benefits the judgments of the Court itself. It has in fact come to consider in recent times that Article 46 of the Convention[289] places an obligation on states to

282. *García Manibardo v. Spain,* 15 February 2000.
283. Judgment of 19 September 2000.
284. *Ashingdane v. the United Kingdom*, 28 May 1985, §57.
285. Judgment of 19 March 1997, §40.
286. See above, p. 44.
287. In particular, *Burdov v. Russia*, 7 May 2002 and, more recently, *Amat-G Ltd and Mebaghishvili v. Georgia*, 27 September 2005.
288. For example, *Tunç v. Turkey*, 24 May 2005. For other recent illustrations of a now plentiful body of case-law, see *Fedotov v. Russia*, 25 October 2005; *Androsov v. Russia*, 6 October 2005; *H.N. v. Poland*, 13 September 2005; *Horvatova v. Slovakia*, 17 May 2005; *Sokur v. Ukraine*, 26 April 2005; *Uzkureliene and others v. Lithuania*, 26 April 2005.
289. This article is worded as follows: "1. The High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

execute its judgments. The nature of this obligation was made clear in full measure for the first time in the *Scozzari and Giunta v. Italy* judgment, in the following terms:

> *It follows [from Article 46], inter alia, that 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 the effects.*[290]

Thus payment of just satisfaction, individual measures and general measures are the three requirements which states have to satisfy.

Specific guarantees

These are the requirements set forth in Articles 5 and 6 of the Convention and in Protocol no. 7, which aim to protect persons deprived of their liberty, persons facing criminal prosecution and foreigners who are the subject of deportation orders.

290. Judgment of 13 July 2000, §249.

Requisite safeguards in cases of deprivation of liberty (Article 5)

The general economy of Article 5

The purpose of Article 5 is to protect persons against arbitrary and wrongful arrest and detention. To that end it stipulates, in the first paragraph, that "Everyone has the right to liberty and security of person" and that "No one shall be deprived of his liberty". The same paragraph, however, sets out exceptions to the rule, listed exhaustively, and in principle to be interpreted strictly. Thus it authorises:

- lawful detention after conviction by a competent court (Article 5 §1a);
- lawful arrest or detention for non-compliance with an order, provided it is lawful, has been issued by court or seeks to secure the fulfilment of a legal obligation (Article 5 §1b);
- arrest and detention of persons where there is reasonable suspicion that they have committed or are about to commit an offence, in order to bring them before the competent legal authority (Article 5 §1c);
- lawful detention of minors for the purpose either of educational supervision or of bringing them before the legal authority (Article 5 §1d);
- lawful detention of persons with infectious diseases, of unsound mind, alcoholics, drug addicts or vagrants (Article 5 §1e);

- lawful arrest and detention of persons attempting to effect illegal entry into the country or persons who are the subject of deportation or extradition procedures (Article 5 §1f).

The scope, both of the rule and of these exceptions, is made clear in a wealth of case-law which is the subject of a separate volume in this collection, and to which reference is made.[291] In any event, the provisions of paragraph 1 of Article 5 place no positive obligations on states. Such obligations appear only in the other paragraphs of Article 5, setting out the safeguards from which persons arrested or detained must benefit.

The positive obligations

Obligations in cases of proper arrest and detention

The safeguards which persons deprived of their liberty may claim are set out in paragraphs 2 to 5 of Article 5. Most of them entail positive intervention by the state, the nature of which varies from one paragraph to another. We shall confine ourselves here to outlining the gist of them.[292]

The obligation to inform. According to Article 5 §2, "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charges against him". Case-law shows that the concept of "arrest" is autonomous in meaning; it exceeds the bounds of strictly penal measures and may consequently apply to a psychiatric confinement order.[293] With regard to the provision of information, the European Court has so far declined to set a precise time limit and decides on a case-by-case basis. It has found a period of ten days between the psychiatric confinement decision and informing the person concerned to be contrary to paragraph 2, but not a period of a few hours (4 hours and 45 minutes) in the case of persons arrested for terrorist acts.[294] As for the information itself, it must include "the essential legal and factual grounds for his arrest" and be conveyed to him, not only in a language which the person concerned understands, but also "in simple, non-technical language".[295] Ideally, this should be done direct, but case-law also accepts indirect information in the course of questioning.[296]

Obligation to bring before a court. This concerns only persons arrested in the circumstances set out in Article 5 §1c. As Article 5 §3 states, they must be brought "promptly before a judge or other officer authorised by law to exercise judicial power", and "shall be entitled to trial within a reasonable time or to release pending trial". The Court is usually more demanding in its assessment of the time taken to bring the person before a court, in terrorism cases also,[297] considering that the word "promptly" requires this to

291. Human rights handbook, No. 5.
292. For a more detailed account, reference is made to Human rights handbook, No. 5, *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2002.
293. *Van der Leer v. the Netherlands*, 25 October 1990.
294. *Fox, Campbell and Hartley v. the United Kingdom*, 27 March 1991.
295. *Fox, Campbell and Hartley*, §40.
296. *Ibid.*
297. For example, *Brogan v. the United Kingdom*, 28 October 1988.

be done within a short time. On the basis of the case-law, this time is generally thought to be one or two days at most.[298] Further, as regards the judge called upon to decide on the need to keep the person in detention, the expression "officer authorised by law to exercise judicial power" is interpreted as excluding members of the Attorney General's Department or of the prosecution service,[299] for obvious reasons of impartiality. Finally, the court in question must be seized for the purpose of deciding on the lawfulness, but also on the necessity, of continued detention. It must have the necessary powers to do so, and its decisions must be binding.[300] Lack of grounds justifying detention must of course lead to the person's release.

Obligation to administer justice speedily. The purpose of Article 5 §4 is primarily to secure to the person detained a right of appeal from the detention order to a "court". To this extent it does not entail a positive obligation on the state, except as regards making provision for such appeal and establishing the court in question. On the other hand, it stipulates that the court must decide "speedily", which to a degree places an obligation on the court seized of the matter. The Court takes into account the complexity of the case, which is normal. This is a question that depends on the individual case, but it is generally thought that the time taken must not exceed a few weeks.[301]

298. Handbook No. 5 (a period of 4 days and 6 hours has been found excessive).
299. See *Huber v. Switzerland*, 23 October 1990 and *Brincat v. Italy*, 26 November 1992.
300. In particular, *Letellier v. France*, 26 June 1991 and *Tomasi v. France*, 27 August 1992.
301. Handbook No. 5.

Obligation to pay compensation. Finally, Article 5 §5 requires states to compensate anyone who is the victim of arbitrary arrest or detention. This obligation is absolute. It is subordinate only to the finding that detention is unlawful.

Obligations linked to cases of improper arrest and detention

Paragraphs 2 to 5 of Article 5 are in principle sufficient to protect persons deprived of their liberty from arbitrary action by the state. As we have seen, this protection relates above all to the review which the court has to carry out. But for such review to be possible, the arrest and detention must be established and recognised by the state. Otherwise the safeguards of Article 5 become quite pointless. In order to prevent the Convention being circumvented in this way, the Court has been led to set forth additional obligations, including that of "officialisation", which hold good for what are referred to as cases of "unacknowledged detention". The relevant case-law was laid down on the basis of the *Kurt v. Turkey* judgment.[302] As is emphasised in that judgment, "Article 5 requires that authorities take effective measures to safeguard against the risk of disappearance and to conduct prompt effective investigation into an arguable claim that an individual has not been seen since being taken into custody". In practical terms, this means that where a person is apprehended by the authorities, they must without fail record the date and time of arrest, the place of detention, the reasons for detention and the identity of the person taking the action. The requirements hold good not just for cases of

302. Judgment of 25 May 1998.

detention not acknowledged in the longer term but also for all such cases of detention, including those that are finally disclosed after a short time.[303]

Safeguards enjoyed by the accused in the framework of a criminal trial (Article 6 and Protocol no. 7)

These are divided between Article 6 and Protocol No. 7.

The safeguards afforded by Article 6

These will be mentioned in passing only.[304] They are set out in paragraph 3 of Article 6. It will be observed that only three of them create positive obligations on states. They are the right of every accused person "to be informed promptly, in a language which he understands, and in detail, of the nature and cause of the accusation against him" (sub-paragraph a), the right to the free assistance of a lawyer appointed by the court and, consequently, the right to legal aid to pay for that assistance (sub-paragraph c) and, lastly, the right to the free assistance of an interpreter if needed (sub-paragraph f).

The safeguards afforded by Protocol No. 7

Protocol No. 7 to the Convention essentially adds two safeguards.

The first is the **right to a two-stage judicial procedure in criminal cases** (Article 2).[305] According to the case-law, the very wording of Article 2 points to allowing a wide margin of appreciation to states as regards the manner of exercise of this right. In particular, domestic law may restrict the jurisdiction of the higher tribunal to examination of legal issues only. Bearing this in mind, the European Court has ruled that the French system applicable in criminal matters, in which judgments of the assize court may be appealed from in the Court of Cassation, does not in general fail to meet the requirements of this article.[306] Nonetheless, France has been found at fault, by reason of a particular feature of the procedure in question: the rule[307] that such an appeal was not available to persons judged *in absentia* by the assize court.[308] However, it should not be thought that the mere fact of a conviction or a finding of guilt being referrable to a higher court is sufficient. It must in addition be possible for the said court to be seized by the convicted person himself. This was the conclusion reached in a case where the possibility of appeal was reserved to the prosecution.[309]

303. See *Anguelova v. Bulgaria*, 13 June 2002.
304. For further details, see Human rights handbook, No. 3, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2002.
305. Article 2 reads: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."
306. *Krombach v. France*, 13 February 2001.
307. This particular procedural feature was abrogated by a law of 2004.
308. *Ibid.* This solution was confirmed by the judgments in *Papon v. France* (25 July 2002) and *Mariani v. France* (31 March 2005).
309. *Gurtepka v. Ukraine*, 6 September 2005.

The second safeguard, provided for in Article 3 of the same protocol, is the **right to compensation in the event of a judicial error**. The resultant obligation is obvious and calls for no comment, except to observe that when calculating the amount of compensation, the person concerned may be required to prove the damage sustained as a result of the judicial error.[310]

The safeguards enjoyed by foreigners subject to a deportation order

Article 1 of Protocol No. 7 provides for certain safeguards which operate in cases of expulsion to protect foreigners who are the subject of such measures, provided they are "lawfully" resident on the territory of the state. The first of them, which does not as such entail a positive obligation strictly speaking, is that the expulsion measure must be taken "in accordance with law". Once this first condition is satisfied, the foreigner must be able: a) to submit reasons against his expulsion; b) to have his case reviewed; and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

These "rights" secured to foreigners clearly call for positive measures by the state. As the Court has to date not given any final judgment relating to the application of Article 1 of Protocol No. 7,[311] it is hard to identify its requirements with certainty. One may imagine that it requires as a minimum that a possibility of appeal be provided in domestic law and that the procedure conform to a certain adversarial pattern. Nevertheless, there are unanswered questions:

- Is the "competent authority" within the meaning of this provision the judicial authority or an administrative authority, and if the latter, is it the one which took the contested decision or an independent authority?
- With what principles does the procedure before this authority have to comply?

Without answering these questions, let us observe that these safeguards may be ignored and the expulsion measure executed immediately if dictated by necessary grounds of public order and national security. Unless the European Court examines the merits of these grounds in each case, this clause is likely to diminish considerably, or even to thwart, the protection such persons enjoy under the Convention.

310. *Shilyayev v. Russia*, 6 October 2005. Note that the Court transposes here the solution reached in relation to Article 5 §5 of the Convention.

311. The Court appears to have been seized of only one case relating to the application of this provision (*Szyszkowski v. San Marino*, 29 March 2005. The persons concerned had been issued in the meanwhile with a residence permit (following a favourable court decision), and as the Court considered that respect for human rights did not require it to pursue its examination of the application, the case was struck off the register.

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These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and especially judges, in mind, but are accessible also to other interested readers.