The European Court of Human Rights

General information, misconceptions and venomous remarks

Discourse by Egbert Myjer, judge at the ECHR,
held at the Netherlands Council for the Judiciary
on the 16th of November 2007

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Egbert Myjer

Born on 31 July 1947 in Arnhem

Master in Law, University of Utrecht, 1966-72

Assistant Professor Criminal Law, University of Leiden, 1972-79

Trainee judge at the District Court of Zutphen, 1979-81

Judge of the District Court of Zutphen, 1981-86

Vice-President of the District Court of Zutphen, 1986-91

Advocate-General of the Court of Appeal, La Haye, 1991-95

Deputy Prosecutor-genera/Chief Advocate General at the Court of Appeal, Amsterdam; 1996-2004

Professor of Human Rights, Free University of Amsterdam, 2000

Judge of the European Court of Human Rights since 1 November 2004

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[1] English translation of: Een klacht indienen bij het EHRM: elf veelvoorkomende misverstanden, in: Advocatenblad 18 februari 2005, p. 110-115.

European Court of Human Rights

F-67075 Strasbourg Cedex

General information

www.echr.coe.int

Historical background

A The European Convention on Human Rights of 1950

1. The Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe. It was opened for signature in Rome on 4 November 1950 and entered into force in September 1953. Taking as their starting point the 1948 Universal Declaration of Human Rights, the framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realisation of human rights and fundamental freedoms. The Convention was to represent the first steps for the collective enforcement of certain of the rights set out in the Universal Declaration.

2. In addition to laying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of the obligations entered into by Contracting States. Three institutions were entrusted with this responsibility: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe, the latter organ being composed of the Ministers of Foreign Affairs of the member States or their representatives.

3. Under the Convention in its original version, complaints could be brought against Contracting States either by other Contracting States or by individual applicants (individuals, groups of individuals or non-governmental organisations). Recognition of the right of individual application was, however, optional and it could therefore be exercised only against those States which had accepted it (Protocol No. 11 to the Convention was subsequently to make its acceptance compulsory, see para-

graph 6 below).

The complaints were first the subject of a preliminary examination by the Commission, which determined their admissibility. Where an application was declared admissible, the Commission placed itself at the parties' disposal with a view to brokering a friendly settlement. If no settlement was forthcoming, it drew up a report establishing the facts and expressing an opinion on the merits of the case. The report was transmitted to the Committee of Ministers.

4. Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission and/or any Contracting State concerned had a period of three months following the transmission of the report to the Committee of Ministers within which to bring the case before the Court for a final, binding adjudication. Individuals were not entitled to bring their cases before the Court.

If a case was not referred to the Court, the Committee of Ministers decided whether there had been a violation of the Convention and, if appropriate, awarded "just satisfaction" to the victim. The Committee of Ministers also had responsibility for supervising the execution of the Court's judgments.

B Subsequent developments

5. Since the Convention's entry into force thirteen Protocols have been adopted. Protocols Nos. 1, 4, 6, 7, 12 and 13 added further rights and liberties to those guaranteed by the Convention, while Protocol No. 2 conferred on the Court the power to give advisory opinions. Protocol No. 9 enabled individual applicants to bring their cases before the Court subject to ratification by the respondent State and acceptance by a screening panel. Protocol No. 11 restructured the enforcement machinery (see below). The remaining Protocols concerned the organisation of and procedure before the Convention institutions.

6. From 1980 onwards, the steady growth in the number of cases brought before the Convention institutions made it increasingly difficult to keep the length of proceedings within acceptable limits. The problem was aggravated by the accession of new Contracting States from 1990. The number of applications registered annually with the Commission increased from 404 in 1981 to 4,750 in 1997. By that year, the number of unregistered or provisional files opened each year in the Commission had risen to over 12,000. The Court's statistics reflected a similar story, with the number of cases referred annually rising from 7 in 1981 to 119 in 1997.

The increasing case-load prompted a lengthy debate on the necessity for a reform of the Convention supervisory machinery, resulting in the adoption of Protocol No. 11 to the Convention. The aim was to simplify the structure with a view to shortening the length of proceedings while strengthening the judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role.

Protocol No. 11, which came into force on 1 November 1998, replaced the existing, part-time Court and Commission by a single, full-time Court. For a transitional period of one year (until 31 October 1999) the Commission continued to deal with the cases which it had previously declared admissible.

7. During the three years which followed the entry into force of Protocol No. 11 the Court's case-load grew at an unprecedented rate. The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001, an increase of approximately 130%. Concerns about the Court's capacity to deal with the growing volume of cases led to requests for additional resources and speculation about the need for further reform.

A Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000 to mark the 50th anniversary of the opening of the Convention for signature, had initiated a process of reflection on reform of the system. In November 2002, as a follow-up to a Ministerial Declaration on "the Court of Human Rights for Europe", the Ministers' Deputies issued terms of reference to the Steering Committee for Human Rights (CDDH) to draw up a set of concrete and coherent proposals covering measures that could be implemented without delay and possible amendments to the Convention. As a result in 2004 a 14th Protocol, amending the control system of the Convention was adopted. It can only enter into force after ratification by all (47) Contracting Parties. Since Russia until now (November 2007) refused to do so the new provisions improving the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the Court, remain unused.

Organisation of the Court

1. The Court, as presently constituted, was brought into being by Protocol No. 11 on 1 November 1998. This amendment made the Convention process wholly judicial, as the Commission's function of screening applications was entrusted to the Court itself, whose jurisdiction became mandatory. The Committee of Ministers' adjudicative function was formally abolished.

2. The provisions governing the structure and procedure of the Court are to be found

in Section II of the Convention (Articles 19-51). The Court is composed of a number of judges equal to that of the Contracting States (currently forty-six). Judges are elected by the Parliamentary Assembly of the Council of Europe, which votes on a shortlist of three candidates put forward by Governments. The term of office is six years, and judges may be re-elected. Their terms of office expire when they reach the age of seventy, although they continue to deal with cases already under their consideration.

Judges sit on the Court in their individual capacity and do not represent any State. They cannot engage in any activity which is incompatible with their independence or impartiality or with the demands of full-time office.

3. The Plenary Court has a number of functions that are stipulated in the Convention. It elects the office holders of the Court, i.e. the President, the two Vice-Presidents (who also preside over a Section) and the three other Section Presidents. In each case, the term of office is three years. The Plenary Court also elects the Registrar and Deputy Registrar. The Rules of Court are adopted and amended by the Plenary Court. It also determines the composition of the Sections.

4. Under the Rules of Court, every judge is assigned to one of the five Sections, whose composition is geographically and gender balanced and takes account of the different legal systems of the Contracting States. The composition of the Sections is varied every three years.

5. The great majority of the judgments of the Court are given by Chambers. These comprise seven judges and are constituted within each Section. The Section President and the judge elected in respect of the State concerned sit in each case. Where the latter is not a member of the Section, he or she sits as an ex officio member of the Chamber. If the respondent State in a case is that of the Section President, the Vice-President of the Section will preside. In every case that is decided by a Chamber, the remaining members of the Section who are not full members of that Chamber sit as substitute members.

6. Committees of three judges are set up within each Section for twelve-month periods. Their function is to dispose of applications that are clearly inadmissible.

7. The Grand Chamber of the Court is composed of seventeen judges, who include, as ex officio members, the President, Vice-Presidents and Section Presidents. The Grand Chamber deals with cases that raise a serious question of interpretation or application of the Convention, or a serious issue of general importance. A Chamber may relinquish jurisdiction in a case to the Grand Chamber at any stage in the procedure before judgment, as long as both parties consent. Where judgment has been delivered in a case, either party may, within a period of three months, request referral of the case to the Grand Chamber. Where a request is granted, the whole case is reheard.

Basic information on procedures

1 General

1. Any Contracting State (State application) or individual claiming to be a victim of a violation of the Convention (individual application) may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights. A notice for the guidance of applicants and forms for making applications may be obtained from the Registry.

2 The procedure before the European Court of Human Rights is adversarial and public. Hearings, which are held only in a minority of cases, are public, unless the Chamber/Grand Chamber decides otherwise on account of exceptional circumstances. Memorials and other documents filed with the Court's Registry by the parties are, in principle, accessible to the public.

3. Individual applicants may present their own cases, but legal representation is recommended, and indeed usually required once an application has been communicated to the respondent Government. The Council of Europe has set up a legal aid scheme for applicants who do not have sufficient means.

4. The official languages of the Court are English and French, but applications may be submitted in one of the official languages of the Contracting States. Once the application has been declared admissible, one of the Court's official languages must be used, unless the President of the Chamber/Grand Chamber authorises the continued use of the language of the application.

2 Admissibility procedure

5. Each individual application is assigned to a Section, whose President designates a rapporteur. After a preliminary examination of the case, the rapporteur decides whether it should be dealt with by a three-member Committee or by a Chamber.

6. A Committee may decide, by unanimous vote, to declare inadmissible or strike out

an application where it can do so without further examination.

7. Individual applications which are not declared inadmissible by Committees, or which are referred directly to a Chamber by the rapporteur, and State applications are examined by a Chamber. Chambers determine both admissibility and merits, in separate decisions or where appropriate together.

8. Chambers may at any time relinquish jurisdiction in favour of the Grand Chamber where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from existing case-law, unless one of the parties objects to such relinquishment within one month of notification of the intention to relinquish. In the event of relinquishment the procedure followed is the same as that set out below for Chambers.

9. The first stage of the procedure is generally written, although the Chamber may decide to hold a public hearing, in which case issues arising in relation to the merits will normally also be addressed.

10. Decisions on admissibility, which are taken by majority vote, must contain reasons and be made public.

3 Procedure on the merits

11. Once the Chamber has decided to admit the application, it may invite the parties to submit further evidence and written observations, including any claims for "just satisfaction" by the applicant. If no hearing has taken place at the admissibility stage, it may decide to hold a hearing on the merits of the case.

12. The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing. A Contracting State whose national is an applicant in the case is entitled to intervene as of right.

13. During the procedure on the merits, negotiations aimed at securing a friendly settlement may be conducted through the Registrar. The negotiations are confidential.

4 Judgments

14. Chambers decide by a majority vote. Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion, either concurring or dissenting, or a bare statement of dissent.

15. Within three months of delivery of the judgment of a Chamber, any party may request that the case be referred to the Grand Chamber if it raises a serious question of interpretation or application or a serious issue of general importance. Such requests are examined by a Grand Chamber panel of five judges composed of the President of the Court, the Section Presidents, with the exception of the Section President who presides over the Section to which the Chamber that gave judgment belongs, and another judge selected by rotation from judges who were not members of the original Chamber.

16. A Chamber's judgment becomes final on expiry of the three-month period or earlier if the parties announce that they have no intention of requesting a referral or after a decision of the panel rejecting a request for referral.

17. If the panel accepts the request, the Grand Chamber renders its decision on the case in the form of a judgment. The Grand Chamber decides by a majority vote and its judgments are final.

18. All final judgments of the Court are binding on the respondent States concerned.

19. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. The Committee of Ministers verifies whether States in respect of which a violation of the Convention is found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments.

5 Advisory opinions

20. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and Protocols.

Decisions of the Committee of Ministers to request an advisory opinion are taken by a majority vote.

21. Advisory opinions are given by the Grand Chamber and adopted by a majority vote. Any judge may attach to the advisory opinion, a separate opinion or a bare statement of dissent.

Role of the Registry

Article 25 of the European Convention of Human Rights (the Convention) provides that: "The Court shall have a registry, the functions and organisation of which shall be laid down in the Rules of Court. [The Court shall be assisted by legal secretaries]".

The task of the Registry is to provide legal and administrative support to the Court in the exercise of its judicial functions. It is therefore composed of lawyers, administrative and technical staff and translators. There are currently some 500 members of the Registry, 205 lawyers and 295 other support staff. Registry staff members are staff members of the Council of Europe, the Court's parent organisation, and are subject to the Council of Europe's Staff Regulations. Approximately half the Registry staff are employed on contracts of unlimited duration and may be expected to pursue a career in the Registry or in other parts of the Council of Europe. They are recruited on the basis of open competitions. All members of the Registry are required to adhere to strict conditions as to their independence and impartiality.

The head of the Registry (under the authority of the President of the Court) is the Registrar, who is elected by the Plenary Court (Article 26 (e) of the Convention). He/She is assisted by one or more Deputy Registrars, likewise elected by the Plenary Court. Each of the Court's four judicial Sections is assisted by a Section Registrar and a Deputy Section Registrar.

The principal function of the Registry is to process and prepare for adjudication applications lodged by individuals with the Court. The Registry's lawyers (also known as legal secretaries) are divided into 20 case-processing divisions, each of which is assisted by an administrative team. The lawyers prepare files and analytical notes for the Judges. They also correspond with the parties on procedural matters. They do not themselves decide cases. Cases are assigned to the different divisions on the basis of knowledge of the language and legal system concerned. The documents prepared by the Registry for the Court are all drafted in one of its two official languages (English and French).

In addition to its case-processing divisions, the Registry has divisions dealing with the following sectors of activity: information technology; case-law information and publications; research and the library; press and public relations; and internal administration. It also has a central office, which handles mail, files and archives. There are two language divisions, whose main work is translating the Court's judgments into the second official language.

How the execution of judgments works

The High Contracting Parties to the European Convention on Human Rights have committed themselves to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention and, in this respect, have undertaken to "abide by the final judgments of the Court in any case to which they are parties" (Article 46 paragraph 1, of the European Convention on Human Rights).

In accordance with Article 46 paragraph 2, the Committee of Ministers is responsible for the supervision of the execution of the judgments of the European Court of Human Rights.

Once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent State to inform it of the steps taken to pay any just satisfaction (compensation and/or costs and expenses) awarded as well as of any individual or general measures which may be necessary in order to comply with the State's legal obligation to abide by the judgment. In the performance of this task the Committee is assisted, in addition to its own secretariat, by a special department of the Council of Europe's Secretariat – the Department for the Execution of judgments of the European Court of Human Rights.

Submitting a complaint to the European Court of Human Rights: eleven common misconceptions [1]

Egbert Myjer
Nico Mol
Peter Kempees
Agnes van Steijn
Janneke Bockwinkel[2]

Compared with many of the domestic systems of procedural law existing in Europe, the procedure of the European Court of Human Rights (ECHR) is quite straightforward and easy to use. Nonetheless, even Strasbourg procedure requires some understanding on the part of practitioners. Just as in domestic proceedings, an error can harm the interests of the applicant and, at worst, result in the loss of the case.

Many of the problems which applicants and their counsel encounter in proceedings before the ECHR can be traced back to a limited number of simple misconceptions. The Dutch judge recently appointed to the Court and the Dutch lawyers working in the Registry of the Court explain below how these problems can be avoided.

Misconception 1:

The ECHR is an appellate body

Cases regularly occur in which applicants (or their lawyers) submit an application to the Court alleging that the domestic courts have incorrectly determined the facts of a case or have overlooked essential submissions of the applicant. Often such an application is based on the submission that Article 6 of the European Convention on Human Rights has been violated.

The function of the Court is to ensure observance of the Convention and its protocols. The Court does not have the function of rectifying errors made by domestic judges in applying domestic law. Nor does the Court take the place of domestic courts in assessing the evidence. It is incorrect to view the Court as a court of 'fourth instance' to which all aspects of a case can be referred[3]. Complaints that the domestic courts should have arrived at a different decision (i.e. a decision more favourable to the applicant) are declared inadmissible as being manifestly ill-founded.

It makes no difference if the complaint is couched in terms of a violation of Article 6 of the Convention. This article guarantees only a fair and public hearing of certain well-defined categories of disputes before an independent and impartial tribunal. It does not also guarantee that domestic proceedings will arrive at the correct result.

Misconception 2:

An initial letter is in any event sufficient to comply with the six-month period.

The Court regularly receives letters submitting a complaint in general terms shortly before the expiry of the period prescribed by Article 35 § 1 of the Convention; sometimes these letters include a statement that the grounds of the complaint will be explained in more detail later. Often a copy of a judgment of a domestic court is enclosed with the letter.

How an application must be lodged is described in detail in a practice direction. This, together with other invaluable information, can be found on the Court's website[4].

Although the Court is indeed prepared to accept a simple letter for the purposes of compliance with the six-month rule, the letter must provide a sufficient description of the complaint: in other words, it must in any event set out the facts on which the application is based and specify the rights which are alleged to have been violated, whether or not with references to articles of the Convention and its protocols.

The Court treats the date of dispatch of the letter containing this information as the date of introduction of the application[5]. For this purpose, the Court is, in principle, prepared to accept the date of the letter itself, unless of course there is an inexplicable difference between the date of the latter and the date of dispatch as evidenced by the postmark. If the letter is undated and the postmark is illegible, the date of introduction will be the date of receipt at the Registry of the Court.

A faxed application will be accepted provided that the signed original copy, bearing original signatures, is received by post within 5 days thereafter.

The six-month period prescribed by Article 35 (1) of the Convention is an absolute time-limit. No procedure for rectification of default is available.

An initial letter which merely states that an application will be submitted does not qualify as submission of an application, even if the documents from the file of the domestic proceedings are enclosed: it is therefore not sufficient to allege that the domestic proceedings were unfair and then refer to an enclosed file of the proceedings. Nor is it possible to expand the scope of a complaint after the expiry of the six-month period.

It should be noted for the sake of completeness that the six-month period runs from the day on which the applicant (or his counsel) becomes aware or could have become aware of the last domestic judgment. In principle, the period is therefore calculated from the date of the pronouncement, if public; where, however, the domestic law prescribes notification in written form the period is calculated from the date of service or dispatch of the judgment[6]. It is for the applicant to convince the Court that it should use a different date.

Misconception 3:

An application may be submitted within six months of a judgment on application for review or a judgment in a non-admissible appeal

Cases sometimes occur in which an applicant lodges an appeal or appeal in cassation against a judgment or decision against which no appeal lies and then submits an application to the Court. There are also cases in which an applicant applies for an extraordinary remedy before applying to the Court.

In such cases the Court calculates the period of six months from the decision given at the conclusion of the ordinary proceedings. The applicant is, after all, expected to have exhausted every 'effective remedy'. A remedy which is available to him only in certain exceptional circumstances, a request for leave to exercise a discretionary power or a remedy not provided by domestic law cannot be deemed to be an effective remedy. A judgment on an application for revision of a final judgment, a judgment given on an appeal lodged by a public authority to safeguard the quality of the case-law or a decision on a petition for a pardon do not therefore interrupt the six-month period[7]. Even the reopening of ordinary proceedings does not suspend the running of the period, unless this is actually followed by a new substantive hearing of the case[8].

Misconception 4:

If a complaint has been made in a letter, it is not necessary to file the application form.

Rule 47 § 1 of the Rules of Court provides that individual applicants must make use of the form provided by the Registry unless the President of the Section concerned decides otherwise. This provision is strictly enforced.

The Registry sends the form to the applicant after receipt of the first letter. The form can also be found on the Court's website[9].

If the complaint has already been set out fully in a letter, it is not necessary to repeat it verbatim in the form. In such a case it is sufficient merely to refer to the letter in the form.

Forms that are incomplete or unsigned are returned to the applicant. The consequences of any delay that occurs as a result are borne by the applicant.

Misconception 5:

A lawyer who states that he is acting on behalf of his client need not submit a written authority to act

Rule 45 § 2 of the Rules of Court states that representatives must submit a power of attorney or written authority to act. No distinction is made for this purpose between representatives who are registered as advocate and other representatives.

If counsel does not supply a written authority to act, the case cannot be heard by the Court. In such cases the Registry sends a reminder. This causes delay (which can sometimes be costly for the applicant).

The Registry supplies a model form of authority whose use is not mandatory (i.e. unlike the application form) but is nonetheless recommended. This model provides for express acceptance of the authority by the legal representative. This model too can be found on the Court's website[10].

Sometimes an applicant may have authorised a lawyer to act for him, but the lawyer's agreement is not evident from the documents. In such a case the Registry requests the applicant to arrange for his lawyer to acknowledge to the Court that he is acting. Until

this has happened, the correspondence is continued with the applicant in person.

Misconception 6:

The applicant has a full year in which to supplement his complaint by means of the application form, written authority and supporting documents

After receipt of the applicant's first communication, the Registry sends the applicant a letter enclosing the text of the Convention, the text of Rules 45 and 47 of the Rules of Court (detailing the formalities to be completed in respect of the application), a 'note for the guidance of persons wishing to apply to the Court' (explaining the admissibility criteria applied by the Court) and the application form with notes.

The last paragraph of point 18 of the letter (English version) reads as follows:

> 'If the application form and all the relevant documents are not sent before that time limit (i.e. not later than 6 months after the date of the first communication from the Registry) this will be taken to mean that you no longer wish to pursue the examination of your case and your file will be destroyed.'

The misconception occurs because the applicant (or his or her counsel) reads only this paragraph. Elsewhere in the letter there is a warning about the consequences of unnecessary delay. The sanction imposed by the Court in this respect is that the date on which the application is filed is taken to be the date of the form (or an even later date if the form is not completed correctly) rather than the date of the letter of complaint. This may mean that the application is deemed to be filed after the six-month period.

The note for the guidance of prospective applicants (point 17) states that the Court wishes the form to be filed diligently. Although a request to extend the period of submitting the form and all relevant documents may be made, the applicant is responsible for – and bears the risk of – ensuring that the Court receives a written document adequately explaining the complaint within six months of the last domestic decision[11].

After the Court has received the application, the applicant can be requested to supplement it, where necessary, with any missing documentary evidence or other information. The Registry may set a time-limit for this purpose. Although failure to comply with this time-limit does not necessarily invalidate the application, it is advisable to submit a reasoned request for an extension before the expiry of the period if it becomes clear that the time-limit cannot be met.

It should be emphasised that the period of a year specified in the last paragrap of the letter of the Registry is definitely not the period available to the applicant. The applicant cannot derive any rights from it. The file is kept for one year after the last communication from the applicant. If the applicant does not communicate within this period the file will be destroyed in order to make space in the Court's already overfull archives for applications that are pursued with greater diligence.

A complainant who contacts the court again after a long period of silence may be required to explain his silence, even if it has lasted for less than a year. The Court may attach consequences to such silence.

Misconception 7:

The entire proceedings can be conducted in Dutch

Unlike the Court of Justice of the European Communities, the Court of Human Rights in Strasbourg has only two official languages, namely English and French (Rule 34 § 1 of the Rules of Court).

The original application and the supporting documents attached to it can be submitted in a language other than English or French provided that the language used is an official language of one of the Contracting Parties (i.e. the States that are party to the Convention)[12] (Rule 34 § 2 of the Rules of Court).

Until recently an applicant was allowed to use such another language until the Court decided on the admissibility of his or her application. However, as preparations are under way to introduce a concentrated procedure without a separate admissibility decision, in anticipation of the entry into force of Protocol No. 14[13], the use of English or French has been made mandatory at an earlier stage in the proceedings, namely from the date on which the complaint is communicated to the respondent government.

The obligation subsequently to use one of the two official languages applies only to pleadings/observations submitted by or on behalf of the applicant. It follows that the applicant need not submit an unsolicited translation of documents from the domestic court file, unless of course these documents are drawn up in a language which is not an official language of one of the Contracting Parties.

If a hearing is held, the applicant should use one of the two official languages (Rule 34 § 2) of the Rules of Court). Hearings are held only very exceptionally and generally take place before the Court rules on admissibility.

The President may be asked to grant leave for the use of a language other than English or French. This is decided on a case-by-case basis. However, even if leave is given, the advocate is expected to have an adequate passive knowledge of English or French (Rule 36 § 5 of the Rules).

Misconception 8:

Rule 39 concerns interlocutory injunction proceedings

Rule 39 of the Rules of Court, 'Interim measures', reads as follows:

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
> …"

This expressly concerns interim measures. Unlike some 'provisional' measures ordered by domestic courts, which in many cases are in effect permanent, they apply only for the term of the proceedings in Strasbourg.

In practice, measures are adopted under Rule 39 only if there is a prima facie case that the applicant will otherwise suffer irreparable damage for which pecuniary compensation after the close of the proceedings will not provide satisfaction. This will be particularly true in the case of expulsions or extraditions to countries that are not party to the Convention, if there is likely to be a violation of Article 2 or 3 of the Convention or of Protocol No. 6.

There is therefore no point in applying, for example, for suspension of the execution of a prison sentence or remand in custody, temporary or permanent closure of a construction project, the issue of a temporary residence permit or an advance on social benefit or compensation.

For the sake of completeness, it should be noted that there is also no point in requesting application of Rule 39 if the complaint is obviously inadmissible for any reason whatever, for example because the effective domestic remedies have not been exhausted.

Misconception 9:

The identity of the applicant can be kept secret from the respondent government

In principle, the procedure of the Court is public (with the exception of settlement negotiations, Article 38 § 2 of the Convention).

Rule 47 § 3 of the Rules of Court provides, however, for the possibility of concealing the identity of an applicant from the public. The applicant must give reasons when submitting such a request to the President.

Even if the President grants such a request, the identity is not concealed from the respondent government. The application and all documents relating to it are copied in full and sent to the representative of the government concerned.

Article 36 § 1 of the Convention is insufficiently known. It reads as follows:

'In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.'

Under Rule 44 § 1 of the Rules of Court, when notice of an application is given to the respondent government and the applicant has the nationality of another State which is party to the Convention, a copy of the application will be transmitted to the government of that other Contracting Party. It is not the practice of the Court to withhold information from that other government.

There have been cases in which an applicant was on the point of being deported (extradited or expelled) from one Contracting Party to another Contracting Party of which he was a national. The Court has never concealed the identity of the applicant from the other State in such cases.

Misconception 10:

It is sufficient to make a request for compensation in the application form

It is common knowledge that the Court may award 'just satisfaction' (pecuniary compensation) to an injured party (Article 41 of the Convention).

In the procedure followed as standard hitherto (in which a separate decision is made on admissibility) the applicant is required to submit his request for compensation after the admissibility decision. The applicant submits his request either in his observations on the merits of the application or – if he does not submit such observations – in a separate document which he must file within two months of the admissibility decision (Rule 60 § 1 of the Rules of Court).

Under the new concentrated procedure without a separate admissibility decision, which will now become the standard procedure, the applicant will be required to submit his request for just satisfaction after the complaint has been communicated to the respondent government.

The Registrar notifies the applicant by letter of the possibility of submitting such a request and of the period within which it must be submitted.

The Court disregards a request for just satisfaction which is submitted too early in the proceedings and is not repeated in the correct stage of the proceedings, or which is lodged out of time[14].

The applicant must submit itemised particulars of all claims and costs together with relevant supporting documents (Rule 60 § 2 of the Rules), failing which the Court may reject the claims in whole or in part[15].

Misconception 11:

Appeal against an admissibility decision that goes against the applicant lies to the Grand Chamber

Article 28 of the Convention explicitly states that the decision of a committee of three judges is 'final'. No such provision, it is true, exists in Article 29 of the Convention, which sets out the procedure if the complaint is not rejected by a committee.

According to the text of the Convention (Article 43 (1)), referral of the case to the Grand Chamber may be requested 'within a period of three months from the date of the judgment of the Chamber'. Such a request is submitted to a panel of five judges. The panel accepts the request 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance' (Article 43 (2)).

However, admissibility decisions are not 'judgments' within the meaning of Article 43 (1). This is evident just from Article 45 of the Convention, where a distinction is made between 'judgments' on the one hand and 'decisions' declaring applications admissible or inadmissible on the other.

In practice, a request for a case to be referred to the Grand Chamber on the basis of an admissibility decision is not submitted to a panel of five judges.

Final observations

Finally, it is emphasised that counsel should apply to Strasbourg only if there has been a relatively serious violation of the Convention. The lack of self-restraint of applicants (whether or not legally represented) in many countries has greatly increased the workload of the Court. It should be noted in this connection that relatively few cases involve important matters of principle.

The governments of States that are parties to the Convention, which have the last word on the text of the Convention, have responded to this situation by drawing up a new admissibility criterion. When Protocol No. 14 enters into force, the Court will be able to turn applicants away if it considers that they have not suffered a significant disadvantage from an alleged violation, even if their complaints are in themselves well-founded (see Article 12 of Protocol No. 14).

[1] English translation of: Een klacht indienen bij het EHRM: elf veelvoorkomende misverstanden, in: Advocatenblad 18 februari 2005, p. 110-115.

[2] Professor Myjer is a judge of the European Court of Human Rights; Mr Mol, Mr Kempees and Ms Van Steijn are legal secretaries of the Court (Article 25 of the Convention); and Ms Bockwinkel was at the time a trainee judge seconded to the Court by the Netherlands Ministry of Justice.

[3] See the recent case of *Baumann v Austria*, no. 76809/01, § 49, 7 October 2004.

[4] http://www.echr.coe.int/

[5] See as a recent example *Latif et al. v. the United Kingdom* (admissibility decision), no. 72819/01, 29 January 2004.

[6] See the recent case of *Sarıbek v. Turkey* (admissibility decision), no. 41055/98, 9 September

2004.

[7] See the recent case of *Berdzenishvili v. Russia* (admissibility decision), no. 31679/03, 29 January 2004.

[8] See, *inter alia, Boĉek v. the Czech Republic* (admissibility decision), no. 49474/99, 10 October 2000.

[9] See *supra* note 3.

[10] See *supra* note 3.

[11] See for example *Latif et al. v. the United Kingdom* (admissibility decision), see *supra* note 3.

[12] We would, for practical reasons, advise caution in the use of uncommon regional or minority languages, regardless of whether they have the status of official language in a particular area, and generally recommend the use of more widely used languages if possible.

[13] *Protocol No. 14 to the Convention for the protection of human rights and fundamental freedoms* (Strasbourg, 13 May 2004); Council of Europe Treaty Series/ Série des Traités du Conseil de l'Europe no. 194. Until now (November 2007) the Protocol No. 14 has been ratified by 46 of the 47 Contracting Parties.

[14] See for example *Willekens v. Belgium*, no. 50859/99, § 27, 24 April 2003.

[15] See, for example, the recent case of *Cumpănă and Mazăre v. Romania* [Grand Chamber], no. 33348/96, § 134, 17 December 2004.

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In toga venenum?

the limits of freedom of expression in and around the courtroom in the case-law of the European Court of Human Rights [1]

by Egbert Myjer, judge European Court of Human Rights

Introductory remarks

Human rights cases seldom cause one to smile.
Exceptions can be made for at least some cases concerning freedom of expression, and more specifically cases in which venomous remarks are made in and around national courtrooms.
The first cases in which the European Court of Human Rights had to deal with this issue related to journalists who were prosecuted for contempt of court (*Sunday Times v. United Kingdom*, judgment of 26 April 1979) or for having published critical remarks on the way national judges had handled a case (for instance: *De Haes and Gijsels v. Belgium*, judgment of 27 January 1997, Worm versus Austria, judgment of 29 August 1997; K*obenter and Standard Verlags GMBH v. Austria*, judgment 2 November 2006).
More recently there have also been cases in which the party to the proceedings or the defence lawyer complained about being disciplined for the way he had expressed his views in and around the national courtroom. In the latter cases sometimes also fair hearing issues (Article 6) were invoked.

In the following I will elaborate on three specific cases. The first two are in fact 'leading Strasbourg cases', the last one is just quoted to indicate that freedom of expression for a lawyer also counts outside the courtroom.
The first case is the case *Nikula v. Finland* (judgment of 21 March 2002) in which a defence counsel was convicted of negligent public defamation in relation to remarks made in court about the prosecutor.
In the second case, *Kyprianou v. Cyprus* (Grand Chamber judgment of 15 December 2005), a lawyer was convicted of contempt of court for having made a remark about the very same court that convicted him.
The third case, *Amihalachioaie v. Moldova* (judgment of 20 April 2004), is about a lawyer who had an administrative fine imposed on him for having made some critical comments about the Moldovan constitutional court in a newspaper interview.

Just to make sure that things are balanced out a little bit, I will conclude my presentation by referring to the cases *Daud v. Portugal* (judgment of 21 April 1998) and *Hermi v. Italy* (Grand Chamber judgment of 18 October 2004) and the way in which the European Court itself deals with inadequate representation by the defence counsel.
In cauda venenum. As an aside, I will ask your attention for the vivid and daring prose with which my Maltese colleague Vanni Bonello in his dissenting opinion has recently criticised a member of the Moldovan judiciary (*Flux nr. 2 v. Moldova*, judgment of 3 July 2007).

I realise that by having made the above-mentioned choices, I will be unable to supply you with the spicy details of some related cases, like the case of *Schöpfer v. Switzerland* (judgment 20 May 1998), about disciplinary actions imposed on a lawyer following criticisms of the judiciary made at a press conference, which were considered by the disciplinary body as *versteckte Reklame* (subliminal advertising) and *Effekthascherei* (cheap showmanship); the case of Saday v. Turkey (judgment 30 March 2006), about a defendant who made the following oral submissions to the judges (in Turkish, of course:) ' *(..) que je me vois maintenant jugé devant un tribunal instauré pour protéger la dictature fasciste du capitalisme, ce en vertu des lois relevant des régimes fascistes les plus sanglants que le monde n'ait jamais vu (..)*' and who was subsequently handed an extra prison sentence of 2 months; the case *Veraart v. The Netherlands* (judgment of 30 November 2006) were a lawyer in a radio interview made critical remarks about a therapist who had helped a woman to recover supposed memories about incest, allegedly committed by her grandfather, her father and two of her brothers – Veraart being the lawyer of the parents -: *'(..) Someone like that should not be allowed to be a therapist surely? That man, he lives in the North Holland province, he should, er, grow cabbages for the market…He should go and grow cabbages out there but he should absolutely not be working with with with patients, or with people who are in emergency situations (..)'* . As a consequence he was disciplined (admonished) because he had expressed himself in unnecessary wounding terms.
Those who are interested can read the whole text of these judgments on the Court's site: www.echr.coe.int (HUDOC).

The case Nikula

The facts:

Anne *Nikula*, a Finnish national born in 1962, is a lawyer living in Helsinki. In 1992-3 she acted as defence counsel in two sets of criminal proceedings before Kokkola City Court concerning the winding-up of companies, in which her client was charged with

aiding and abetting in fraud and abusing a position of trust. A former co-suspect was summoned by the public prosecutor to testify. Mrs. Nikula objected and prepared a memorandum in which she denounced the tactics of the public prosecutor as constituting "manipulation and unlawful presentation of evidence". Her objection was rejected by the City Court, which dealt with the case at first instance, and her client was eventually convicted.

The prosecutor subsequently initiated criminal proceedings against her for defamation in the Court of Appeal. On 22 August 1994 she was convicted of defamation "without better knowledge", i.e. merely expressing one's opinion about someone's behaviour and not imputing an offence whilst knowing that it has not been committed. A fine was imposed and she was ordered to pay damages to the prosecutor and costs to the State. Both Mrs. Nikula and the prosecutor appealed to the Supreme Court, which upheld the Court of Appeal's reasons but waived the fine, considering that the offence was minor; the obligation to pay damages and costs was, however, confirmed.

Mrs Nikula then lodged an application against the Republic of Finland, complaining that her right to express herself freely in her capacity as defence counsel was violated in that she was found guilty of having defamed the prosecutor (Article 10). Third party comments were received from Interights (The International Centre for the Legal Protection of Human Rights)

The law:

The European Court of Human Rights held by five votes to two that there had been a violation of Article 10 of the Convention. Again by five votes to two it awarded her 5,042 euros (EUR) in respect of non-pecuniary damage and, unanimously, EUR 1,900 for pecuniary damage and EUR 6,500 for costs and expenses. In the law-part of its judgment the Court also made reference to the following principles adopted by international organisations:

> According to paragraph 20 of the Basic Principles on the Role of Lawyers (adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders), lawyers should enjoy "civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority".
>
> In its Recommendation (2000) 21 the Committee of Ministers of the Council of Europe recommends the governments of Member States to take or reinforce, as the case may be, all measures they consider necessary with a view to implementing the freedom of exercise of the profession of lawyer. For instance, "lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards". Lawyers should, however, "respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards" (principles I:4 and III:4).'

The Court considered that there had been an interference with the exercise of Mrs Nikula's right to freedom of expression (Article 10 para 1). It then went on to consider whether that interference was justified under Article 10 § 2. The Court accepted that the interference had been prescribed by law and had served the legitimate aim of protecting the reputation and the right of the prosecutor. However, the next question, whether the interference had been 'necessary in a democratic society', was answered in the negative. In doing so the Court first repeated the general principles which should be taken into account and then applied these principles to Mrs Nikula's case:

(i) General principles

> In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including in this case the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.
>
> The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1052-53, §§ 29-30, with further references).
>
> The Court also reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The national authorities have a certain margin of appreciation in assessing the necessity of an interference,

but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see *Schöpfer*, cited above, pp. 1053-54, § 33). However, in the field under consideration in the present case there are no particular circumstances – such as a clear lack of common ground among member States regarding the principles at issue or a need to make allowance for the diversity of moral conceptions – which would justify granting the national authorities a wide margin of appreciation (see, for example, The Sunday Times v. *the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, pp. 35-37, § 59, with further reference to *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24).

(ii) Application of the above principles to the instant case

Turning to the facts of the present case, the Court's task is to determine whether, in all the circumstances, the restriction on Ms Nikula's freedom of expression answered a "pressing social need" and was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national courts in justification of it were "relevant and sufficient".

The limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I, with further references). In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context.

The Court would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. "Equality of arms" and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties. The Court nevertheless rejects the applicant's argument that defence counsel's freedom of expression should be unlimited.

The present applicant was convicted for having criticised a prosecutor for decisions taken in his capacity as a party to criminal proceedings in which the applicant was defending one of the accused. The Court reiterates the distinction in various Contracting States between the role of the prosecutor as the opponent of the accused, and that of the judge (see paragraph 25 above). Generally speaking, this difference should provide increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole.

It is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant's view, constituted "role manipulation ... breaching his official duties". Although some of the terms were inappropriate, her criticism was strictly limited to T.'s performance as prosecutor in the case against the applicant's client, as distinct from criticism focusing on T.'s general professional or other qualities. In that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel.

The Court notes, moreover, that the applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media (see *Schöpfer*, cited above, p. 1054, § 34, and *Prince v. the United Kingdom*, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222). Nor can the Court find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult (see *W.R. v. Austria*, no. 26602/95, Commission decision of 30 June 1997 (unreported) in which counsel had described the opinion of a judge as "ridiculous", and *Mahler v. Germany*, no. 29045/95, Commission decision of 14 January 1998 (unreported), where counsel had asserted that the prosecutor had drafted the bill of indictment "in a state of complete intoxication").

The Court further reiterates that even though the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court. There is no indication that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question. The City Court indeed limited itself to dismissing that objection, whereas the presiding judge could have interrupted the applicant's pleadings and rebuked her even in the absence of a request to that end from the prosecutor. The City Court could even have revoked her appointment as counsel under the legal-aid scheme or excluded her as counsel in the trial. In that connection, the Court would stress the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.

It is true that, following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. It is likewise relevant that the Supreme Court waived her sentence, considering the offence to have been minor in nature. Even though

the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred.

It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society. Both the Acting Prosecuting Counsel's decision not to bring charges against the applicant and the minority opinion of the Supreme Court suggest that the national authorities were also far from unanimous as to the existence of sufficient reasons for the interference now in question. In the Court's view such reasons have not been shown to exist and the restriction on Ms Nikula's freedom of expression therefore failed to answer any "pressing social need".

In these circumstances the Court concludes that Article 10 of the Convention has been breached in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved. (..)'

The case Kyprianou

The facts:

On 14 February 2001 Mr *Kyprianou* was involved in a murder trial, defending an accused before the Court of Assize of Limassol. During the trial, he objected to having been interrupted during his cross-examination of a prosecution witness, sought leave to withdraw and, when leave was not granted, he alleged that members of the court were talking to each other and sending each other notes ("ravasakia" - which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges said they had been "deeply insulted" "as persons" by the applicant. They added that they could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate" and felt that "if the court's reaction [were] not immediate and drastic, … justice [would suffer] a disastrous blow". They gave him the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him or to retract. He did neither. The court then found Mr Kyprianou to be in contempt of court and sentenced him to five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response"; "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned". Mr Kyprianou served the prison sentence immediately, although he was in fact released early, in accordance with the relevant legislation. His appeal was dismissed by the Supreme Court on 2 April 2001.

Mr Kyprianou then lodged an application against the Republic of Cyprus. He argued (among other things) that he had not received a hearing by an impartial tribunal within the meaning of Article 6 § 1 of the Convention; that he had been presumed guilty by the Limassol Assize Court before he had been afforded an opportunity to defend himself (Article 2 § 2); that the Limassol Assize Court had failed to inform him in detail of the accusation made against him (Article 6 § 3(a)) and that his conviction violated Article 10 of the Convention.

His case was first dealt with by a Chamber of seven judges. In its Chamber judgment of 27 January 2004 the European Court of Human Rights held unanimously that there had been a violation of Article 6 §§ 1, 2 and 3 (a) and that it was not necessary to examine the applicant's complaint under Article 10. The Court awarded the applicant 15,000 euros (EUR) for non-pecuniary damage and EUR 10,000 for costs and expenses. On 19 April 2004 the Cypriot Government requested that the case be referred to the Grand Chamber and the panel of the Grand Chamber accepted the request on 14 June 2004. Third party interventions on the contempt of court issues of the case were received from the Governments of Ireland, Malta and the United Kingdom.

The law:

The Grand Chamber (17 judges) held unanimously that there had been a violation of Article 6 § 1 of the Convention, by sixteen to one that it was not necessary to examine separately the applicant's complaint under Article 6 § 2 of the Convention, unanimously that it was not necessary to examine separately the applicant's complaint under Article 6 §3 (a) of the Convention and unanimously that there had been a violation of Article 10 of the Convention. The Court awarded the applicant 15,000 euros (EUR) for non-pecuniary damage and EUR 35,000 for costs and expenses.

The reasoning in the judgment is especially important because of the way the Court dealt with the impartiality issues (Article 6 § 1) in relation to a national contempt of court procedure. Very exceptionally, if not for the first time, the presumption of personal impartiality was found to have been rebutted. The Court follows the usual pattern: the Court repeats the general principles established in its case-law and then applies

these principles to the case before it:

'(a) The general principles

The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see the *Padovani v. Italy* judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, § 30 and *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45 and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58, and *Wettstein v. Switzerland,* no. 33958/96, § 44, CEDH 2000-XII).

In applying the subjective test the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber*, cited above, § 25). The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long established in the case-law of the Court (see, for example, the *Le Compte, Van Leuven and De Meyere v. Belgium* judgment cited above, p. 25, § 58). It reflects an important element of the rule of law, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness. This principle must apply equally to all forms of tribunal including juries (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30). Although in some cases, it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 793, § 32). In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).

The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (see *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI). Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality (see *Buscemi v. Italy*, cited above, § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis of the subjective test (*Lavents v. Latvia,* no. 58442/00, §§ 118 and 119, 28 November 2002).

An analysis of the Court's case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where for instance the exercise of different functions within the judicial process by the same person (see the *Piersack v. Belgium* case, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example Grieves v. the United Kingdom, cited above, and *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in the above-mentioned *Buscemi* case, but it may also be of such a nature as to raise an issue under the subjective test (for example the *Lavents* case, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.

(b) Application of the above principles to the instant case

The applicant expressed his grievance as being that the judges of the Limassol Assize Court had failed to satisfy the requirement of impartiality under both the objective and subjective

tests. The Court proposes to examine this complaint by following the objective and subjective approaches with reference to the considerations of functional and personal partiality set out above (see paragraphs 118-121 above).

(i) Objective test

The applicant claimed that, in the particular circumstances of his case, the fact that the same judges of the court in respect of which he allegedly committed contempt tried, convicted and sentenced him, raised objectively justified doubts as to the impartiality of that court.

The Court observes that this complaint is directed at a functional defect in the relevant proceedings. In this connection it has first had regard to the arguments put forward by the Government and the intervening third parties concerning the evolution of the common law system of summary proceedings in respect of contempt of court and its compatibility with the Convention. It notes in particular the increasing trend in a number of common law jurisdictions acknowledging the need to use the summary procedure sparingly, after a period of careful reflection and to afford appropriate safeguards for the due process rights of the accused (see paragraphs 46-47, 49 and 52 above).

However, the Court does not regard it as necessary or desirable to review generally the law on contempt and the practice of summary proceedings in Cyprus and other common law systems. Its task is to determine whether the use of summary proceedings to deal with Mr Kyprianou's contempt in the face of the court gave rise to a violation of Article 6 § 1 of the Convention.

In considering this question, the Court recalls that, both in relation to Article 6 § 1 of the Convention and in the context of Article 5 § 3, it has found doubts as to impartiality to be objectively justified where there is some confusion between the functions of prosecutor and judge (see, for Article 6 § 1, *mutatis mutandis, Daktaras v. Lithuania,* no. 42095/98, §§ 35 -38, ECHR 2000-X and, for Article 5 § 3, *Brincat v. Italy*, judgment of 26 November 1992, Series A no. 249-A, pp. 11-12, §§ 20-22; *Huber v. Switzerland,* judgment of 23 October 1990, Series A no. 188, pp. 17-18, §§ 41-43 and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, pp. 3298-3299, §§ 146-150).

The present case relates to a contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (see *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, pp. 18-19, §§ 41-42).

The Court therefore finds that, on the facts of the case and considering the functional defect which it has identified, the impartiality of the Assize Court was capable of appearing open to doubt. The applicant's fears in this respect can thus be considered to have been objectively justified and the Assize Court accordingly failed to meet the required Convention standard under the objective test.

(ii) Subjective test

The applicant further alleged that the judges concerned acted with personal bias.

This limb of the applicant's complaint was therefore directed at the judges' personal conduct. The Court will accordingly examine a number of aspects of the judges' conduct which are capable of raising an issue under the subjective test.

Firstly, the judges in their decision sentencing the applicant acknowledged that they had been "deeply insulted" "as persons" by the applicant. Even though the judges proceeded to say that this had been the least of their concerns, in the Court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal embroilment on the part of the judges (see paragraph 18 above).

Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements. In particular, the judges stated that they could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate" and that "if the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow" (see paragraph 18 above).

Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response". In the judges' opinion, "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned" (see paragraph 18 above).

Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court. After deciding that the applicant had committed the above offence they gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him

or to retract. He was, therefore, in fact asked to mitigate "the damage he had caused by his behaviour" rather than defend himself (see paragraphs 17 and 18 above).

Although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.

This conclusion is reinforced by the speed with which the proceedings were carried out and the brevity of the exchanges between the judges and Mr Kyprianou.

Against this background and having regard in particular to the different elements of the judges' personal conduct taken together, the Court finds that the misgivings of Mr Kyprianou about the impartiality of the Limassol Assize Court were also justified under the subjective test.

(iii) Review by the Supreme Court

Finally, the Court shares the Chamber's view that the Supreme Court did not remedy the defect in question. The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings (see *De Cubber v. Belgium* cited above, p. 14, § 33). In the present case, although the parties disagree as to the precise scope and the powers of the Supreme Court, it is clear that it had the power to quash the decision on the ground that the Limassol Assize Court had not been impartial. However, it declined to do so and upheld the conviction and sentence. As a consequence, it did not cure the failing in question (see *Findlay v. the United Kingdom*, cited above, p. 263, §§ 78-79, De *Haan v. the Netherlands*, judgment of 26 August 1997, Reports 1997-IV, p. 1379, §§ 52-55).

In the light of the foregoing and having examined the facts of the case under both the objective and subjective tests enshrined in its case-law, the Court finds that the Limassol Assize Court was not impartial within the meaning of Article 6 § 1 of the Convention. (..)'

As far as the freedom of expression issues are concerned, the Court followed its usual pattern: it first established that there had been an interference, that the interference had been prescribed by law and that it had pursued the legitimate aim of maintaining the authority of the judiciary within the meaning of Article 10 § 2 of the Convention. The only question at issue was whether the interference with the applicant's freedom of expression had been 'necessary in a democratic society':

(i) The general principles

The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III, *Cumpǎnǎ and Mazǎre v. Romania*, cited above, § 88, and *Nikula v. Finland*, cited above, § 46).

In particular, the Court must determine whether the measure taken was "proportionate to the legitimate aims pursued" (see the Sunday Times *v. the United Kingdom* (no. 1), op. cit, p. 38, § 62 and *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51). In addition, the fairness of the proceedings, the procedural guarantees afforded (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-...) and the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; *Skałka v. Poland*, cited above, §§ 41-42 and *Lešník v. Slovakia*, no. 35640/97, §§ 63-64, ECHR 2003-IV) are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.

The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, § 40). What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, *mutatis mutandis*, among many other authorities, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12).

The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III, *Nikula v. Finland*, cited above, § 45 and *Schöpfer v. Switzerland*, cited above, pp. 1052-53, §§ 29-30, with further references).

Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. Moreover, a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, even if in principle sentencing is a matter for the national courts, the Court recalls its case-law to the effect that it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty - of defence counsel's freedom of expression can be accepted as necessary in a democratic society (see *Nikula v. Finland*, cited above, §§ 54-55).

It is evident that lawyers, while defending their clients in court, particularly in the context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the court, keeping in mind their client's best interests. The imposition of a custodial sentence, would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole (see *Nikula v. Finland*, cited above, §§ 54 and *Steur v. the Netherlands*, cited above, § 44). They might for instance feel constrained in their choice of pleadings, procedural motions and the like during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. The imposition of a prison sentence on defence counsel can in certain circumstances have implications not only for the lawyer's rights under Article 10 but also the fair trial rights of the client under Article 6 of the Convention (see *Nikula v. Finland*, cited above, § 49 and Steur v. the Netherlands, cited above, § 37). It follows that any "chilling effect" is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.

(ii) Application of the above principles to the instant case

In the present case the applicant was convicted of the offence of contempt in *facie curiae* by the Limassol Assize Court whilst defending an accused in a murder trial. The judges considered that the applicant had showed manifest disrespect to the court by way of words and conduct.

The Court must ascertain whether on the facts of the case a fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other hand, the protection of the applicant's freedom of expression in his capacity as a lawyer.

The Limassol Assize Court sentenced the applicant to five days' imprisonment. This cannot but be regarded as a harsh sentence, especially considering that it was enforced immediately. It was subsequently upheld by the Supreme Court.

The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.

Having regard to the above, the Court is not persuaded by the Government's argument that the prison sentence imposed on the applicant was commensurate with the seriousness of the offence, especially in view of the fact that the applicant was a lawyer and considering the alternatives available (see paragraphs 79 and 98 above).

Accordingly, it is the Court's assessment that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel (see *Nikula v. Finland*, cited above, § 49, *Steur v. the Netherlands*, cited above, § 44). The Court's finding of procedural unfairness in the summary proceedings for contempt (see paragraphs 122-135 above) serves to compound this lack of proportionality (see paragraph 171 above).

This being so, the Court considers that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression. The fact that the applicant only served part of the prison sentence (see paragraph 20 above) does not alter that conclusion.

The Court accordingly holds that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant. (..)'

The case Amilalachioaie

The facts:

In a case referred to it by a group of deputies and the Ombudsman of Moldova, the Constitutional Court gave a decision on 15 February 2000 declaring unconstitutional the statutory provisions requiring lawyers to be members of the Moldovan Bar Council. Mr Amilhalachioaie, a lawyer and Chairman of the Molovan Bar Council, criticised the decision in an interview with a journalist, which was published in the journal "Economic Analysis". In a final decision of 6 March 2000 the Constitutional Court imposed an administrative fine equivalent to 36 euros on the applicant for being disrespect-

ful towards it. It censured him for stating that, as a result of the decision, "complete chaos would reign in the legal profession" and that the question therefore arose as to whether the Constitutional Court was constitutional. The court also punished him for asserting that its judges "probably did not consider the European Court of Human Rights to be an authority".

The law:

The Court held by six votes to one that there had been a violation of Article 10 of the European Convention on Human Rights. It held, by five votes to two, that the finding of a violation constituted just satisfaction for any non-pecuniary damage sustained by the applicant. The applicant forgot to ask for the money of the fine back.

In this case the Court finally found that there had been no 'pressing social need' to restrict the freedom of expression of the applicant:

1. **General principles**

The Court reiterates that a "law" within the meaning of Article 10 § 2 of the Convention is a norm that is formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, those norms need not be foreseeable with absolute certainty, even though such certainty is desirable, as the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see The Sunday Times *v. the United Kingdom* (no. 1), judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2325-26, § 35).

The degree of precision depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68).

The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54).

However, as the Court has previously had occasion to say, lawyers are entitled to freedom of expression too and to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Furthermore, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, *Reports* 1998-III, pp. 1053-54, § 33).

While the Contracting States have a certain margin of appreciation in assessing whether such a need exists, it goes hand in hand with a European supervision, embracing both the law and the decisions applying it (see The Sunday Times *v. the United Kingdom* (no. 2), judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50).

In performing its supervisory role, the Court has to look at the interference complained of in the light of the case as a whole, including the tenor of the applicant's remarks and the context in which they were made, and determine whether it "correspond[ed] to a pressing social need", was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see The Sunday Times (no. 2), ibid., and *Nikula v. Finland*, no. 31611/96, § 44, ECHR 2002-II).

2. **Application of the aforementioned principles to the instant case**

The Court notes that the applicant was convicted for stating in an "interview" given to a newspaper that the decision of the Constitutional Court "[would] produce total anarchy in the legal profession" and that the question therefore arose whether the Constitutional Court was constitutional. He was also convicted for saying that the judges of the Constitutional Court probably "[did] not regard the European Court of Human Rights as an authority".

Such a conviction may be regarded as an interference with the applicant's right to respect for his freedom of expression, as guaranteed by Article 10 of the Convention.

The Court finds at the outset that the interference in question was "prescribed by law", within the meaning of the second paragraph of Article 10 of the Convention. In that connection, it notes that the issue between the parties in the instant case is whether Article 82 of the Code of Constitutional Procedure, which sets out the acts for which an administrative penalty may be imposed, should be construed broadly or narrowly.

The Court notes that the wording of Article 82 contains a general provision that makes anyone showing an obvious lack of regard towards the Constitutional Court liable to a fine.

Although the acts that give rise to liability are not defined or set out with absolute precision

in the legislation, the Court finds that in view of his legal training and professional experience as Chairman of the Bar, the applicant could reasonably have foreseen that his remarks were liable to fall within the scope of the aforementioned provision of the Code of Constitutional Procedure.

It further considers that the interference pursued a legitimate aim, as it was justified by the need to maintain both the authority and the impartiality of the judiciary, within the meaning of the second paragraph of Article 10 of the Convention. It must now determine whether that interference was "necessary in a democratic society".

The Court notes that the applicant's comments were made on an issue of general interest in the context of a fierce debate among lawyers that had been sparked off by a Constitutional Court decision on the status of the profession that had brought to an end the system whereby lawyers were organised within a single structure, the Moldovan Bar Council, which was an association chaired by the applicant.

In that connection, the Court finds that even though the remarks may be regarded as showing a certain lack of regard for the Constitutional Court following its decision, they cannot be described as grave or as insulting to the judges of the Constitutional Court (see, *mutatis mutandis, Skałka v. Poland,* no. 43425/98, § 34, 27 May 2003; *Perna v. Italy* [GC], no. 48898/99, § 47, ECHR 2003-V; and *Nikula*, cited above, §§ 48 and 52).

Furthermore, since it was the press that reported the applicant's comments, some of which the applicant subsequently denied making, the Court finds that it is not possible to hold him responsible for everything that appeared in the published "interview" (see paragraph 14 above).

Lastly, although the fine of 360 lei (equivalent to 36 euros) imposed on the applicant is a seemingly modest sum, it nevertheless has symbolic value and is indicative of the Constitutional Court's desire to inflict severe punishment on the applicant, as it is close to the maximum that could be imposed under the legislation.

In the light of these considerations, the Court finds that there was no "pressing social need" to restrict the applicant's freedom of expression and that the national authorities have not furnished "relevant and sufficient" reasons to justify such a restriction. Since the applicant has not gone beyond the bounds of acceptable criticism under Article 10 of the Convention, the interference in issue cannot be regarded as having been "necessary in a democratic society".

Consequently, there has been a violation of Article 10 of the Convention.(..)'

What can be concluded from the abovementioned case-law?

* When a lawyer is convicted and sentenced or when disciplinary action is taken against him in connection which he said in his professional capacity, this will be considered as an interference with the exercise of his freedom of expression, as laid down in Article 10 § 1of the Convention.

* An interference should be looked at in the light of the case as a whole, including the content of the remarks and the context in which they were made.

* According to Article 10 § 2 of the Convention, an interference may be justified if it is prescribed by law, pursues one of more of the legitimate aims referred to in paragraph 2 and is 'necessary in a democratic society' for achieving such an aim or aims.

* In many cases it is the 'necessity in a democratic society' test which is not met. There should be a 'pressing social need' to restrict the freedom of expression and any restriction should be 'proportionate to the legitimate aim pursued'. The reasons adduced by the authorities to justify it must be 'relevant and sufficient'.

* The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State bases on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice.

* While lawyers are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The national authorities have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them.

* It is evident that lawyers, while defending their clients in court, particularly in the

context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the trial, keeping in mind their client's best interests. The imposition of a custodial sentence on the lawyer in such cases would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole. They might for instance feel constrained in their choice of pleadings, procedural motions and the like during proceedings before the courts, quite possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation.

* It should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty, an obligation to pay compensation for harm suffered and/or costs incurred or even the administering of a mere admonition.

* Only in exceptional cases a restriction of the defence counsel's freedom of expression can be accepted as necessary in a democratic society.

* In certain cases an interference with defence counsel's freedom of expression can also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. 'Equality of arms' and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties.

* A difference should be made between submissions confined to a courtroom and submissions made outside the courtroom (press).

* In the procedural context of a court hearing a prosecutor must sometimes tolerate very considerable criticism by the defence counsel.

* It is the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.

* However, special attention should be paid if a case relates to an act of contempt in the face of the court, aimed at the judges personally and where they have been the direct object of the applicant's criticisms as to the manner in which they have been conducting the proceedings. From the point of view of the demands of 'impartiality' as laid down in Article 6 of the Convention, it is not acceptable that the same judges take the decision to prosecute, try the issues arising from the applicant's conduct, determine his guilt and impose the sanction. In such a situation the confusion of roles between complainant, witness, prosecutor and judge can self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.

Inadequate representation by defence counsel: the ultimate Strasbourg sanction

The question may be asked: does the European Court allow inadequate representation by a defence counsel to be sanctioned or disciplined at all? And just for clarity: I would not even dare to suggest that a lawyer by using his right to freedom of expression is thereby inadequately representing his client. Still, there may be circumstances that a lawyer, either by clearly 'under-representing' or equally by 'over-representing' is shown not to serve the interests of his client in an adequate manner. One answer has been given above: it is the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial. But Strasbourg case-law has provided for one ultimate sanction as far as genuinely inadequate representation is concerned: ultimately the national court should intervene to protect the interests of the defendant. In the case of *Daud v. Portugal* (judgment of 21 April 1998) the Court considered:

38. The Court reiterates that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective, and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused" (see the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, § 38). "Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed... [T]he competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way" (Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65).

39. In the instant case the starting-point must be that, regard being had to the preparation and

conduct of the case by the officially assigned lawyers, the intended outcome of Article 6 § 3 was not achieved. The Court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January 1993 – see paragraph 19 above) and the hearing (26 January 1993 – see paragraph 20 above) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds (see paragraph 23 above).

Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 § 3 (c) (see the Goddi v. Italy judgment of 9 April 1984, Series A no. 76, p. 11, § 27).

40. The Court must therefore ascertain whether it was for the relevant authorities, while respecting the fundamental principle of the independence of the Bar, to act so as to ensure that the applicant received the effective benefit of his right, which they had acknowledged.

41. The Court notes, firstly, that the application for a judicial investigation made by the applicant on 15 October 1992 was refused by the investigating judge on the principal ground that it was written in Spanish (see paragraphs 9–10 and 14 above). The application of 15 December, in which the applicant asked the court to carry out certain investigative measures, was refused by the judge in charge of the case for the same reason (see paragraphs 17 and 18 above). Those refusals themselves did not affect the fairness of the trial, since the various investigative measures sought by the applicant were carried out during the trial.

42. In his letter of 15 December 1992, after more than eight months had elapsed, the applicant also asked the court for an interview with his lawyer, who had still not contacted him (see paragraph 17 above). Because the letter was written in a foreign language, the judge disregarded the request. Yet the request should have alerted the relevant authorities to a manifest shortcoming on the part of the first officially assigned lawyer, especially as the latter had not taken any step since being appointed in March 1992. For that reason, and having regard to the refusal of the two applications made during the same period by the defendant himself, the court should have inquired into the manner in which the lawyer was fulfilling his duty and possibly replaced him sooner, without waiting for him to state that he was unable to act for Mr Daud. Furthermore, after appointing a replacement, the Lisbon Criminal Court, which must have known that the applicant had not had any proper legal assistance until then, could have adjourned the trial on its own initiative. The fact that the second officially assigned lawyer did not make such an application is of no consequence. The circumstances of the case required that the court should not remain passive.

43. Taken as a whole, these considerations lead the Court to find a failure to comply with the requirements of paragraph 1 in conjunction with paragraph 3 (c) of Article 6 from the stage of the preliminary inquiries until the beginning of the hearings before the Lisbon Criminal Court. There has therefore been a violation of those provisions. (..)'

In the Grand Chamber case of *Hermi v. Italy* (judgment of 18 October 2006) the European Court had to deal with shortcomings of a defence lawyer appointed by the applicant himself. The lawyer had complained that the State had not sufficiently informed his detained client of the date of the appeal hearing and about the fact that he had to ask to be brought to the hearing room five days in advance. The European Court, smelling a lawyer's tactic, did not want to play along with the defence game and made some very critical comments about the passive behaviour of the lawyer. Besides, no violation was established:

It is regrettable that the notice did not indicate that it was for the applicant to request, at least five days before the date of the hearing, that he be brought to the hearing room (see paragraph 17 above). However, the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements. It is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights.

In the instant case, the applicant was informed of the date of the appeal hearing on 1 September 2000, that is, more than two months in advance of the hearing. The same was true of the lawyer appointed by the applicant (see paragraph 17 above). During that time, the applicant's lawyers did not deem it necessary to get in touch with their client (see paragraph 18 above). There is nothing in the case file to indicate that the applicant attempted to make contact with them.

The Court cannot but regret the lack of communication between the applicant and his lawyers. Precise explanations concerning the request to be brought to the hearing, and the time-limit and arrangements for making such a request, could have dispelled any doubts the applicant might have had in that regard. In that connection, the Court points out that it is clear from the wording of Article 599 § 2 of the CCP (see paragraph 31 above) and the case-law of the Court of Cassation (see judgment no. 6665 of 1995 – paragraph 33 above) that a prisoner wishing to attend the appeal hearing in the context of a summary procedure must make known his wish to be brought to the hearing at least five days in advance. That would have been known to the lawyers appointed by the applicant.

The Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no. 205, p. 16, § 30). In that connection it must be borne in mind that the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 38, and *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or appointed by the accused. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Daud v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, pp. 749-750, § 38, and *Sannino v. Italy*, no. 30961/03, § 49, 27 April 2006).

In the present case, the applicant at no point alerted the authorities to any difficulties encountered in preparing his defence. Furthermore, in the Court's view, the shortcomings of the applicant's counsel were not manifest. The domestic authorities were therefore not obliged to intervene or take steps to ensure that the defendant was adequately represented and defended (see, conversely, *Sannino*, cited above, § 51).

In addition, the Court notes that the Rome Court of Appeal interpreted, in substance, the applicant's omission to request his transfer to the hearing room as an unequivocal, albeit implicit, waiver on his part of the right to participate in the appeal hearing (see paragraph 20 above). In the particular circumstances of the present case, the Court considers that that was a reasonable and non-arbitrary conclusion.

It observes in that regard that the obligation on the applicant to make clear his wish to be brought to the hearing did not entail the completion of any particularly complex formalities. Moreover, the transfer of a prisoner calls for security measures and needs to be arranged in advance. A strict deadline for submitting the request for transfer is therefore justified.

It should also be pointed out that there were further indications lending weight to the conclusion that the applicant did not wish to take part in the appeal hearing. Firstly, there is nothing in the case file to indicate that, on the day of the hearing, when he realised that he was not going to be taken to the hearing room, the applicant protested to the prison authorities. Secondly, in their pleadings of 23 October 2000, filed with the registry of the Court of Appeal a mere eleven days before the date of the hearing, the applicant's lawyers did not request that Mr Hermi be brought to the hearing room.

It is true that, at the appeal hearing, Mr Marini objected to the proceedings being continued in his client's absence (see paragraph 20 above). However, in the Court's view, that objection, made at a late stage and unsupported by any statement from the defendant himself, could not outweigh the attitude adopted by the applicant.

In the light of the above, and taking account in particular of the conduct of the applicant's lawyers, the Court considers that the Italian judicial authorities were entitled to conclude that the applicant had waived, tacitly but unequivocally, his right to appear at the hearing of 3 November 2000 before the Rome Court of Appeal. Moreover, the applicant could have asserted that right without the need for excessive formalities.

It follows that there has been no violation of Article 6 of the Convention. (..)'

Hors concours: critical remarks in the concurring opinions of European Court's Judge Giovanni Bonello. Remarks that cannot be reviewed by a higher tribunal.

As promised I will end by quoting one of the most recent dissenting opinions of the judge elected in respect of Malta, Giovanni Bonello. The way this Strasbourg judge makes use of the possibility provided for in Article 45 § 2 of the Convention ('If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion') is the ultimate exercise of the freedom of expression. In a foreword of 'A Free Trade of Ideas; the separate opinions of Judge Vanni Bonello' (to be published by Wolf Legal Publishers, 2008), the British judge and vice-president of the European Court, Sir Nicolas Bratza , and the deputy registrar of the European Court, Michael O'Boyle , described his way of writing in the following terms: *'(..) It is the skill of literature. His legal ideas are conveyed in a stately carriage of imaginative and epigrammatic language. He is a wordsmith of the highest order whose carriage travels surely – sometimes indignantly and angrily – across the finely manicured lawns of the English language. He is most certainly the Court's first linguistic stylist. (..)'*

In the case of *Flux (no. 2) v. Moldova* (judgment of 3 July 2007) the facts were as follows: The applicant, *Flux*, is a newspaper based in Chişinău. On 19 June 2002 *Flux* published on its first page a preview of an article due to appear in a future issue, together with a summary entitled "The red millionaires" and a big picture of the leader of the Communist Party parliamentary group, Victor Stepaniuc. The next day, Mr Stepaniuc brought proceedings for defamation against *Flux* and against the author of the article, arguing that "the defendants disseminated information which is defamatory of me as a citizen, an MP and as the leader of the Communist Party parliamentary group". On 21 June 2002 *Flux* published the article announced two days before, which was based on the account of the deputy Chief Executive Officer of the Anenii Noi canned food plant and which reported on alleged attempts by a Communist parliamentarian to have the plant declared bankrupt and sold off. On 1 August 2002 a Moldovan court ruled in favour of Mr Stepaniuc, saying that the following statement from the "The red millionaires" summary was defamatory: "The Communists want to sell the Anenii Noi canned food plant off piece-meal." The court ordered *Flux* and the author to pay Mr Stepaniuc 3,600 Moldovan Lei (MDL – EUR 270) and MDL 1,800 respectively, and to issue an apology within 15 days. Two appeals by *Flux* against that judgment were ultimately dismissed. On 6 February 2003, Chişinău Regional Court dismissed the first appeal as being unfounded and failed to take into consideration the article published on 21 June 2002. On 1 April 2003, the Court of Appeal dismissed the second appeal, stating that it was clear that the information published in the article about Mr Stepaniuc did not correspond to reality.

Relying on Article 10 (freedom of expression), *Flux* complained before the European Court of Human Rights that the domestic courts' decisions had interfered with its right to freedom of expression. It further complained that the domestic courts had failed to give reasons in their decisions, in breach of Article 6 § 1 (right to a fair trial). Having considered the fact that journalistic freedom also covered possible recourse to a degree of exaggeration, or even provocation, and having weighed up the different interests involved in the applicant's case, the Court in its judgment concluded that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society". Accordingly, there had been a violation of Article 10. The Court held that there was no need to examine separately the complaint under Article 6 § 1.

Judge Bonello however made in his partly dissenting opinion the following remarks about the Moldovan judge who had delivered the national judgment:

1. In this case the Court could have voiced its views on the pathology of an administration of justice. It did not.

2. The applicant newspaper *Flux* submitted complaints relating to two violations of Article 6 of the Convention. The majority declared inadmissible the first complaint on the lack of independence and impartiality of Judge I.M. A second complaint regarding the alleged failure of the domestic courts to give reasons for their decisions was disposed of by the majority with a finding that this complaint did not raise an issue separate from the freedom of expression complaint under Article 10, and that consequently the Court did not consider it necessary to examine it separately.

3. As the applicant's first Article 6 complaint was declared inadmissible not by a judgment but by a separate 'decision' of the Court, I am restrained from expressing if and why I agreed or disagreed with that decision, finding some comfort in the reflection that it is not the first time that courts trip over semantics on their way to justice. This restraint does not apply to the second complaint which was dealt with by a judgment; this enables me to elaborate and make public the reasons for my dissent.

4. I find it hard to agree with the majority's conclusion that a claim of violation of fair-trial guarantees (deriving from an alleged failure by the domestic courts to give reasons for their decision) raises no separate issue from that of a violation of freedom of expression. The domestic courts had condemned the applicant newspaper to pay damages, plus costs, and to make an apology to a leading government politician. The Court unanimously found these

domestic judgments to have been in violation of the applicant's freedom of expression. This 'freedom of expression' finding surely determined an issue totally distinct from that whether the applicant's fair-trial guarantees had been respected or not, and in my view this separate complaint should have been considered and determined separately.

5. The Court enjoys unquestionable discretion to refrain from deciding complaints which, although admissible and meritorious, do not raise issues substantially different from others in which a violation of some Convention guarantee has already been found. By rule of thumb, it can safely be said that if a graver violation has previously been established, the Court would rightly find it futile to determine also a lesser violation arising from the same facts.

6. In the circumstances of the present case I do not consider a possible infringement of the fair-trial guarantees to be meaner in weight or flimsier in value than a breach of freedom of expression. The very particular facts on which this application is based tend to indicate that one core issue to be determined should have been whether the Article 6 fair-trial guarantees had been respected or not.

7. The applicant newspaper claims the domestic courts failed to give reasons on which to base its conviction for libel – not accidentally, not through some genuine pressure-of-work oversight, but inasmuch as the judge who ruled against the applicant lacked independence and impartiality "because he was a friend of Mr Stepaniuc (the plaintiff in the libel proceedings) and had been appointed president of the Buiucani district court by the Communist party parliamentary group" whose leader was the plaintiff in the defamation proceedings against the applicant newspaper.

8. The applicant added that in other defamation cases between *Flux* and representatives of the government, judge I.M. had always ruled in favour of the latter and awarded them the maximum amount provided for by law. By "a strange coincidence" the same judge examined the majority of defamation actions brought by his friend Mr Stepaniuc. All the claims of Mr Stepaniuc had always been upheld by judge I.M. even in those lawsuits in which the plaintiff had failed to pay court fees, which fact, by itself, should have rendered the action procedurally inadmissible. Nor did the fact that the plaintiff consistently failed to appear for the hearing of his court cases have any negative impact on his pending cases – they were all the same examined and determined by judge I.M. usually at the first hearing.

9. These are the plaintiff's allegations of fact to explain why judge I.M. could not be considered independent and impartial and why he failed to give reasons for finding the applicant newspaper liable to maximum libel damages.

10. These allegations on their own, if proved, would be worrying indicators of a questionable detachment of the presiding judge from the litigants – or from one of them. The alert however sounds louder still, as the alleged failure of judge I.M. to give reasons for his decision (a decision the Court unanimously found to have been in violation of the Convention) has to be assessed against a wider historical backdrop. If, as alleged, this failure of the presiding judge marches hand in hand with systemic evidence of feeble guarantees for the independence and impartiality of the judiciary as a whole, the alert should have sounded more inexorably.

11. I am attaching as an appendix brief summaries of several external *reports* on the state of the judiciary in Moldova, all highly negative and startling. For reasons of balance I wanted to include *reports* from other authoritative sources denying that the independence of the judiciary in Moldova is a stretcher case. I found none.

12. It is, in my view, against these seemingly universal concerns that the alleged failure by judge I.M. to give reasons should have enticed the Court to take some note. The Court could have asked itself whether a reluctance to reason out an unreasonable decision is the minimum to expect from a self-respecting, hire and fire judiciary. The Court could, or should, have investigated whether this was 'telephone justice' in which the telephone was pointless and the justice hilarious.

13. I find it self-delusory to harness impressive formulas to avoid facing core issues of the administration of justice, and then to feel fulfilled by one dexterous sweep of the debris under the carpet. No doubt irrationally, I believe more than I make-believe. Strasbourg, I thought, has a role to play in fortifying standards, well beyond that of seeking refuge behind legal fictions. In the long run they only energize the determination of those with a talent for finding the independence of the judiciary amusing. Those bent on making the independence of the judiciary obsolete know they need look no further.

14. I would have expected the Court to pounce on this opportunity to give hope to the people of Moldova. To let out some timid whispers for justice politically untainted. I would have expected the Court to have thoroughly investigated if the judgment that condemned the applicant was supported by good reasons or by any reason at all. I would have been gratified had the Court asked how often judge I.M., and other candidates for the heroes of the resistance award, found against the ruling party or its exponents in politically sensitive lawsuits. It would seem that the administration of justice in Moldova respects a number of precepts. I looked for them in Article 6 and could find none of them there.

15. All this alarms me profoundly. I have this old-fashioned prejudice against judges approximately impartial. I respond with inconstant passion to the credo of some politicians that judges fit nicely everywhere, but best of all in their pockets. I find bland, if not inconsequential, the doctrine that justice must not only be done, but should manifestly be seen to be done. Far more relevant, to me, is the doctrine that, for control-freaks to rule undisturbed, injustice should not only be done, but should manifestly be seen to be done.

16. Judge I.M.'s career crashed - from minor district judge to President of the Supreme Court in a span of time shorter than it takes to say 'the party is always right'. In an otherwise bleak panorama, it is comforting to note that the sacrifice of judges who align their energies with the welfare of the ruling political class, does not always cripple their careers.

17. I thought this was the right time for the Court to start panicking. This a self-evident opportunity to detox an administration of justice. Instead I had to witness the Court allowing the Moldovan judiciary the widest margin of depreciation.

Concluding remark

Incidentally, let no lawyer ever try to imitate Judge Bonello by paraphrasing his words in any national courtroom thus criticising any member of the national judiciary unless he is on very sure ground indeed. Remember that Judge Bonello sits on our side of the table. Despite everything I have indicated above, I cannot predict whether the European Court of Human Rights would be prepared to hold that any interference with the freedom of expression at the national level was not justified. If there is real reason to complain in such terms, it is probably wiser to save the venom for the European Court of Human Rights itself.

[1] I wish to express my gratitude to Peter Kempees, senior lawyer in the Registry of the European Court, who made valuable comments on the draft version of this presentation and undertook to correct the original 'English' version. Any remaining irregularities concerning the English language are entirely my responsibility.

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Contact
Netherlands Council for the Judiciary
PO Box 90613
2509 LP The Hague
The Netherlands

Published
November 2007

Print run
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