

HUMAN RIGHTS AND CRIMINAL PROCEDURE

The case law
of the European Court
of Human Rights



2nd edition

Jeremy McBride

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Contents

INTRODUCTION	5
CHAPTER 1 – CRIMINAL CHARGE	13
CHAPTER 2 – INVESTIGATION	21
CHAPTER 3 – PREVENTIVE MEASURES	37
CHAPTER 4 – INITIAL APPREHENSION AND CUSTODY	41
CHAPTER 5 – DETENTION ON REMAND	69
CHAPTER 6 – GATHERING EVIDENCE	131
CHAPTER 7 – INTERROGATION	163
CHAPTER 8 – CHARGING, PLEA BARGAINING AND DISCONTINUANCE OF PROCEEDINGS	181
CHAPTER 9 – THE TRIAL COURT	197
CHAPTER 10 – PUBLIC HEARING	225
CHAPTER 11 – PROOF AND EVIDENCE	235
CHAPTER 12 – DEFENCE	293
CHAPTER 13 – RIGHTS OF VICTIMS	357
CHAPTER 14 – TRIAL <i>IN ABSENTIA</i>	371
CHAPTER 15 – JUDGMENT	383
CHAPTER 16 – APPEAL	405
CHAPTER 17 – REOPENING OF PROCEEDINGS	459
CHAPTER 18 – TRIAL WITHIN A REASONABLE TIME	465
CHAPTER 19 – COMPENSATION AND COSTS	475
CHAPTER 20 – CHILD-RELATED ISSUES	493
INDEX OF CASES	507
TABLE OF CONTENTS	523

Introduction

This is the second and expanded edition of a handbook intended to assist judges, lawyers and prosecutors in taking account of the requirements of the European Convention on Human Rights and its Protocols (“the European Convention”) – and more particularly of the case law of the European Court of Human Rights (“the European Court”) – when interpreting and applying codes of criminal procedure and comparable or related legislation. It does so by providing extracts from key rulings of the European Court and the former European Commission of Human Rights (“the former European Commission”)¹ that have determined applications complaining about one or more violations of the European Convention in the course of the investigation, prosecution and trial of alleged offences, as well as in the course of appellate and various other proceedings linked to the criminal process.

The use of extracts from these rulings to illustrate the various requirements of the European Convention governing the operation of the criminal process reflects not only the fact that the mere text of the latter is insufficient to indicate the scope of what is entailed by that instrument – particularly as that is in many respects heavily dependent on the interpretation given to its provisions by the European Court and the former European Commission – but also because the circumstances of cases selected give a sense of how to apply the requirements in concrete situations.

The relevance of the European Convention to the interpretation and application of codes of criminal procedure and comparable or related legislation arises both from provisions in the former that explicitly set out requirements with respect to the operation of the criminal justice system and from many other provisions that give rise to a range of implicit requirements that will also need to be taken into account.

The explicit requirements come primarily from the right to liberty and security in Article 5 and the right to a fair hearing in the determination of a criminal charge in Article 6 but also from the right of appeal in criminal matters, the right to compensation for wrongful conviction and the right not to be tried or punished twice in Articles 2, 3 and 4 of Protocol No. 7 respectively.

1. The former European Commission had a role in implementing the European Convention until the coming into force of Protocol No. 11 but its rulings on a number of important points relating to the criminal process remain authoritative. This handbook assumes a basic familiarity with the European Convention system.

The implicit requirements in the European Convention stem particularly from the right to life in Article 2 and the prohibition of torture and inhuman treatment and punishment in Article 3 (which are of significance for matters such as the use of force in law-enforcement action, the investigation of alleged offences and the conduct of interrogation); the right to respect for private and family life, home and correspondence in Article 8 (which not only sets important limitations on the way in which offences can be investigated and evidence gathered but is also relevant to the restrictions to which persons arrested and remanded in custody can be subjected and the publicity that can be given to certain aspects of criminal proceedings); the right to freedom of expression in Article 10 (which is relevant not only to the reporting of criminal proceedings but also to the limits that can be imposed on criticism of the criminal justice system, especially as regards its operation in a given case); the right to the peaceful enjoyment of possessions in Article 1 of Protocol No. 1 (which must be respected in the course of law-enforcement action and may also be relevant to measures taken to secure either evidence of the commission of an offence or the proceeds derived from this); and the right to freedom of movement in Article 2 of Protocol No. 4 (which can affect restrictions imposed on suspected offenders in the course of an investigation of an offence or pending its trial).

It may well be that the terms of the codes of criminal procedure and comparable or related legislation reflect and embody many, if not all, of the requirements of the European Convention regarding the criminal process. However, it is the manner in which they are applied in practice that will determine whether or not the requirements of the European Convention are actually observed. Having regard to the way in which the European Court and the former European Commission have interpreted and applied the provisions of the European Convention in specific circumstances may thus provide a useful guide when it comes to interpreting and applying codes of criminal procedure and comparable or related legislation, thereby ensuring that the commitment made in Article 1 of the European Convention to secure the rights and freedoms set out in it is properly fulfilled.

In considering the relevance of the European Convention to criminal justice it should not be overlooked that the rights and freedoms which it guarantees – notably those with respect to assembly, association, expression, private life and religion in Articles 8 to 11 but also the prohibition of retrospective liability and penalties in Article 7 – can also set substantive limits on the scope of criminal law.² These limitations are not, however, dealt with in this handbook because its focus is only on the operation of the criminal process where there is no question about the admissibility of imposing criminal liability.

Similarly, the handbook does not take account of the way in which these rights and freedoms, as well as the right to life and the prohibition of torture and inhuman or degrading treatment or punishment, may not only require various acts and omissions

2. See, for example, *Korbely v. Hungary* [GC], 9174/02, 19 September 2008 (Article 7), *A. D. T. v. United Kingdom*, 35765/97, 31 July 2000 (Article 8) and *Ahmet Arslan and Others v. Turkey*, 41135/98, 23 February 2010 (Article 9).

to constitute criminal offences³ – with the penalties actually imposed reflecting the gravity of the conduct concerned⁴ – but also can impose constraints on the penalties for other offences,⁵ as well as the manner in which these are executed.⁶

In addition it should be noted that the understanding of what constitutes a “criminal” offence for the purpose of the European Convention is not restricted to the particular conception of this under the law of any state bound by this instrument. Like many other provisions in the European Convention, a “crime” is something that has been given an autonomous meaning by the European Court and the former European Commission. This has the consequence that, while the classification of something as “criminal” under national law will be decisive in attracting the application of the various requirements of the European Convention to the relevant proceedings, the fact that certain proceedings are not so classified under national law will not preclude those requirements from being considered applicable to them.

Thus, as the extracts in the first section of this book illustrate, the factors considered particularly important in this context will be whether or not the norm in question is generally applicable, whether the purpose of the penalty imposed was compensatory or punitive in character, whether or not the penalty involved imprisonment or was in some other respect (such as payment of a substantial sum of money) severe or burdensome. The application of these criteria has resulted in at least certain prison disciplinary offences, road-traffic regulatory offences and tax surcharges being treated as “criminal” for the purpose of the European Convention. This treatment does not mean that such matters have to be classified as “criminal” for the purposes of national law. However, the manner in which they are handled does need to ensure that a similar level of protection is available in proceedings with respect to them. As a consequence, codes of criminal procedure and comparable or related legislation may not be the only relevant national procedural standard when it comes to fulfilling the requirements of the European Convention in proceedings that will be regarded as “criminal” by the European Court.

It is, of course, important to bear in mind that the extracts do not seek to deal with every detailed aspect of the requirements of the European Convention. This would be impossible, not only because of the constraints of space but also because the case law of the European Court and the former European Commission has not dealt with every possible problem that could arise in interpreting and applying the European Convention in the context of criminal process. New questions will undoubtedly arise as criminal justice systems are expected to deal with the changing character of criminal activity. Moreover, the European Convention is itself a living instrument and this may result in the way in which its provisions are interpreted and applied being revised – invariably in a more exacting manner – as the European consensus

3. See, for example, *Hristovi v. Bulgaria*, 42697/05, 11 October 2011 (Article 3) and *Söderman v. Sweden* [GC], 5786/08, 12 November 2013 (Article 8).

4. See, for example, *Okkali v. Turkey*, 52067/99, 17 January 2006 and *Gäfgen v. Germany* [GC], 22978/05, 1 June 2010.

5. See, for example, *Vinter and Others v. United Kingdom* [GC], 66069/09, 9 July 2013 (irreducible life imprisonment), *Murat Vural v. Turkey*, 9540/07, 21 October 2014 (length of prison sentence) and *Grifhorst v. France*, 28336/02, 26 February 2009 (amount of fine).

6. See, for example, *Muršić v. Croatia* [GC], 7334/13, 20 October 2016 as regards prison conditions.

as to what is required evolves.⁷ Subject to these qualifications, the extracts have been selected with a view to giving a good indication of the scope of the requirements of the European Convention as presently established.

The organisation of the handbook does not follow the order of the provisions of the European Convention. Instead it follows the different stages of the criminal process, starting with the investigation stage and covering the various obligations entailed in this, the initial use of apprehension and custody, preventive measures and detention on remand, the process of gathering evidence and interrogation, as well as charging, plea-bargaining and the discontinuance of proceedings before trial. It then turns to the trial stage, looking at requirements relating to the court and a public hearing, the approach to the burden of proof and the standards applicable to evidence, in particular those regarding witnesses and admissibility. This is followed by consideration of the specific rights of the defence, the rights of victims of alleged criminal offences, the use of trial *in absentia* and the standards governing a judgment and its consequences. Thereafter it deals with appeals, the reopening of proceedings, the requirement of trial within a reasonable time and various obligations relating to payment of compensation and costs. It concludes by dealing with a number of specifically child-related issues that have arisen with respect to the application of the European Convention.

The following paragraphs give an overview of the main elements that the European Convention requires in the criminal process, and what they entail. It is important to note that, while the criminal process follows a sequence of stages, some aspects of particular rights and freedoms under the European Convention may be engaged in more than one of those stages, and so the application of the requirements to which they give rise cannot be rigidly compartmentalised.

Questions about the duties governing a criminal investigation – particularly its thoroughness, effectiveness and independence – have arisen especially in the context of allegations of unlawful killing and ill-treatment contrary to Articles 2 and 3, but the standards established are increasingly invoked where other rights and freedoms under the European Convention are affected. Moreover, these standards are also applicable to alleged offences in general, not least because their commission can affect many substantive rights under the European Convention and the failure to deal with them appropriately can result in the violation of the right to an effective remedy under Article 13.

The right to liberty and security under Article 5 establishes a strong presumption in favour of suspected offenders remaining free. This imposes important obligations as regards the initial apprehension and custody of such persons and the use and duration thereafter of detention on remand. The need for reasonable suspicion is a continuing requirement but is not of itself sufficient, with the European Court being concerned especially about the exercise of power that is arbitrary and the need for continued detention being for reasons that are not only admissible but also objectively

7. See, for example, *Borgers v. Belgium*, 12005/86, 30 October 1991, as to the impartiality requirement in Article 6, and *Selmouni v. France* [GC], 25803/94, 28 July 1999, as to what amounts to torture.

substantiated. Furthermore, the overall length of detention pending trial must be closely scrutinised, with particular implications for the diligence in processing a case.

Whenever someone is detained, the exercise of effective judicial control is seen under the European Convention system as a vital safeguard not only of the right to liberty and security but also against the possibility of improper treatment in circumstances where an individual is especially vulnerable. As a result Article 5(3) imposes a requirement of automatic and prompt judicial supervision of the justification for the loss of liberty following the initial apprehension and custody of a suspected offender. Thereafter Article 5(4) requires that there be a genuine ability for a person subject to detention to challenge its legality – entailing the fulfilment of many specific conditions in order to ensure its effectiveness – so long as it lasts during the criminal process and after this has been concluded.

Although the assistance of a lawyer is a potentially key element of the ability of someone to defend him or herself in the actual trial, the potential for the interests of the defence to be prejudiced at a much earlier stage of proceedings has led the European Court to find that such assistance will generally be needed even during the initial interrogation. Wherever the right to be assisted by a lawyer arises, there is a need to ensure that the possibility of having access to one is unimpeded and can take place in a manner allowing advice to be given in confidence. Furthermore, the right to assistance may entail a duty for the state to secure and pay for the services of a lawyer where this cannot be afforded by the person concerned. This will be especially so where the competence of the accused and/or the consequences of conviction are such that the provision of legal assistance in this manner is in the interests of justice. However, the right to legal assistance – whether or not provided by the state – does not mean that it cannot be regulated, particularly where prejudice to the proceedings could result.

The gathering of evidence to support a prosecution can affect many rights under the European Convention. In particular the prohibition on torture and inhuman treatment precludes the use of certain interrogation techniques, and concern for voluntariness will also exclude both criminal sanctions being employed in a manner that leads a person to incriminate him or herself and the use in certain circumstances of techniques of entrapment and incitement. However, there are circumstances in which evidence can be obtained against a person's will through searches and medical examination, provided certain safeguards are observed. Moreover, even where evidence may have been obtained in breach of the right to respect for private life, the principal consideration governing its admissibility will be the impact of this on the overall fairness of the proceedings.

The last consideration – fairness – will inform the evaluation of many aspects of a trial and (if one is held) an appeal. Although there are particular standards concerning matters such as the adequacy of time to prepare one's defence and the summoning and cross-examination of witnesses, the case law demonstrates that the actual impact of a failure to observe them in a given instance will be the principal concern of the European Court. However, that court has the advantage of hindsight in making this assessment whereas assumptions that a certain ruling will

not be prejudicial might not be so wisely made by a court where the proceedings have still to run their course.

Fairness will never be achieved in circumstances where there is no equality of arms between the prosecution and defence in criminal proceedings. A lack of such equality will be found where, for example, expert witnesses are not neutral but effectively prosecution-minded, where the defence does not have full access to the case file and where the prosecution can make submissions at first instance or on appeal to which the defence cannot respond.

In any prosecution the presumption of innocence puts the burden of proof on the prosecution; this means that an accused cannot be compelled to incriminate him or herself and that there must be evidence to substantiate a conviction. At the same time the drawing of presumptions from certain circumstances and a requirement that an accused explain a particular situation will not necessarily be objectionable so long as certain safeguards exist. However, the presumption of innocence also has implications for statements by officials before trial, the conduct of the judge in the course of it and the treatment of someone after an acquittal or discontinuance of proceedings.

A fundamental consideration in any trial will be the independence and impartiality of the court. This has implications for the safeguards for judges against improper pressures as well as circumstances which may give rise to both actual bias on their part or – more commonly – well-founded apprehension that this might exist, possibly as a result of their prior involvement in the proceedings, connections with the prosecuting body or a victim, or the influence of press coverage.

On top of all the different standards governing the conduct of criminal proceedings in order to ensure fairness, a key consideration of the European Convention is that a person should be tried within a reasonable time. This obligation – which is extensively breached in practice – applies to both trial at first instance and the different levels of appeal, as well as the overall length of the entire proceedings in a particular case. No particular period is prescribed as “reasonable” because the circumstances of cases inevitably differ. However, while complexity may explain some lengthy proceedings, inactivity in conducting them and delay as a result of inadequate resources are not acceptable excuses.

All these issues are seen in the various extracts from the rulings of the European Court and the former European Commission. The extracts have been chosen to illustrate different facets of the requirements of the European Convention concerning the various issues relevant to the conduct of criminal proceedings. All footnotes and, in almost all instances, text in [square] brackets are editorial. Space constraints have allowed only limited extracts to be chosen and, as a result, references to the case law, parts of sentences and even whole paragraphs have often been omitted. This has been done in a manner which hopefully still gives a sense of the essential reasoning and the specific context of the ruling while at the same time endeavouring not to misrepresent the stance of the European Court or the former European Commission. It should be borne in mind that there are often other cases that can exemplify but also, to a certain extent, qualify the particular issues being addressed.

The full text of all the rulings from which the extracts have been derived can be found in the HUDOC database of the European Court (www.echr.coe.int/ECHR/EN/hudoc), generally in both English and French but in some instances only in one of these languages. The case names of rulings that involve an admissibility decision rather than a judgment are followed by “(dec.)”⁸ Where a case has more than one application number only the first one is included.

The extracts are from rulings up to 31 December 2016.

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8. In the one instance where a report of the former European Commission is involved, the case name is followed by “(rep.)”.

Chapter 1

Criminal charge

► ***Ezeh and Connors v. United Kingdom* [GC], 39665/98, 9 October 2003**

82. ... it remains undisputed that the starting-point, for the assessment of the applicability of the criminal aspect of Article 6 of the Convention to the present proceedings, is the criteria outlined in *Engel and Others* ...:

82. ... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. ...

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. ...

86. In addition, ... the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative ... This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ...

90. The offences with which the applicants were charged were classified by domestic law as disciplinary ...

Thus ... the adjudication of such offences ... was designed to maintain order within the confines of the prison.

100. In explaining the autonomous nature of the concept of "criminal" in Article 6 of the Convention, the Court has emphasised that the Contracting States could not at their discretion classify an offence as disciplinary instead of criminal, or prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, as this would subordinate the operation of the fundamental clauses of Article 6 to their sovereign will. The Court's role under that Article is therefore to satisfy itself that the disciplinary does not improperly encroach upon the criminal ...

101. ... misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that "some matters may be more serious than others", that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the Rules might also amount to an offence under the criminal law so that, theoretically at least, there was nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.

102. Moreover, criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence ...

103. ... the offences in question were directed towards a group possessing a special status, namely prisoners, as opposed to all citizens. However, ... this fact renders the nature of the offences *prima facie* disciplinary. It is but one of the "relevant indicators" in assessing the nature of the offence ...

104. Secondly ... the charge against the first applicant corresponded to an offence in the ordinary criminal law ...

105. Thirdly, the Government submit that disciplinary rules and sanctions in prison are designed primarily to ensure the successful operation of a system of early release so that the "punitive" element of the offence is secondary to the primary purpose of "prevention" of disorder. The Court considers that awards of additional days were, from any viewpoint, imposed after a finding of culpability ... to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners. It does not find persuasive the Government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives not being mutually exclusive ... and being recognised as characteristic features of criminal penalties ...

106. Accordingly, the Court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants were charged are to be regarded as "criminal" for Convention purposes, clearly give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

107. The Court finds it therefore necessary to turn to the third criterion: the nature and degree of severity of the penalty that the applicants risked incurring ...

120. The nature and severity of the penalty which was "liable to be imposed" on the applicants ... are determined by reference to the maximum potential penalty for which the relevant law provides ...

The actual penalty imposed is relevant to the determination ... but it cannot diminish the importance of what was initially at stake ...

124. The Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability ...

128. In the present case, it is observed that the maximum number of additional days which could be awarded to each applicant by the governor was 42 for each

offence (Rule 50 of the Prison Rules). The first applicant was awarded 40 additional days and this was to be his twenty-second offence against discipline and his seventh offence involving violent threats. The second applicant was awarded 7 additional days' detention and this was to be his thirty-seventh offence against discipline. The awards of 40 and 7 additional days constituted the equivalent, in duration, of sentences handed down by a domestic court of approximately 11 and 2 weeks' imprisonment, respectively, given the provisions of section 33(1) of the 1991 Act ...

The Court also observes that ... nothing was submitted to the Grand Chamber, to suggest that awards of additional days would be served other than in prison and under the same prison regime as would apply until the normal release date set by section 33 of the 1991 Act.

129. In these circumstances, the Court finds that the deprivations of liberty which were liable to be, and which actually were, imposed on the applicants cannot be regarded as sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them ...

130. ... the Court concludes ... that the nature of the charges, together with the nature and severity of the penalties, were such that the charges against the applicants constituted criminal charges within the meaning of Article 6 of the Convention, which Article applies to their adjudication hearings.

► ***Matyjek v. Poland (dec.)*, 38184/03, 30 May 2006**

49. The Court observes that there exists a close connection between lustration proceedings and the criminal-law sphere. In particular, the Lustration Act provides that matters not regulated by it are subject to the relevant provisions of the Code of Criminal Procedure. Consequently, the Commissioner of Public Interest, who is empowered to initiate the lustration proceedings, has been vested with powers identical to those of the public prosecutor, which are set out in the rules of criminal procedure ... Similarly, the position of the person subject to lustration has been likened to that of an accused in criminal proceedings, in particular in so far as the procedural guarantees enjoyed by him or her are concerned ...

50. The Court also notes that the organisation and the course of lustration proceedings, as governed by the Act, are based on the model of a Polish criminal trial and that the rules of the Code of Criminal Procedure are directly applicable to lustration proceedings ...

51. In sum, although under the domestic law the lustration proceedings are not qualified as "criminal", the Court considers that they possess features which have a strong criminal connotation.

52. The Court reiterates that the second criterion stated above – the very nature of the offence, considered also in relation to the nature of the corresponding penalty – represents a factor of appreciation of greater weight. In this regard the Court finds that the misconduct committed by the applicant consisted of his having lied in a declaration which he had a statutory obligation to submit. ... The Court considers that the offence of making an untrue statement in a lustration declaration is

very similar to the above-mentioned offences. Moreover, according to the ordinary meaning of the terms, it is analogous to the offence of perjury ...

53. The Court also notes that the legal provision infringed by the applicant ... is directed at a vast group of citizens, born before May 1972, who not only hold many types of public functions, but also wish to exercise professions ... The lustration court decides whether the person subject to lustration violated the law by submitting a false declaration. If such a finding is made, the statutory sanctions are imposed. Thus, the lustration procedure in Poland is not aimed at punishing acts committed during the communist regime ... In the light of the above, the Court considers that the offence in question is not devoid of purely criminal characteristics.

54. As regards the nature and degree of severity of the penalty that the applicant suffered in the application of the Act, the Court first notes that the Act provides for an automatic and uniform sanction if the person subject to lustration has been considered by a final judgment to have lied in the lustration declaration. A final judgment to that effect entails the dismissal of the person subject to lustration from the public function exercised by him or her and prevents this person from applying for a large number of public posts for the period of 10 years. The Court observes that the moral qualifications, of which the person who has lied in the lustration declaration is automatically divested, are described broadly as: unblemished character, immaculate reputation, irreproachable reputation, good civic reputation, or respectful of fundamental values. The obligation to demonstrate those qualifications is necessary in order to exercise many professions, such as those of prosecutor, judge and barrister. That list is not exhaustive however as the Act refers to other statutes that may, as a prerequisite for exercising a public function, require one of the above-mentioned moral qualifications.

55. It is true that neither imprisonment nor a fine can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character.

56. ... the applicant, who is a politician, as a result of having been deemed a "lustration liar" by a final judgment, lost his seat in Parliament and cannot be a candidate for future elections for 10 years. In this connection the Court reiterates that the purpose of lustration proceedings is not to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State, since admitting to such collaboration – the so-called "affirmative declaration" – does not entail any negative effects, but to punish those who have failed to comply with the obligation to disclose to the public their past collaboration with those services ...

57. The Court considers that, given its nature and duration, the sanction provided by the Lustration Act must be considered as detrimental to and as having serious consequences for the applicant.

58. Having weighed up the various aspects of the case, the Court notes the predominance of those which have criminal connotations. In such circumstances the Court concludes that the nature of the offence, taken together with the nature and severity of the penalties, was such that the charges against the applicant constituted criminal charges within the meaning of Article 6 of the Convention.

► ***Jussila v. Finland* [GC], 73053/01, 23 November 2006**

29. The present case concerns proceedings in which the applicant was found, following errors in his tax returns, liable to pay VAT [value added tax] and an additional ten per cent surcharge ...

35. ... No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6 ...

37. ... it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive.

38. The second criterion, the nature of the offence, is the more important. The Court observes that ... it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not persuaded ... that VAT applies to only a limited group with a special status: as in the previously-mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* ... as regards the third Engel criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.

► ***Storbråten v. Norway* (dec.), 12277/04, 1 February 2007**

... two measures were imposed on the applicant in two separate and consecutive sets of judicial proceedings.

First, a two-year disqualification order was imposed on him under section 142(1), points 1 and 2, of the Bankruptcy Act on account of certain conduct in relation to his bankruptcy, notably with reference to tax and VAT offences and book-keeping offences in contravention of Articles 286(2) and 288 of the Penal Code. Thereafter, he was prosecuted on three counts, all connected to the bankruptcy, namely failure to comply with the book-keeping requirement in breach of Article 286 of the Penal Code and of the relevant provisions of the Accounting Act 1977; failure to declare business turnover in violation of section 72(2) of the Value Added Tax (VAT) Act 1969; and failure to submit tax declarations in breach of section 12-1(1)D of the Tax Assessment Act 1980.

It is undisputed that at least some of the acts had constituted the basis not only for the disqualification order but also for the criminal prosecution ... From the outset the Court observes that the disqualification order was imposed at the end of a procedure conducted under the Bankruptcy Act which had predominantly civil-law features and which was not regarded as a “penal procedure of [the respondent] State” ...

... as illustrated by the sequence of events in the applicant’s case, a disqualification order intervening at an early stage would play a supplementary role to criminal prosecution and conviction at a later stage with the possibility then of stripping the offender of his or her rights under Article 29 of the Penal Code, as opposed to continuing the disqualification order. Whilst a disqualification order would be lifted in the event of an acquittal or discontinuation of the criminal proceedings, the institution of such proceedings was not a direct and inevitable consequence of disqualification. Nor would the latter be considered to be part of the sanctions under Norwegian law for the offences in respect of which the applicant was tried in the criminal case ...

As to the nature and degree of severity of the measure, it should be noted that a disqualification order entailed a prohibition against establishing or managing a new limited liability company for a period of two years, not a general prohibition against engaging in business activities. In the view of the Court, the character of the sanction was not such as to bring the matter within the “criminal” sphere. Although a disqualification order, which was to be entered on a special public register for such measures, was capable of having a considerable impact on a person’s reputation and ability to practise his or her profession ..., the Court does not find that what was at stake for the applicant was sufficiently important to warrant classifying it as “criminal”. This is not altered by the fact that more severe measures could be imposed under section 142(4) extending to existing positions and honorary posts in other companies ...

Against this background, the Court arrives at the same conclusion as the Norwegian Supreme Court, namely, that the imposition of a disqualification order did not constitute a “criminal” matter for the purposes of Article 4 of Protocol No. 7 to the Convention.

It may in addition be noted that the two measures not only pursued different purposes – prevention and deterrence in the case of the first and also retribution in the case of the second – but also differed in their essential elements ... For instance, while subjective guilt was not a prerequisite for the application of section 142(1) item 1 of the Bankruptcy Act in the first set of proceedings, it was a condition for establishing criminal liability in the second set; whereas reasonableness of the sanction was a condition in the former context, it was not in the latter.

► ***R. v. United Kingdom (dec.)*, 33506/05, 4 January 2007**

... the Court observes that the police decided not to prosecute, and the applicant was so informed; instead they issued a warning to the applicant in respect of the offences which he had admitted committing. The question arises in this case whether the criminal charge thereby was dropped or was in fact determined.

The Court will have regard, in this context, to the three guiding criteria as to whether there has been a determination of a criminal charge: the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable ... It notes, as to the first, that according to domestic law, a warning is not a criminal conviction. As to the second, the purpose of the warning is, largely, preventative and does not pursue the aims of retribution and deterrence. Lastly, no fine or restriction of liberty is imposed. The applicant in this case was required to sign on a register and was referred to the youth offending team for possible intervention, measures which the Court finds preventative in nature ... The Court finds therefore that the warning applied to the applicant did not involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. Nor did it involve any public official declaration of guilt of criminal offence which could offend Article 6 § 2.

► ***Salov v. Ukraine, 65518/01, 6 September 2005***

66. In this connection, the Court notes that on 31 October 1999 the Kyivsky District Prosecution Service of Donetsk instituted criminal proceedings against the applicant on charges of interfering with voters' rights. Those proceedings ended on 15 September 2000 with the ruling of the Donetsk Regional Court upholding the applicant's conviction on the initial charges brought by the prosecution under Article 127 § 2 of the Criminal Code. As to the remittal of the case for additional investigation on 7 March 2000 by the Kuybyshevsky District Court of Donetsk and the subsequent quashing of that resolution by the Presidium of the Donetsk Regional Court on 5 April 2000, the Court does not consider it necessary to separate this part of the applicant's criminal trial from the remainder of the criminal proceedings in their entirety as such a separation would be artificial. From the Court's point of view, the remittal of the case for additional investigation marked a procedural step which was a precondition to a new determination of the criminal charge ..., even though it contained no elements of a final judicial decision in a criminal case and did not constitute the final determination of the charges against the applicant, an issue that should be considered in more detail in the examination of the merits of the applicant's complaints under Article 6 § 1 of the Convention. Taking into account the importance of these procedural decisions of the Kuybyshevsky District Court of Donetsk and the Presidium of the Donetsk Regional Court and their influence on the outcome of the proceedings as a whole, the Court considers that the guarantees of Article 6 § 1 must be applicable to these procedural steps.

67. In these circumstances, the Court accepts that when the applicant's case was remitted for additional investigation on 7 March 2000 and that resolution was quashed on 5 April 2000 he could be considered the subject of a "charge" within the autonomous meaning of Article 6 § 1. Accordingly, this provision is applicable in the instant case.

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE OF PROCEEDINGS (Discontinuance, Reasons for discontinuance suggesting guilt), p. 188 below

Chapter 2

Investigation

DUTY TO CONDUCT THOROUGH AND EFFECTIVE INVESTIGATION

► ***Kaya v. Turkey*, 22729/93, 19 February 1998**

89. ... The autopsy report provided the sole record of the nature, severity and location of the bullet wounds sustained by the deceased. The Court shares the concern of the Commission about the incompleteness of this report in certain crucial respects, in particular the absence of any observations on the actual number of bullets which struck the deceased and of any estimation of the distance from which the bullets were fired. It cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions unanswered ...

► ***M. C. v. Bulgaria*, 39272/98, 4 December 2003**

181. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

182. That was not done in the applicant’s case. The Court finds that the failure of the authorities in the applicant’s case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on “direct” proof of rape. Their approach in the particular case was restrictive, practically elevating “resistance” to the status of defining element of the offence.

183. The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors ...

► ***Ramsahai and Others v. Netherlands* [GC], 52391/99, 15 May 2007**

329. The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons ... or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai’s body by the bullet ..., have not been explained.

330. What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later ... Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation ...

332. There has accordingly been a violation of Article 2 of the Convention in that the investigation into the circumstances surrounding the death of Moravia Ramsahai was inadequate ...

338. Whilst it is true that to oblige the local police to remain passive until independent investigators arrive may result in the loss or destruction of important evidence, the Government have not pointed to any special circumstances that necessitated immediate action by the local police force in the present case going beyond the securing of the area in question ...

339. ... In addition, as stated by the Minister of Justice to Parliament, the State Criminal Investigation Department are able to appear on the scene of events within, on average, no more than an hour and a half. Seen in this light, a delay of no less than fifteen and a half hours is unacceptable.

340. As to the investigations of the Amsterdam/Amstelland police force after the State Criminal Investigation Department took over, the Court finds that the Department's subsequent involvement cannot suffice to remove the taint of the force's lack of independence ...

► *Dimitrova and Others v. Bulgaria*, 44862/04, 27 January 2011

79. The Court notes that the relevant domestic authorities ... concluded that Mr B.I. was solely responsible for the death of Mr Gerasimov, whom he had killed when reacting disproportionately to an attack, with one blow to the head. The Court is struck by the fact that in reaching that conclusion the authorities manifestly failed to take into account important evidence collected during the investigation. The Court refers, first of all, to the results of Mr Gerasimov's post-mortem, which found a multi-fragment fracture of the skull, numerous wounds on the head and wounds and bruises on the body ... Mr Gerasimov's hospital report of 31 May 2003 also indicated that he had four wounds to the head ... For the Court, these findings alone, indicative of repeated blows and not of a single one, as accepted by the authorities, would have been sufficient to refute their version of the events. Furthermore, Mr Gerasimov's post-mortem found a multi-fragment fracture with a depression of the parietal bone ..., which might indicate that he had been hit in the back of the head with considerable force. These elements, indicative of a possible deliberate attack, square poorly with the authorities' conclusion that Mr B.I. had acted in self-defence.

80. In accepting that Mr Gerasimov and his companions had been the ones to start the fight and that, therefore, Mr B.I. had acted in self-defence, the authorities disregarded another important circumstance, namely that after the fight it was Mr Gerasimov's companions who alerted the police ... When they reached a petrol station and asked the staff to call the police, they were nervous and said that he had

been beaten up ... At the same time Mr B.I. and his companions went into hiding ... Although they alleged later that they had been attacked, they never reported the attack to the police and did not request that it be investigated. These elements could have been indicative of the two groups' attitude to the events, but again the authorities seemed to have disregarded them.

81. The authorities' version of the events also failed to explain why Mr B.I. and his companions deliberately drove to the place where Mr Gerasimov and his companions were. If Mr B.I. had indeed, as Mr Z.E. supposed ..., intended to ask if they had seen Mr N.S.'s horse, still it is not clear why it was necessary for the four of them to leave the main road and drive along a dirt road to reach the place where the others were working. In adopting the version disputed by the applicants, the authorities failed to take into account other relevant facts established during the investigation, namely, that Mr N.S. had admitted that the group had been carrying wooden bats, that two bats and a knife had been found in his car ..., and that, furthermore, it was the van used by Mr Gerasimov and his companions which had been seriously damaged Although this evidence could be seen as disproving the authorities' conclusions, they disregarded it completely. Furthermore, they never sought to explain how Mr Gerasimov had suffered numerous wounds and bruises or why there had been blood in the van used by him and his companions, which was not his but could have been Mr B.I.'s ...

82. For these considerations the Court is of the view that the authorities failed to carry out a thorough, objective and impartial analysis of the relevant evidence gathered during the investigation of Mr Gerasimov's death. Therefore, the investigation itself could not have been thorough and objective. This in principle would have been sufficient to justify a conclusion that there was a breach of Article 2 of the Convention. Nevertheless, the Court considers it necessary to indicate other deficiencies in the investigation.

83. It notes that it has not been informed of any investigative steps aimed at establishing the possible involvement in Mr Gerasimov's death of Mr B.I.'s companions ... While ... it is not for it to interfere with the lines of inquiry pursued by the investigators, the Court notes that there were strong indications that the three of them might have also been implicated, which the authorities manifestly failed to account for ... However, notwithstanding the existence of evidence indicating that the three of them could have been involved and their own suspicious behaviour, and the investigator's initial assessment that there existed a reasonable suspicion that they could have acted as accessories in Mr Gerasimov's beating up, which led to their arrests, they were never investigated ...

84. The Court sees other reasons to doubt the comprehensiveness of the investigation. It notes that in its decision to drop the initial charges against Mr B.I. the Pernik regional public prosecutor's office relied on the testimony of Mr K.G. The latter had been an eyewitness to the fight and had testified that he had recognised Mr B.I. and seen him grappling with someone else, who had then delivered a blow with a knife ... However, the prosecuting authorities did nothing to verify this key testimony, regardless of the fact that its credibility could appear doubtful, given that he had observed the fight from a considerable distance while driving ... Moreover, although

the prosecuting authorities found a knife ..., they did not take fingerprints from it, did not verify whether it had been the one Mr B.I. had been stabbed with and did not attempt to explain how it had ended up in Mr N.S.'s car. In the Court's view these were obvious and available investigative steps which could have shed light on the circumstances of Mr Gerasimov's death.

85. Also, the prosecuting authorities did not seek to explain the inconsistencies in the testimonies of Mr B.I., who admitted initially to having hit Mr Gerasimov, several days later denied this, and during his last examination on 10 December 2003 acknowledged that he "might have" done it ... Furthermore, he stated initially that he had been stabbed by Mr Gerasimov, but later on explained that someone had "almost" stabbed him, the knife only cutting through his clothes ...

86. ... As discussed in the preceding paragraphs, the Court is not satisfied that the authorities carried out a thorough and objective investigation, as required under Article 2 of the Convention, because they failed to take available investigative measures and manifestly disregarded important evidence.

87. Moreover, the Court considers that the applicants, as the next of kin of Mr Gerasimov, could not participate effectively in the investigation into their relative's death, as also required under Article 2 of the Convention ... It already found that the hypothetical possibility for them to appeal against the Pernik regional public prosecutor's office's decision of 25 May 2004 did not amount to an effective remedy within the meaning of Article 35 § 1 of the Convention ... Accordingly, it does not consider that such an appeal would have given the applicants any meaningful opportunity to participate in the proceedings.

88. Nor does the Court consider that the applicants were given any other opportunity to participate and express their views. They could not request to be designated civil parties, because domestic law at the time did not provide for such a possibility, the case never having reached the trial stage ... Moreover, they did not participate in the procedure whereby the Pernik Regional Court approved the plea agreement between Mr B.I. and the prosecution, because the domestic court did not invite them to make submissions, as it was authorised to do ... In fact, the applicants' views were never sought and never taken into account by the domestic authorities. The applicants were not even formally informed of the outcome of the investigation and only found out about it later through publications in the media ...

89. To sum up, the Court considers that the investigation of Mr Gerasimov's death was not thorough, nor was it objective. Moreover, the applicants were not given any meaningful opportunity to participate in it. Therefore, the investigation into Mr Gerasimov's death carried out by the national authorities fell short of the requirements of Article 2 of the Convention ...

► ***Cobzaru v. Romania*, 48254/99, 26 July 2007**

88. ... Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to