in art.37(1) regarding striking out, and art.39(1) regarding friendly settlements.[611] Drawing on the case law under these Articles, the Court has identified a number of related factors as relevant to the requirement under art.33(3)(b), including whether the issue raised by the case is of general importance (for example, where there is a need to clarify the States' obligations under the Convention or to induce the respondent state to resolve a structural deficiency affecting other persons in the same position as the applicant)[612]; whether the Court has previously considered the issue raised in the application or an analogous issue;[613] and whether the issue is of only historic interest such as where an impugned law has subsequently been amended.[614] In *Duric v Serbia*[615] the Court held that, even if it had found the financial sum at stake not to constitute a significant disadvantage to the applicant, respect for human rights would have required the Court to consider the merits of the claim before it which concerned payment of the fees of police-appointed lawyer in a preliminary criminal investigation. The role of the lawyer was crucial to maintaining the functioning and fairness of the Serbian criminal justice system and it followed that issues closely related to the procedural status of such lawyers, including the payment of their fees without which their continued participation could not be relied on, could not be considered trivial, or something that does not deserve an examination on the merits.[616]

The second safeguard is that the ground must have been "duly considered" by a domestic tribunal. The purpose of this clause is to ensure that every case receives a judicial examination whether at the national level or at the European level, so as to avoid a denial of justice.[617] The Court observed in *Korolev* that the clause is consonant with the principle of subsidiarity, as reflected *inter alia* in art.13, which requires that an effective remedy against violations be available at the national level. Accordingly, where the applicant had no effective remedy at a domestic level art.35(3)(b) will be inapplicable.[618] Otherwise, the fact that the applicant had an opportunity to put his case in adversarial proceedings;[619] that he was able to avail himself of an appeal;[620] and that a decision is sufficiently reasoned so there is no appearance of arbitrariness[621] will be relevant factors as to whether a ground has been "duly considered" at the domestic level.

[611] See respectively, paras 1–109 and 1–106 below.

[612] *Korolev v Russia*; *Gaftoniuc v Romania* at paras 34–35; and for an example of this see *Finger v Bulgaria* App. no. 37346/05 (May 10, 2011) (potential systemic problem of unreasonable length of civil proceedings in Bulgaria and the alleged lack of effective remedies in that regard).

[613] *Fedetov v Moldova*, at para.22.

[614] *Ionascu v Romania* at para.39; *Fedetov v Moldova* at para.23.

[615] App. no. 48155/06 (June 7, 2011).

[616] Para.56.

[617] *Korolev v Russia*; *Fedetov v Moldova* at para.26.

[618] e.g. App nos 12977/09, 15856/09, 15890/09, 15892/09 and 16119/09 (November 23, 2010) (no effective remedy against excessive delay in civil proceedings).

[619] *Ionescu v Romania* at para.40.

[620] *Fedetov v Moldova* at para.26; *Burov v Moldova*, App. no. 38875/03 (June 14, 2011) at para.35.

[621] *Cavajda v Czech Republic* App. no. 17696/07 (March 21, 2011).

CHAPTER 2

PRINCIPLES OF INTERPRETATION

A. INTRODUCTION

I. The Vienna Convention on the Law of Treaties

The interpretation of the Convention is governed by the principles enunciated in arts 31 to 33 of the Vienna Convention on the Law of Treaties (May 23, 1969).[1] The "general rule" in art.31 of the Vienna Convention is that a treaty: **2–01**

> "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[2]

The context includes the preamble to the treaty and any other agreements which the parties have entered into which may be relevant to the interpretation of the treaty.[3] Whilst the "ordinary meaning" of words is to be adopted where this is consistent with the object and purpose of the Convention, a "special meaning" is to be given to a term if it established that the parties so intended.[4] Recourse may be had to supplementary means of interpretation, including the *travaux préparatoires*, only where the meaning is otherwise ambiguous, obscure or absurd.[5] The English and French texts of the Convention are to be treated as

[1] Art.4 of the Vienna Convention provides that the Vienna Convention does not have retrospective effect. It does not therefore strictly apply to to the European Convention on Human Rights (which was concluded in 1950). Nevertheless, in *Golder v United Kingdom* (1979–80) 1 E.H.R.R. 525 paras 29–30 the court accepted that the Vienna Convention provided the appropriate international law guidance for the determination of the scope and content of the European Convention. The Vienna Convention has been described as "not so much an innovation but rather a codification of previous practice" F. Matscher, "Methods of Interpretation of the Convention", in Macdonald R. St. J., Matscher F. & Petzold H., *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), p.65; for general discussion, see Brownlie I., *Principles of Public International Law* (6th edn, Oxford, 2003), Ch.27. For analysis of the status of the Human Rights Act 1998 as a statute incorporating a treaty into domestic law, see Fatima S., *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005), Ch.7.

[2] See art.31(1), Vienna Convention.

[3] Art.31(2) and (3).

[4] Art.31(4). This is the basis for the European Court of Human Rights adoption of an autonomous approach to the construction of certain Convention terms: see paras 2–43 to 2–45 below.

[5] Art.32.

equally authentic[6] and are presumed to have the same meaning.[7] In cases of divergence between the English and French versions, the meaning which best reconciles the two texts, having regard to the object and purpose of the treaty, is to prevail.[8] In *Golder v United Kingdom*[9] the Court observed that:

> "In the way in which it is presented in the 'general rule' in Article 31 of the Vienna Convention, the process of interpretation is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article".

2–02 This approach to interpretation leaves the Court a wide degree of latitude as to which of the elements of the "general rule" should be emphasised in a particular case. The Court will usually begin with a textual analysis, including (if necessary) a comparison between the English and French texts. However, the Court has sometimes been willing to interpret a provision in a way which is inconsistent with the "ordinary meaning" of the words, where this is necessary in order to give effect to the object and purpose of the Convention.[10]

II. Object and purpose

2–03 The principal object and purpose of the Convention is the protection of individual rights from infringement by the contracting states.[11] The Convention seeks to achieve this objective through the maintenance and promotion of "the ideals and values of a democratic society".[12] The Convention is "a constitutional instrument of European public order in the field of human rights".[13] It cannot therefore be interpreted merely as a reciprocal agreement between the contracting states. Rather, it creates:

> "a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a 'collective enforcement'."[14]

[6] Art.33(1). The last paragraph of the ECHR provides in terms that the French and English language versions are equally authentic.
[7] Art.33(3).
[8] Art.33(4).
[9] (1979–80) 1 E.H.R.R. 525 paras 29–30.
[10] Frequently, this technique is adopted in a manner designed to achieve more effective protection of human rights. On rare occasions, however, the court has adopted a similar approach in order to restrict Convention rights: see, for example, *Pretto v Italy* (1984) 6 E.H.R.R. 182 at para.26.
[11] *Austria v Italy* (1961) 4 Y.B. 116 at 138; *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25 at para.239.
[12] *Kjeldsen and others v Denmark* (1979–80) 1 E.H.R.R. 711 at para.53. These principles are reflected in the preamble to the Convention which speaks in terms of the "maintenance and further realisation of human rights and fundamental freedoms" on the basis of "an effective political democracy", and the primacy of "the rule of law".
[13] *Chrysostomos, Papachrysostomou and Loizidou v Turkey* (1991) 68 D.R. 216 at [242].
[14] *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25 at para.239; *Austria v Italy* (1961) 4 Y.B. 116 at [138]; *Chrysostomos, Papachrysostomou and Loizidou v Turkey* (1991) 68 D.R. 216 at [242].

2–04 Particularly important features of a democratic society, in the context of criminal cases, are "pluralism, tolerance and broadmindedness"[15] and the "rule of law".[16] The Court has emphasised that the protection of the right to life (in art.2 of the Convention), and the prohibition on torture and inhuman and degrading treatment (in art.3) together enshrine "one of the basic values of the democratic societies making up the Council of Europe".[17] Democratic values also involve a recognition of the importance of the rights of the defence in criminal proceedings, since the right to a fair trial "holds a prominent place in a democratic society".[18] The requirement in art.6(1) for an "independent and impartial" tribunal encompasses the principle of separation of powers in a democracy, and guarantees the independence of the courts from the executive,[19] the parties,[20] and the legislature.[21] Freedom of expression is "one of the essential foundations of a democratic society"[22] and access by the media to the courts is of particular importance in ensuring a fair and public trial[23] and in maintaining public confidence in the courts.[24]

2–05 It is important to distinguish between "democratic values" and the protection of majority sentiment. The duty to protect inalienable rights sometimes requires the Court to set standards, even where these do not meet with majority approval.[25] The Convention exists, at least in part, to protect the rights of unpopular groups and individuals. If the democratic process were always sufficient there would be no necessity for a code of legally enforceable minimum rights. The Court has therefore been careful to emphasise that:

> "although the interests of the individual must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[26]

[15] *Handyside v United Kingdom* (1979–80) 1 E.H.R.R. 737 at para.49; *Dudgeon v United Kingdom* (1981) 4 E.H.R.R. 149 at para.53.
[16] *Golder v United Kingdom* (1979–80) 1 E.H.R.R. 525 at para.34; *Klass v Germany* (1979–80) 2 E.H.R.R. 214 at para.55; *Iatrides v Greece* Judgment March 25, 1999 para.62.
[17] *McCann, Savage and Farrell v United Kingdom* (1996) 21 E.H.R.R. 97 at para.147 citing *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at para.88.
[18] *DeCubber v Belgium* (1985) 7 E.H.R.R. 236 at para.30; *Colozza v Italy* (1985) 7 E.H.R.R. 516 at para.32; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at para.113; *Van Mechelen v Netherlands* (1998) 25 E.H.R.R. 647 at para.58.
[19] *McGonnell v United Kingdom* (2000) 30 E.H.R.R. 289.
[20] *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165 at para.78.
[21] *Crociani and others v Italy* (1980) 22 D.R. 147; *Demicoli v Malta* (1992) 14 E.H.R.R. 47 Op. Comm. para.40.
[22] *Handyside v United Kingdom* (1979–80) 1 E.H.R.R. 737 at para.49; *Sunday Times v United Kingdom (No.1)* (1979–80) 2 E.H.R.R. 245 at para.65; *Lingens v Austria* (1986) 8 E.H.R.R. 407 at paras 41–42.
[23] *Axen v Germany* (1984) 6 E.H.R.R. 195 at para.25.
[24] *Hodgson, Woolf Productions and the NUJ v United Kingdom* (1988) 10 E.H.R.R. 503; *Worm v Austria* (1998) 25 E.H.R.R. 454 at para.50.
[25] In *Inze v Austria* (1988) 10 E.H.R.R. 394 at para.44 the court considered that support amongst the local population for measures discriminating against illegitimate children merely reflected "the traditional outlook".
[26] *Young, James and Webster v United Kingdom* (1981) 4 E.H.R.R. 38 at para.63.

Thus, the Court has consistently held that degrading forms of punishment cannot be justified on the ground that they have been in use for a long time or meet with general approval.[27] In *Tyrer v United Kingdom*[28] the Court held that judicial corporal punishment was in breach of art.3, despite the fact that a majority of the population of the Isle of Man favoured its retention. As the Court pointed out:

> "it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves".

Similarly, in *Handyside v United Kingdom*[29] the Court held that the right to freedom of expression extends to information and ideas that "offend, shock or disturb society or a section of it"; and in *Dudgeon v United Kingdom*[30] the Court found that criminal offences prohibiting consensual homosexual activity in private were in breach of art.8, despite the "strength of the view that it would be seriously damaging to the moral fabric of Northern Ireland" if such conduct were to be decriminalised.

2–06 References to the object and purpose of the Convention are not to be dismissed as mere statements of aspiration. Together they form the core guiding principles to the Convention's interpretation and application. In *Wemhoff v Germany*[31] the court observed that it is:

> "necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the objective of the treaty, and not that which would restrict to the greatest degree possible the obligations undertaken by the parties".

Similarly, in *Golder v United Kingdom*[32] the Court said that it would be "a mistake" to see the reference to the rule of law in the Preamble to the Convention as a "merely . . . rhetorical reference, devoid of significance for those interpreting the Convention". And in *Soering v United Kingdom*[33] the Court observed that:

> "In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."

B. THE COURT'S INTERPRETATIVE TECHNIQUES

2–07 In order to give effect to the object and purpose of the Convention, the Court has developed a series of interpretative techniques that differ significantly from the

[27] *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1; *Campbell and Cosans v United Kingdom* (1988) 4 E.H.R.R. 1 at para.29.
[28] (1978) 2 E.H.R.R. 1 at para.31.
[29] (1979–80) 1 E.H.R.R. 737.
[30] (1981) 4 E.H.R.R. 149.
[31] (1979–80) 1 E.H.R.R. 55 at para.8.
[32] (1979–80) 1 E.H.R.R. 525 at para.34.
[33] (1989) 11 E.H.R.R. 439 at para.87.

common law approach to legal reasoning. The remainder of this chapter examines the principal themes that emerge from the Court's caselaw.

I. Practical and Effective Interpretation

2–08 It is a general principle governing the interpretation of a law-making treaty[34] that:

> "particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words, and with other parts of the text, and in such a way that reason and a meaning can be attributed to every part of the text".[35]

Applying this principle, the Court has rejected a formalistic approach, holding that the Convention "is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective".[36]

2–09 The Convention is thus concerned with the substance of an individual's position rather than its formal classification, and Courts may need to "look behind appearances and examine the realities of the procedure in question".[37] One consequence of this approach is that compliance by the state with the letter of a Convention obligation will not necessarily be sufficient, if the protection afforded in practice has been substantially undermined. In *Artico v Italy*,[38] where the legal aid lawyer appointed to represent the applicant was shown to have been ineffective, the Court found a violation of art.6(3)(c). Noting that this provision guaranteed legal "assistance" rather than simply the "nomination" of a lawyer, the court pointed out that:

> "[M]ere nomination does not ensure effective assistance, since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting, or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations."[39]

[34] International law distinguishes between law-making treaties (*traités-loi*) and contractual treaties (*traités-contrats*). In a law-making treaty, such as the European Convention on Human Rights, the intention of the contracting parties is not simply to establish reciprocal undertakings, but to create objective rights with corresponding legal liabilities.
[35] Fitzmaurice G.G., *The Law and Procedure of the International Court of Justice*, (Grotius, Cambridge, 42–9 1986), p.345, cited in Merrils J.G., *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester, 1993), p.77. See also Jacobs and White, *The European Convention on Human Rights* (2nd edn, Oxford), p.35.
[36] *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330 at para.31; *Airey v Ireland* (1979–80) 2 E.H.R.R. 305 at para.24; *Artico v Italy* (1981) 3 E.H.R.R. 1 at para.33; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at para.87.
[37] See, amongst numerous other authorities, *Deweer v Belgium* (1979–80) 2 E.H.R.R. 439 at para.44; *Adolf v Austria* (1982) 4 E.H.R.R. 315 at para.30; *Welch v United Kingdom* (1995) 20 E.H.R.R. 247 at para.27.
[38] (1981) 3 E.H.R.R. 1 at para.33.
[39] See also *Goddi v Italy* (1984) 6 E.H.R.R. 457 at para.31 where the state was found in violation of art.6(3)(c) since the lawyer appointed to represent the applicant was unable properly to represent his client, who had absconded. The court held that in order to ensure effective legal assistance, the trial should have been adjourned.

Moreover, the Court held that it was not necessary for the applicant to establish that the shortcomings in legal representation had caused actual prejudice to his case. This would be "asking the impossible" since it could never be proved that effective representation would have secured the acquittal of an accused. The Court considered that an interpretation which introduced this requirement into art.6(3)(c) "would deprive it in large measure of its substance".[40] In *Campbell and Fell v United Kingdom*[41] the Court held that art.6(3)(c) implied not merely effective representation at the hearing itself, but an adequate opportunity for prior consultation.

2–10 *Minelli v Switzerland*[42] provides another example of practical and effective interpretation. In that case the Court was called upon to determine whether the presumption of innocence in art.6(2) applied to an application for an award of costs to an acquitted defendant. The government argued that the right to be presumed innocent applied only to the determination of a criminal charge, and not to proceedings subsequent to an acquittal. The court disagreed, holding that art.6(2) "governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge". The presumption of innocence would therefore be violated by a judicial pronouncement after acquittal reflecting an opinion that the accused was, in reality, guilty of the offence.

2–11 One of the most important illustrations of the effectiveness principle is the Court's recognition of the Convention's extra-territorial effect.[43] In its landmark decision in *Soering v United Kingdom*[44] the Court held that a decision to extradite an individual to a non-Convention state where there were substantial grounds for believing that he would be exposed to inhuman or degrading treatment contrary to art.3 would engage the responsibility of the state from which extradition was sought. The Court held that a decision to surrender an individual in such circumstances:

> "would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers".[45]

While an obligation to refuse co-operation was "not explicitly referred to in the brief and general wording of Article 3", a decision to surrender an individual to face such treatment "would plainly be contrary to the spirit and intendment of the Article". There was therefore an "inherent obligation not to extradite".[46] This principle has since been extended to a decision to deport a convicted drug trafficker after the expiry of his sentence.[47]

[40] Para.35.
[41] (1985) 7 E.H.R.R. 165 at para.99.
[42] (1983) 5 E.H.R.R. 554. See also *Leutscher v Netherlands* (1996) 24 E.H.R.R. 181.
[43] See para.1–174 for the extent to which art.1 jurisdiction extends beyond the territory of contracting states.
[44] (1989) 11 E.H.R.R. 439.
[45] Para.88.
[46] *Soering* at para.88.
[47] *D v United Kingdom* (1997) 24 E.H.R.R. 423. *Al-Sadoon and Mufdhi v United Kingdom*, App. no. 61498/08 (March 2, 2010).

2–12 In *Aydin v Turkey*[48] the Court held that where an individual made an allegation of torture or inhuman or degrading treatment, the state was under an obligation to carry out:

> "a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the complainant to the investigatory procedure".

The court has emphasised the same principle in the context of art.2:[49]

> "... the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention .... The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities."[50]

Most recently, the Court has held that the imperative to make the prohibition on slavery and forced labour in art.4 practical and effective necessitates certain positive obligations on contracting states to impose a sufficient spectrum of safeguards in national legislation to prohibit and punish the trafficking of human beings, saying:

> "The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking."[51]

II. Rights to be broadly construed/restrictions to be narrowly interpreted

2–13 The effectiveness principle has led the Court to hold that provisions of the Convention conferring rights are to be broadly and purposively construed, whilst those establishing exceptions and limitations must be restrictively interpreted. Further, art.18 of the Convention provides that the restrictions set out in the Convention "shall not be applied for any purpose other than those for which they have been prescribed." In *Gusinsky v Russia*, the Court held that there could be

[48] (1998) 25 E.H.R.R. 251 at para.103.
[49] See for example *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2, *Caciki v Turkey* (2001) 31 E.H.R.R. 133. The principle was applied in the domestic context in *R. (Amin) v Secretary of State for the Home Department* [2004] 1 A.C. 653.
[50] App. no. 55721/07 (July 7, 2011), at paras 162–163.
[51] *Rantsev v Cyprus and Russia* (2010) 28 B.H.R.C. 313, para.284. See also *Siliadin v France* (2005) 20 B.H.R.C. 654.

a violation of art.18 in conjunction with another article.[52] The application of the effectiveness principle is most apparent in relation to the qualified rights in arts 8 to 11. In its interpretation of these provisions the Court has consistently maintained that a generous construction is appropriate in determining the scope of the protected right set out in the first paragraph of each article.[53] In *Niemetz v Germany*,[54] for example, the court held that the concepts of a person's home and private life in art.8 included business premises and activities, on the ground that:

> "it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which an individual may live his own personal life as he chooses".

Similarly, in *Kokkinakis v Greece*[55] the right to freedom of thought, conscience and religion in art.9 was held to apply not only to recognised religious or ethical value systems but also to the conscientious beliefs of "atheists, agnostics, sceptics and the unconcerned".

2–14 However, when the Court turns to assess the purported justification for an interference with the protected right (under the second paragraph of each of these Articles) it has generally adopted the strict approach exemplified in *Klass v Germany*[56]:

> "The cardinal issue arising under Article 8 in the present case is whether the interference . . . is justified by the terms of paragraph 2 of the Article. This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted."

Applying this approach, the Court held that powers of secret surveillance:

> "are tolerable under the Convention only insofar as strictly necessary for safeguarding the democratic institutions".

Likewise, when determining whether an interference with freedom of expression under art.10(1) is justified by reference to the public interests identified in art.10(2), the Court has held that it is:

> "faced not with a choice between two conflicting principles but with the principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".[57]

[52] (2005) 41 E.H.R.R. 17, at paras 73–78. The Court found a violation of art.18 in conjunction with art.5, based on the fact that the applicant's liberty had been restricted not only for the legitimate purpose of bringing him before the competent legal authority, but also in order to intimidate him. These additional, illegitimate, purposes led to the violation of art.18.

[53] A possible exception to this is *Laskey and ors v United Kingdom* (1997) 24 E.H.R.R. 39, where the court doubted whether organised group sadomasochism was fully within the notion of private life.

[54] (1993) 16 E.H.R.R. 97 at paras 29 to 30.

[55] (1994) 17 E.H.R.R. 397.

[56] (1979–80) 2 E.H.R.R. 214 at para.42.

[57] *Sunday Times v United Kingdom* (1979–80) 2 E.H.R.R. 245 at para.65.

Whilst the application of this principle is most clearly seen in relation to arts 8 to 11, it has in fact been applied to all Convention rights.[58] Thus, the right to life in art.2 has been held to encompass both deliberate and unintentional loss of life.[59] Its provisions must be strictly construed and any deprivation of life must be subjected to the "most careful scrutiny".[60] In the context of the right to personal liberty in art.5, the Court has held that the exceptions set out in para.5(1)(a) to (f) provide an "exhaustive definition" of the circumstances in which a person may be deprived of his or her liberty and are to be given a narrow interpretation.[61] A wide interpretation: **2–15**

> "would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration".[62]

In *Cuilla v Italy*[63] the Court applied this approach in holding that the arrest and detention of a suspect pending an order for "preventive measures" fell outside the permitted exceptions in art.5(1), despite the acknowledged importance of the fight against organised crime in Italy.

The right to a fair trial in art.6 is also to be given a broad construction[64] since a restrictive interpretation "would not be consonant with the object and purpose of the provision".[65] Any restriction on the rights of the defence is to be scrutinised with special care, and departures from a truly adversarial procedure are to be kept to the minimum possible. In the leading case of *Van Mechelin v Netherlands*[66] the Court observed that: **2–16**

> "Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied."

[58] The prohibition on forced or compulsory labour in art.4(2) is an exception. The Court has held that the categories established in art.4(3) are not limitations on the right in art.4(2). Rather, they delimit the content of that right and therefore aid its interpretation: *Schmidt v Germany* (1994) 18 E.H.R.R. 513; *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163; recently reiterated by the Grand Chamber in *Stummer v Austria*, App. no. 37452/02 (July 7, 2011) at para.120. It would seem to follow that art.4(2) does not necessarily prohibit all forms of compulsory labour which are outside the examples set out in art.4(3).

[59] *Stewart v United Kingdom* (1985) 7 E.H.R.R. 453; *Oneryildiz v Turkey* (2005) 41 E.H.R.R. 20.

[60] *McCann, Savage and Farrell v United Kingdom* (1996) 21 E.H.R.R. 97 at paras 147–150.

[61] *Winterwerp v Netherlands* (1979–80) 2 E.H.R.R. 387 at para.37.

[62] *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647 at para.69.

[63] (1991) 13 E.H.R.R. 346 at para.41.

[64] *Moreiva de Azvedo v Portugal* (1992) 13 E.H.R.R. 731 at para.66; *Delcourt v Belgium* (1979–80) 1 E.H.R.R. 355.

[65] *De Cubber v Belgium* (1985) 7 E.H.R.R. 236 at para.30.

[66] (1998) 25 E.H.R.R. 647 at para.59. See now also (2009) 26 B.H.R.C. 1 at para.205 (" . . . there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities").

III. Permissible limitations must not impair the essence of a Convention right

2–17 Another aspect of the doctrine of practical and effective interpretation is the principle that limitations and conditions imposed on the exercise of a Convention right must not impair its very existence or deprive it of its effectiveness.[67] In *Fox, Campbell and Hartley v United Kingdom*[68] the government argued that a power of detention which was exercisable on the ground of "genuine suspicion" was sufficient to meet the requirements of art.5(1)(c) which permits arrest or detention on "*reasonable* suspicion" of the commission of an offence. The Court held that the difficulties associated with policing terrorist crime, including the need to protect informers:

> "cannot justify stretching the notion of 'reasonableness' to the point where the essence of the right secured by Article 5(1)(c) is impaired".

In *Golder v United Kingdom*[69] the government sought to argue that art.8, which protects (amongst other things) the right to respect for a person's correspondence, applied only to state interference with existing correspondence rights, and did not therefore restrict the state's right to control or prohibit correspondence to and from prisoners. Not surprisingly, the Court rejected this argument, holding that:

> "it would be placing an undue and formalistic restriction on the concept of interference with correspondence not to regard it as covering the case of correspondence which has not yet taken place, only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed".

IV. Evolutive interpretation

2–18 The Convention has been described as a "living instrument which must be interpreted in the light of present day conditions".[70] It calls for an evolutive and dynamic approach to its interpretation rather than a static and historical one. The concepts used in the Convention are therefore to be understood in the context of the democratic societies of modern Europe, and not according to the conceptions of 50 years ago when the Convention was drafted.[71] As Lord Hope pointed out in *R. v Director of Public Prosecutions ex parte Kebilene*[72] "the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules".

[67] *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 E.H.R.R. 1 at para.52; *Ashingdane v United Kingdom* (1985) 7 E.H.R.R. 528 at para.57. *Winterwerp v Netherlands* (1979–80) 2 E.H.R.R. 387 at para.60; *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329 at para.194; *Philis v Greece* (1991) 13 E.H.R.R. 741 at para.59.

[68] (1991) 13 E.H.R.R. 157 at para.32.

[69] (1979–80) 1 E.H.R.R. 525.

[70] *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1 at para.31; *Airey v Ireland* (1979–80) 2 E.H.R.R. 305 at para.26.

[71] It is for this reason that the *travaux préparatoires* are of only marginal relevance in the interpretation of the Convention.

[72] [1999] 3 W.L.R. 972.

Whilst evolutive interpretation has an important role to play in ensuring that **2–19** rights remain relevant, a court applying the Convention cannot, through the process of interpretation, create wholly new obligations which the contracting parties have not undertaken. In particular, evolutive interpretation is constrained by other principles of interpretation, such as the ordinary meaning of the articles of the Convention. Thus in *Bankovic and ors v Belgium*,[73] the Court, while not ruling out the application of this interpretative principle to art.1 of the Convention, which determines the scope and reach of the entire convention system of human rights, found the meaning of art.1 to be restricted by a clear indication in the ordinary meaning of the wording of art.1, which was confirmed by the preparatory materials.

However, the special character of the Convention means that even a clear textual limitation may eventually be removed by an emergent evolutive consensus, as illustrated by the evolving European consensus on the death penalty. In *Soering v United Kingdom*[74] the Court rejected the submission of Amnesty International that:

> "evolving standards in Western Europe regarding the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3".

The Court noted that art.3 could not have been intended by the drafters of the Convention to include a general prohibition on the death penalty since the death penalty was expressly permitted by the wording of art.2. Noting that the death penalty in peacetime had in fact been abolished by all contracting states, the Court observed that such subsequent practice in national penal policy could in principle be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under art.2(1) and hence remove a textual limit on the scope for evolutive interpretation of art.3. However, the Court was of the view that the opening for signature of Protocol 6, which abolished capital punishment in peacetime, indicated an intention of the Contracting Parties to adopt the normal method of amendment of the text, allowing each State to choose the moment when it would undertake this step.

Ocalan v Turkey[75], faced with a considerable evolution in state practice since *Soering*, the Grand Chamber (agreeing with the judgment of the Court) considered—but did not find it necessary to decide—that this could now be taken as signalling the agreement of the contracting states to abrogate, or at the very least to modify, art.2(1) in the way rejected in *Soering*. This was not necessarily undermined by the opening of signature of Protocol 13, which abolished the death penalty in times of war. However, it considered that the fact that there were still a large number of states yet to sign or ratify Protocol 13 meant that there remained a limitation on the development of the interpretation of art.3, which:

> " . . . may prevent the court from finding that it is the established practice of the contracting states to regard the implementation of the death penalty as inhuman and degrading treatment contrary to art 3 of the convention, since no derogation may be made from that provision, even in times of war."[76]

[73] (2001) 11 B.H.R.C. 435 at paras 65–66.

[74] (1989) 11 E.H.R.R. 439.

[75] (2005) 18 B.H.R.C. 293.

[76] Para.165.

In *Al-Sadoon and Mufdhi v United Kingdom*[77] the Court took the final step towards finding the death penalty to be contrary to both arts 2 and 3 under all circumstances, holding the textual bar to this evolutive interpretation of the Convention to have been removed by a further development in state practice since its decision in *Oscalan*:

> "All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (cf. *Soering*, cited above, §§ 102–104)."[78]

2–20 In *Cruz Varas v Sweden*[79] the court held that in the absence of a specific provision in the Convention enabling the court to make a legally binding order for interim relief, a failure by a state to comply with a request for interim measures could not be regarded as an interference with the right of individual petition. Despite the history of almost invariable compliance with such requests, the Court could not "create new rights and obligations which were not included in the Convention at the outset". However, in *Mamatkulov and Askarov v Turkey*,[80] the Grand Chamber, upholding the decision of the Chamber,[81] held that in light of developments in international law and the fact that, following the implementation of Protocol 11 the right of individual petition was no longer optional, it was now implicit in art.34 that contracting states were required to comply with r.39 indications and to refrain from any act or omission which might prejudice the integrity and effectiveness of the Court's final judgment.[82] The application of the evolutive approach in practice can be controversial. In *Scoppola v Italy No. 2*,[83] the minority of the Grand Chamber were of the view that the majority's evolutive interpretation of art.7 of the Convention, finding the principle of retrospectivity to implicitly guarantee that subsequent more lenient criminal law would be applied against a defendant, amounted to an impermissible re-writing of the Convention, saying:

> " . . . the majority has gone on to examine the case under Article 7 § 1 and, in order to apply it, has had it re-written in order to accord with what they consider it ought to have been. This, with respect, oversteps the limits."[84]

2–21 Evolutive interpretation thus requires the Court to strike a careful balance, which recognises that it is not the task of the interpreter to change the content of a norm

[77] App. no. 61498/08 (March 2, 2010).
[78] Para.121.
[79] (1992) 14 E.H.R.R. 1 see paras 1–33 to 1–38 above.
[80] (2005) 41 E.H.R.R. 25.
[81] 14 B.H.R.C. 149.
[82] The obligation not to hinder the right of individual petition was also emphasised by the court in *Poleshchuk v Russia* (2006) 42 E.H.R.R. 35, paras 27–31 (refusal to allow imprisoned applicant to post his application to the court, and pressure on him not to pursue his application).
[83] App. no. 10249/03 (September 17, 2009).
[84] Partly dissenting opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jociene, Villiger and Sajo.

established in the Convention, whilst at the same time acknowledging that if the content of a norm "has undergone a change in social reality, the interpreter must take account of this".[85] As a former President of the Court has put it[86]:

> "Human rights treaties must be interpreted in an objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when the treaties were drafted retain hardly any continuing validity. Nevertheless, treaty interpretation must not amount to treaty revision. Interpretation must therefore respect the text of the treaty concerned."

The Court must, in the end, make a judgment as to whether a new social or legal standard has achieved sufficiently wide acceptance to affect the interpretation and application of the Convention. In making this judgment a consideration of comparative law and practice within Europe and elsewhere may be relevant, as may other international agreements which the contracting parties (or the majority of them) have concluded.

2–22 Many Convention concepts are obviously rooted in the current legal and social standards of the contracting states. The requirements of the "protection of morals", for example, or the question of whether an interference with a Convention right is "necessary in a democratic society" can only be judged according to contemporary standards, and the court has been particularly willing to adopt an evolutive approach to such questions. Thus, in *Dudgeon v United Kingdom*[87] the Court observed that:

> "As compared with an era when [the legislation] was enacted there in now a better understanding and, in consequence, an increased tolerance of homosexual behaviour to the extent that it is no longer considered to be necessary or appropriate to treat homosexual practices [between consenting adults in private] as in themselves a matter to which the sanctions of the criminal law should be applied. The Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states."

2–23 *Dudgeon* was concerned with the position of gay men over the age of 21. It took a further 15 years before the Convention organs came to accept that the same principle should apply to those aged over 16. In *Sutherland v United Kingdom*[88] the Commission overturned its previous caselaw,[89] holding that the potential application of the offence of gross indecency to consensual sexual activity between 16 and 17 year old males was in breach of arts 8 and 14. In coming to the conclusion that a differential age of consent for gay men could no longer be justified, the Commission referred to "major changes" which had occurred in professional opinion on the need to protect young gay men and the desirability of an equal age of consent. The Commission considered that it was:

[85] Sereni *Diritto Internazionale* 1 (1956), p.182 cited in Matscher F., "Methods of Interpretation of the Convention" in Macdonald R. St. J., Matscher F. and Petzold H., *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), p.70.
[86] Bernhardt R., *The European Dimension: Studies in Honour of Gérard J. Wiarda* (Koln, 1988), p.65 at p.71.
[87] (1982) 4 E.H.R.R. 149 at para.60.
[88] (1997) 24 E.H.R.R. CD 22.
[89] *X v United Kingdom* (1980) 19 D.R. 66.

"opportune to reconsider its earlier case law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young gay men without any corresponding harmful consequences".

In *L and V v Austria*[90] the court again drew on what it considered to be a growing European consensus in holding that the imposition of a higher age of consent for gay sex breached art.14 when read with art.8. In *Smith and Grady v United Kingdom*[91] the Court considered the ban on homosexuals in the army, which the Government sought to justify in part with reference to the prejudices of members of the armed forces. The Court held that such negative prejudices could not amount to a justification for the intereference with the applicants' rights. However, in *Schalk and Kopf v Austria*,[92] the Court found that, while the institution of marriage had undergone major social changes, there was no European consensus regarding same sex marriage such that the right to marry in art.12 could not be interpreted evolutively to extend to same sex couples.

2–24 This requirement for a dynamic interpretation is not, however, confined to the qualified rights in arts 8 to 11. It applies generally, and governs the interpretation of all aspects of the Convention. In *Tyrer v United Kingdom*[93] the Court held that judicial birching was in breach of art.3, saying that it:

"could not but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe".

In the Court's view it was the standards which were currently prevalent which were decisive of the issue, and not those which were prevalent when the Convention was adopted: art.3 embodied the *concept* of inhuman and degrading punishment and not the particular *conception* which may have been held in 1950.

2–25 Similarly in *Winterwerp v Netherlands*[94] the Court found that the term "person of unsound mind" in art.5(1)(e) was:

"[A] term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing, and society's attitude to mental illness changes, in particular so that greater understanding of the problems of mental patients is becoming more widespread."

And in *Borgers v Belgium*[95] the Court held that the requirements of a fair trial in art.6 had undergone a "considerable evolution" in the Court's caselaw, particularly as regards the importance attached to the appearance of fairness, and the increased sensitivity of the public to the fair administration of justice.

[90] (2003) 36 E.H.R.R. 55.
[91] (2000) 29 E.H.R.R. 493.
[92] App. no. 30141/04 (June 24, 2010), at para.58.
[93] (1979–80) 2 E.H.R.R. 1 at para.31.
[94] (1982) 4 E.H.R.R. 228.
[95] (1993) 15 E.H.R.R. 92.

2–26 The inevitable consequence of this approach is that the strict doctrine of precedent does not apply to decisions of the European Court and Commission of Human Rights. Older Convention caselaw must be approached with this principle in mind. Where there is some evidence that standards may be in transition, the Court may be willing to reconsider its own decisions at relatively frequent intervals, and sometimes even calls for a particular situation to be kept under review. In *Rees v United Kingdom*,[96] for example, the court rejected a complaint under art.8 brought by a transsexual who had been denied the right to a change of legal status. Nevertheless the Court said that it was "conscious of the seriousness of the problems affecting these persons and the distress they suffer", and continued:

"The Convention has always to be interpreted in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review, having regard particularly to the scientific and societal developments".

In the subsequent cases of *Cossey v United Kingdom*[97] and *Sheffield and Horsham v United Kingdom*[98] the Court adhered to its earlier decision in *Rees*, but by a diminishing majority in each case. In the *Sheffield* case, the finding of no violation was by a majority of only 11 to nine, and the court openly criticised the United Kingdom for its failure to carry out a review of the need to maintain the existing arrangements. Whilst voting with the majority "after much hesitation" the British judge, Sir John Freeland, suggested that further inaction by the United Kingdom "could well tilt the balance in the other direction". The balance finally changed in the case of *Goodwin v United Kingdom*,[99] where the Court took note of the continuing international trend in favour of legal recognition of the new sexual identity of post-operative transsexuals (even though there could not yet be said to be a European consensus on the issue) and found that the United Kingdom had breached art.8 by refusing to accord such legal recognition.

2–27 The Court's evolutive approach to interpretation does not, however, mean that the parties can simply ignore a previous decision of the Court or Commission which has been reached after hearing full argument. The Court has made clear that the interests of legal certainty, foreseeability and equality before the law require that it only depart from its own precedents for a cogent reason.[100] There is accordingly, in practice, a heavy onus on an applicant seeking to persuade the Court to depart from a recent decision. In *Wynne v United Kingdom*,[101] a case concerning the rights of a mandatory life sentence prisoner, the Court suggested that it would require "cogent reasons" to depart from the conclusion that it had reached on the nature of the mandatory life sentence three years earlier in *Thynne, Wilson and Gunnell v United Kingdom*.[102] However, in *Stafford v United*

[96] (1987) 9 E.H.R.R. 56.
[97] (1991) 13 E.H.R.R. 622.
[98] (1999) 27 E.H.R.R. 163.
[99] (2002) 35 E.H.R.R. 18. See also *Van Kuck v Germany* (2003) 37 E.H.R.R. 51.
[100] *Mamatkulov and Askarov v Turkey* (2005) 41 E.H.R.R. 25 at para.121; *Scoppola v Italy (No. 2)*, App. no. 10249/03 (September 17, 2009) at para.104; *Bayatyan v Armenia*, App. no. 23459/03 (July 7, 2011) at para.98.
[101] (1995) 19 E.H.R.R. 333 at para.36.
[102] (1991) 13 E.H.R.R. 666.

Kingdom[103] the Court accepted that, while it would not depart from previous decisions "without cogent reason",[104] since:

> "the Convention is first and foremost a system for the protection of human rights, the Court must . . . have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[105]

The Court considered that there had been "significant developments in the domestic sphere"[106] relating to the judicialisation of the life sentence, and concluded that:

> "the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner."[107]

The Court departed from previous caselaw that read art.9 of the Convention together with art.4(3)(b) (which excludes compulsory military or other service, in the case of countries where consciencious objectors are recognised, from the scope of the prohibition on forced labour), so as to exclude from the scope of the right to freedom of conscience conscientious objection to compulsory service. The departure was justified on the basis of an obvious trend among European countries to recognise the right to conscientious objection, and other international developments.[108] In *Scoppola v Italy No. 2*,[109] the majority of the Grand Chamber departed from previous case law on art.7 of the Convention and found the principle of retrospectivity to contain an implicit guarantee that more lenient criminal law would be applied against a defendant even if enacted subsequently to the commission of the offence. The Court noted that a long time had elapsed since a previous Commission decision to the contrary and that during that time there had been important international developments, demonstrating that this had become a fundamental principle of criminal law.

V. Practice in other jurisdictions

2–28 The Court has observed that the main purpose of the Convention is:

> "to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction".[110]

[103] (2002) 35 E.H.R.R. 32.
[104] Para.71.
[105] Para.68.
[106] Para.69.
[107] Para.79.
[108] Paras 100–109.
[109] App. no. 10249/03 (September 17, 2009), paras 104–109.
[110] *Belgian Linguistics Case (No.1)* (1979–80) 1 E.H.R.R. 241 at 250 para.[e].

Thus, the Court has consistently held that the existence of a "generally shared approach" in other contracting states is relevant to the application of the Convention[111] although "absolute uniformity" is not required.[112] The Court has no systematic means of establishing the comparative law position on a particular issue, even within the Council of Europe. It relies on the collective experience of the judges of the Court, on the research of the parties, and on any *amicus* interventions[113] for its information.

2–29 As we have seen, the Court was heavily influenced by commonly accepted European standards in *Tyrer v United Kingdom*[114] and *Dudgeon v United Kingdom*.[115] On the other hand, when considering the length of a criminal sentence the Commission has held that "the mere fact that an offence is punished more severely in one country than in another does not suffice to establish that the punishment is inhuman or degrading".[116] And in *T and V v United Kingdom*[117] the Court referred to the absence of a European consensus on the age of criminal responsibility in concluding that the prosecution of two boys for a murder committed when they were 10 was compatible with art.3 of the Convention. In *Vo v France*[118] the court noted the lack of any European consensus on the issue of when a foetus becomes a "person" for the purposes of the right to life in art.2 of the Convention.[119] European consensus regarding same-sex marriage impose an obligation on the respondent Government to grant a same-sex couple like access to marriage as heterosexual couples.[120]

2–30 When called upon to determine whether an interference with freedom of expression is justified under the protection of morals exception in art.10(2), the Court has often stressed that "it is not possible to find in the legal and social orders of the contracting states a uniform European conception of morals".[121] Thus, in *Handyside v United Kingdom*,[122] the Court attached little significance to the fact that the book to which the applicant's conviction related had been distributed elsewhere in Europe without attracting prosecution. Similarly, in *Wingrove v United Kingdom*[123] where the applicant's complaint under art.10 related to the English offence of blasphemy, the Court observed that:

[111] *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330 para.41; *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1 para.31; *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 para.60; *X, Y and Z v United Kingdom* (1997) 24 E.H.R.R. 143 para.52.
[112] *Sunday Times v United Kingdom (No.1)* (1979–80) 2 E.H.R.R. 245 para.61; *Muller v Switzerland* (1991) 13 E.H.R.R. 212 para.35; *Wingrove v United Kingdom* (1996) 24 E.H.R.R. 1 para.58; *F v Switzerland* (1988) 10 E.H.R.R. 411 para.33. *Monnell and Morris v United Kingdom* (1987) 10 E.H.R.R. 205 para.47.
[113] See para.1–151 above.
[114] (1978) 2 E.H.R.R. 1.
[115] (1982) 4 E.H.R.R. 149.
[116] *C v Germany* (1986) 46 D.R. 176.
[117] (2000) 30 E.H.R.R. 121, paras 73–74.
[118] (2005) 40 E.H.R.R. 12.
[119] Para.82. Reaffirmed in *A, B and C v Ireland* App. no. 25579/05 (December 16, 2010), at para.223.
[120] App. no. 30141/04 (June 24, 2010), at para.58.
[121] *Muller v Switzerland* (1991) 13 E.H.R.R. 212 para.35; *Handyside v United Kingdom* (1979–80) 1 E.H.R.R. 737.
[122] (1979–80) 1 E.H.R.R. 737.
[123] (1997) 24 E.H.R.R. 1 at para.58.

"[T]here is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations."

2–31 The Court's reference to comparative practice in *Monnell and Morris v United Kingdom*[124] was unusual. The applicants complained that a "loss of time" order under s.29(1) of the Criminal Appeal Act 1968[125] was in violation of art.5. In concluding that such an order was compatible with art.5(1)(a) the Court noted that:

"[U]nder the law of many of the Convention countries detention pending a criminal appeal is treated as detention on remand and a convicted person does not start to serve his or her sentence until the conviction has become final. In such systems, the appellate court itself determines the sentence and, in some of them, exercises a discretion in deciding whether or to what extent detention pending appeal shall be deducted from the sentence."

2–32 Finally, it should be borne in mind that the Court's consideration of comparative practice is not necessarily confined to European jurisdictions. In *Chahal v United Kingdom*[126] the Court relied on the practice adopted in Canada for resolving national security cases as illustrating that:

"there are techniques which can be employed which both accommodate legitimate security concerns . . . and yet afford the individual a substantial measure of procedural justice".[127]

"Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of art 3 of the convention sought to proscribe or, as it was so well put in the US Supreme Court's judgment in *Rochin v California* (1952) 342 US 165 (see para 50, above), to 'afford brutality the cloak of law'".[128]

VI. Ordinary meaning

2–33 In interpreting a provision of the Convention, the Court will seek to ascertain the ordinary meaning of a word insofar as this accords with the context of the provision and the object and purpose of the Convention.[129] In determining the ordinary meaning of a term, regard should be had to the French and English texts of the Convention, both of which are equally authentic.[130] On occasions, the Court has

[124] (1988) 10 E.H.R.R. 205 at para.47.
[125] Under s.29(1) the Court of Appeal may, if it considers that an appeal is without merit, direct that time served between the imposition of the sentence and the disposal of the appeal should not count towards the accused person's sentence. As to the circumstances in which such an order may be made see *Practice Direction (Crime: Sentence: Loss of Time)* [1980] 1 W.L.R. 270.
[126] (1997) 23 E.H.R.R. 413 at para.131.
[127] App. no. 54810/00 (July 11, 2006).
[128] Para.105. App. 22978/05 (June 1, 2010). Paras 73–74. In particular, para.174.
[129] *Johnson v Ireland* (1987) 9 E.H.R.R. 203 at para.51. *Luedicke, Belkacem and Koc v Germany* (1979–80) 2 E.H.R.R. 149 at para.40.
[130] *Luedicke, Belkacem and Koc v Germany* (1979–80) 2 E.H.R.R. 149 at para.40.

resorted to dictionary definitions. In *Luedicke, Belkacem and Koc v Germany*[131] the Court was concerned with the meaning of art.6(3)(e) of the Convention, which provides that an accused person is to be provided with "the free assistance of an interpreter". The German government argued that when viewed in its context this provision allowed for the costs of an interpreter to be reclaimed from a convicted defendant. The Court held that:

"the ordinary meaning of the terms '*gratuiment*' and 'free' in Article 6(3)(c) of the Convention [was] not contradicted by the context of the sub-paragraph, and [was] confirmed by the object and purpose of Article 6".

These terms denoted:

"neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration".

2–34 In the event of a conflict between the ordinary meaning of a provision and the clear object and purpose of the Convention, the latter will generally prevail. In *Wemhoff v Germany*[132] the Court was called upon to interpret art.5(3), which provides that an accused is "entitled to trial within a reasonable time *or* to release pending trial". As the Court observed, a "purely grammatical" construction would leave the authorities with a choice between two obligations—that of conducting the proceedings within a reasonable time, or that of releasing an accused pending trial. The Court was:

" . . . quite certain that such an interpretation would not conform to the intention of the High Contracting Parties. It is inconceivable that they should have intended to permit their judicial authorities, at the price of release of the accused, to protract proceedings beyond a reasonable time."

As a result, art.5(3) is to be read as if the word "or" is replaced by the word "and".

2–35 A similar approach is evident in relation to art.6(3)(c), which provides that the accused has the right:

"to defend himself in person *or* through legal assistance of his own choosing *or*, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

Here again, the wording of the English text of art.6(3)(c) suggests that the right to free legal representation is an alternative to the right of an accused person to represent himself. However, in *Pakelli v Germany*[133] the Court preferred to follow the French text, which links the rights contained in art.6(3)(c) by the word "*et*", on the basis that this would result in a more faithful reflection of the underlying aims of art.6. Accordingly, the Court held that art.6(3)(c) guarantees three related but independent rights:

[131] (1979–80) 2 E.H.R.R. 149 at para.40.
[132] (1979–80) 1 E.H.R.R. 55 at paras 4–5.
[133] (1984) 6 E.H.R.R. 1.

"Having regard to the object and purpose of this Article, which is designed to secure effective protection of the rights of the defence . . . a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require."[134]

2–36 A second issue which arose in the *Wemhoff*[135] case was whether the period to be considered in connection with the right to "trial within a reasonable time" in art.5(3) came to an end when the accused was first produced before the trial court, or continued until the trial court's judgment was delivered. The Court noted that the English text permitted either interpretation, but the use of the word "*jugée*" in the French text allowed for only one meaning, namely that the period to be considered continued until the judgment terminating the trial:

"Thus confronted with two versions of a treaty which are equally authentic but not exactly the same, the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest degree possible the obligations undertaken by the Parties. It is impossible to see why the protection against unduly long detention on remand, which Article 5 seeks to ensure for persons suspected of offences, should not continue up to the delivery of judgment rather than cease at the moment the trial opens."[136]

2–37 A similar problem arose in *Brogan v United Kingdom*[137] in connection with the permissible interval between a person's arrest and first appearance in court. There, the court was faced with a difference between the word "promptly" in the English text of art.5(3) and the word "*aussitot*" in the French text (which literally means immediately). The Court held that:

"the use in the French text of the word '*aussitot*', with its constraining connotation of immediacy, confirm[ed] that the degree of flexibility attaching to the notion of 'promptness' [was] limited".

As a result, a delay of four days and six hours was found to exceed the time permitted under art.5(3).

[134] At para.31. Note, however, that in *X v Austria* (App. no.1242/61) the Commission observed that;"While [Article 6(3)(c)] guarantees the right to an accused person that proceedings against him will not take place without an adequate representation of the case for the defence, [it] does not give an accused person the right to decide for himself in what manner his defence should be assured . . . the decision as to which of the two alternatives should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, rests with the competent authorities concerned."

[135] (1979–80) 1 E.H.R.R. 55.

[136] Note that the right to the determination of a criminal charge within a reasonable time in art.6(1) of the Convention has been interpreted as including the time taken for the final determination of any appeal: *Neumeister v Austria (No.1)* (1979–80) 1 E.H.R.R. 91 at para.19; *Wemhoff v Germany* (1979–80) 1 E.H.R.R. 55; *Konig v Germany (No.1)* (1979–80) 2 E.H.R.R. 170 at para.98; *Eckle v Germany* (1983) 5 E.H.R.R. 1 at para.76.

[137] (1989) 11 E.H.R.R. 117 at para.59.

2–38 In the *Belgian Linguistics Case (No.2)*[138] the Court was concerned with the scope of the prohibition on discrimination in art.14. The English text guarantees the delivery of Convention rights "without discrimination", whereas the French text uses the much stricter term "*sans distinction aucune*". The Court considered that:

"one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply".

2–39 A final example is provided by the case of *Jespers v Belgium*[139] where the Commission observed, in connection with art.6(3)(c), that:

" . . . the word 'facilities' (French 'facilités') is qualified by the adjective 'adequate' (French 'nécessaire'). Despite the slight difference in meaning between the adjective in the French text and the one in the English text it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence."

2–40 Where one language version uses a particular word or phrase throughout the Convention, whilst the other version includes slight differences, the likelihood is that the differences have no significance. The French text, for example, uses the term "*prévues par la loi*" throughout arts 8 to 11, as well as in art.1 of Protocol 1. The English text, on the other hand, uses the term "in accordance with the law" in art.8, "prescribed by law" in Arts 9 to 11 and "provided for by law" in art.1 of Protocol 1. The Court has attached no significance to the different versions of the English text.[140]

VII. Travaux Préparatoires

2–41 Recourse to *travaux préparatoires*[141] is classed as a supplementary means of interpretation under art.32 of the Vienna Convention on the Law of Treaties. It may be deployed only in order to confirm the meaning of a provision as established in accordance with art.31,[142] or where the application of the principles in art.31 leaves the meaning ambiguous, obscure or absurd. This restriction is especially appropriate to the European Convention on Human Rights, in view of the Court's evolutive approach to interpretation.[143] Whilst the *travaux préparatoires* may have a certain relevance in determining the object and purpose of the Convention, they cannot be used as a primary aid to the construction of particular provisions. Thus, in *Lawless v Ireland*[144] the Court observed that:

[138] (1979–80) 1 E.H.R.R. 252 at 284, para.10.

[139] (1981) 27 D.R. 61 at para.57.

[140] *Sunday Times v United Kingdom (No.1)* (1979–80) 2 E.H.R.R. 245 at para.48. (The Court referred, in this connection, to art.33(4) of the Vienna Convention.)

[141] See *Collected Edition of the Travaux Préparatiores of the European Convention on Human Rights*.

[142] See para.2–01 above.

[143] See paras 2–18 to 2–27 above.

[144] (1979–80) 1 E.H.R.R. 15 at para.14.

recognition by the authorities of the length of time already spent in detention and the need to take additional steps to bring about a more speedy trial . . . "

G. COMPENSATION

8–146 Article 5(5) guarantees the enforceable right to compensation for everyone who has been the victim of arrest or detention in contravention of art.5. For example, in *Caballero v. United Kingdom*[383] concerning the automatic refusal of bail in breach of art.5(3), where the court considered that the applicant would otherwise have had a good chance of being released on bail prior to his trial, and in which the period of detention pending trial was nine months, the European Court awarded non-pecuniary compensation of £1,000, which it said it had arrived at "on an equitable basis". However, it is also relevant to note that the ultimate disposal of the case will have a profound effect upon the appropriate measure of damages. Here, the applicant was subsequently sentenced to life imprisonment and the trial court deducted the period of his pre-trial detention from the sentence imposed. In *SBC v United Kingdom*,[384] the Court refused to speculate on whether or not the applicant would have been granted bail had a proper hearing taken place. Absent such a finding, there existed no causal link between the art.5(3) violation and pecuniary loss (salary).

8–147 A decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" for the purposes of art.34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention.[385] That remains the case notwithstanding that the length of the applicant's detention pending trial is taken into account in calculating the amount of reparation, so long as there is no acknowledgment in the judgment concerned, either express or implied, that it had been excessive under art.5(3).[386]

[383] (2000) 30 E.H.R.R. 643.
[384] (2002) 34 E.H.R.R. 21.
[385] *Amuur v France* (1996) 22 E.H.R.R. 533, para.36. Cf. *Michalak v Slovakia* (2011) ECHR App. 30157/03, February 8, paras 125–132.
[386] *Labita v Italy* (2008) 46 E.H.R.R. 50, GC, para.143; *Lebedev v Russia* (2008) 47 E.H.R.R. 34; *Molodorych v Ukraine* (2010) ECHR App. 2161/02, October 28, para.76.

CHAPTER 9

ISSUES IN PRE-TRIAL PROCEDURE

A. LEGAL REPRESENTATION AND RELATED MATTERS

I. Introduction

9–01 Article 6(3)(c) guarantees the right of a defendant in criminal proceedings "to defend himself in person, or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". The purpose of this provision is to secure "equality of arms" so as "to place the accused in a position to put his case in such a way that he is not at a disadvantage vis-à-vis the prosecution."[1] We have already seen[2] that denial of access to a solicitor during police detention may violate art.6(3)(c) in conjunction with art.6(1), particularly if adverse inferences are subsequently drawn from a defendant's failure to answer questions in an interview.[3] In this section, we examine the right to legal representation more generally, including the imposition of mandatory representation requirements, issues surrounding the appointment and dismissal of counsel, the standard of representation and the adequacy of the time allowed for preparation of the defence case, legal professional privilege and the right to legal aid in criminal proceedings.

II. Mandatory representation

9–02 Subject to the requirement to provide legal aid in appropriate cases[4] it is, in the first place, for the national authorities to determine whether the accused should have the right to defend himself in person, or through a lawyer. In *X v Austria*[5] the Commission observed that:

[1] *X v FRG* (1984) 8 E.H.R.R. 225; *Bonisch v Austria* (1987) 9 E.H.R.R. 191.
[2] See para.5–58 above.
[3] *Murray v United Kingdom* (1996) 22 E.H.R.R. 29.
[4] See paras 9–29 to 9–38 below.
[5] Application No.1242/61.

"While [Article 6(3)(c)] guarantees to an accused person that proceedings against him will not take place without an adequate representation of the case for the defence, [it] does not give an accused person the right to decide for himself in what manner his defence should be assured . . . [T]he decision as to which of the two alternatives should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, rests with the competent authorities concerned."

9–03 Thus, the Court has recognised that there may be circumstances in which domestic law might justifiably insist on legal representation.[6] In *Croissant v Germany*[7] the applicant was charged in connection with his activities as the lawyer of various members of the Red Army Faction. The relevant German legislation required that he be legally represented at all stages of the proceedings. He was initially represented by two court-appointed lawyers of his own choosing. Because of the complexity of the case the court then appointed a third lawyer to whom the applicant objected on political grounds. In finding no violation of art.6 the Court considered that a requirement for legal representation could not breach art.6(3)(c): "The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings—which finds parallels in the legislation of other contracting states—cannot, in the Court's opinion, be deemed incompatible with the Convention."

9–04 Similarly in *Imbroscia v Switzerland*[8] the Court held that a requirement of legal representation is in the first instance a question for the national authorities, the court considering the matter in the light of the overall fairness of the trial. The Commission has expressed a similar view in relation to appeal proceedings.[9] Moreover, it is to be noted that mandatory professional defence in the case of serious offences was considered permissible by most members of the United Nations Human Rights Committee.[10]

9–05 It is against this background that domestic courts will have to evaluate statutory provisions requiring a defendant to be legally represented for the purposes of cross-examining a child victim of assault, cruelty or sexual abuse or an adult rape victim. Section 34A of the Criminal Justice Act 1988 prohibited a defendant in person from cross-examining any child witness who is alleged to be a victim of or witness to a sexual or violent offence. This provision was repealed by the Youth Justice and Criminal Evidence Act 1999,[11] which introduced similar restrictions in relation to adult rape victims. Providing the accused has been given a proper opportunity to cross-examine through counsel,[12] we consider that

[6] In Italy, for example, it seems that only legal representatives are able to attend appeal proceedings in the Court of Cassation: *Tripodi v Italy* (1994) 18 E.H.R.R. 295 at para.30. As to the practice of the European Court of Human Rights on this issue, see para.1–30 above.

[7] (1993) 16 E.H.R.R. 135.

[8] (1994) 17 E.H.R.R. 441.

[9] *Philis v Greece* (1990) 66 D.R. 260.

[10] U.N. Docs. CCPR/C/SR. 132 (May 16, 1994). Report on Jordan.

[11] s.67(3), Sch.6.

[12] The Youth Justice and Criminal Evidence Act 1999 makes provision for the appointment of a "special counsel", where this is necessary in the interests of justice, to conduct cross-examination of a complainant where the accused is unrepresented. As the role of "special counsel" in criminal proceedings generally, see para.9–141 below.

it is unlikely that such a provision would be found to breach art.6. Although some commentators have assumed that the prohibition might infringe defendants' rights under the Convention, this neglects the point that such rules are intended to strike a proper balance between the rights of the accused and those of the victim.[13] The case law of the Strasbourg Court suggests that the right in art.6(3) is satisfied if the accused is permitted either to represent himself *or* is represented by a lawyer.[14] The text of art.6(3)(c) is not expressed as a right to represent oneself. In the Scots case of *McCarthy v HM Advocate*,[15] the High Court of Justiciary rejected an article 6 challenge to the equivalent Scottish legislation.[16] The court stated that Strasbourg case law has made it clear that art.6(3) does not establish a right to represent oneself. In short, "if a system allows a person to be represented by a lawyer, then Article 6.3.(c) will be satisfied." Indeed, it is arguable that obliging a victim to be cross-examined by the person alleged to have abused them has the potential to violate the art.3 rights of the victim.[17]

III. Choice of representation

9–06 In general, an accused's choice of lawyer should be respected,[18] and an appointment made against the wishes of the accused will be "incompatible with the notion of a fair trial . . . if it lacks relevant and sufficient justification".[19] Factors to be taken into account include the basis of the accused's objection to the appointment and the existence or absence of prejudice. Article 6(3)(c) does not however guarantee the accused the right to choose a court-appointed lawyer, nor to be consulted with regard to the choice of an official defence counsel.[20] The principle has been held to apply to legally aided defendants in the United Kingdom.[21] A lawyer may be excluded by the court for good reason.[22] Thus, in *X v United Kingdom*[23] the Commission found no violation of art.6(3)(c) where the Professional Conduct Committee of the Bar Council had ruled that it would be improper for defence counsel to represent his father in a criminal trial. A defendant does not have an absolute right to be represented by lay relatives either.[24]

[13] See *Doorson v Netherlands* (1997) 23 E.H.R.R. 330.

[14] *Pakelli v Germany* (1983) 6 EHRR 1.

[15] [2008] JCJAC 56.

[16] The Criminal Procedure (Scotland) Act 1975, ss. 277C and 277D.

[17] Such a complaint was made in *M v United Kingdom* (Unreported) see para.19–60 below.

[18] *Goddi v Italy* (1984) 6 E.H.R.R. 457.

[19] *Croissant v Germany* (1993) 16 E.H.R.R. 135. para.27; *Vozhigov v Russia* (App. No. 5953/02, March 29, 2007, para 41.

[20] *X v Germany* (1976) 6 D.R. 114.

[21] *X v United Kingdom* (1983) 5 E.H.R.R. 273; *Balliu v Albania*, App.No.74727/01, judgment of June 16, 2005.

[22] *X v United Kingdom* Application No.6298/73, (1975) 2 Digest 831 (disrespect to the court); *Ensslin, Baader and Raspe v Federal Republic of Germany* (1978) 14 D.R. 64 (breach of professional ethics); *cf. Bothwell* [2006] N.I.C.A. 35, (chosen lawyers did not have rights of audience, no violation of Art.6 in excluding them).

[23] (1978) 15 D.R. 242 (paras 243–244).

[24] *Mayzit v Russia* (2006) 43 E.H.R.R. 38, *Popov v Russia*, App.No.26853/04, judgment of July 13, 2006.

9–07 The fact that an accused has failed to attend the hearing does not entitle the court to proceed in the absence of his lawyer.[25] Indeed, if neither the defendant nor the legal representative is duly informed of the hearing, it is a violation of Art.6 for the court to proceed.[26] Similarly, there may be a violation if the lawyer is not allowed to see the case file, since this is likely to reduce the effectiveness of the legal representation.[27]

9–08 The accused's right to representation by a lawyer can be undermined by a breakdown in the relationship between counsel and his client or by professional embarrassment. How far does the court have to go in permitting the instruction of alternative counsel in such circumstances? The problem of professional embarrassment arose in *X v United Kingdom*.[28] In the course of evidence given on a voir dire the defendant departed from his instructions and admitted that certain incriminating statements which he was alleged to have made were true. Despite this, he wished defence counsel to continue to represent him on the basis that the statements were untrue. Defence counsel withdrew. The judge took the view that given the extent of the admissions which the defendant had made on the voir dire, any fresh counsel appointed would be unavoidably embarrassed. Accordingly, he declined to permit the appointment of new counsel and required the defendant to continue unrepresented, albeit with the assistance of his solicitors. The Commission considered that "the trial judge offered the applicant every assistance and advice in the presentation of his case,"[29] and took account of the fact that the applicant's solicitors continued to act for him and were available to advise and assist him during the trial; the fact that the defendant in person was permitted the opportunity to cross-examine witnesses and call evidence; the fact that the judge had offered the defendant the opportunity to make an unsworn statement from the dock; the fact that the judge gave clear directions on the burden and standard of proof; and the fact that the judge had directed an acquittal on three of the counts. The Commission observed that:

> "[A]n accused person cannot require counsel to disregard basic principles of his professional duty in the presentation of his defence. If such an insistence results in the accused having to conduct his own defence, any consequent 'inequality of arms' can only be attributable to his own behaviour ... [S]uch was the nature, scope and specificity of the incriminating statements made by the applicant, [that] it was not unreasonable for the trial judge to have formed the opinion that fresh counsel could not continue to act on his behalf in a manner consistent with his professional duty not to mislead the court."[30]

[25] *Lala v Netherlands* (1994) 18 E.H.R.R. 586.

[26] *Metelitsa v Russia*, App.No.33132/02, judgment of June 22, 2006 (not notified of appeal hearing—prosecution represented, defence not); *Kehayov v Bulgaria*, App.No.41035/98, judgment of January 8, 2005 (lawyer barred from pre-trial remand hearing); *Pirali Orujov v Azerbaijan*, App. No. 8460/07, February 3, 2011 (applicant not legally represented at appeal hearing and Supreme Court failed to check whether the applicant had actually been served with a summons notifying him of the hearing).

[27] *Ocalan v Turkey*, App.No.46221/99, judgment of Grand Chamber on May 12, 2005; *Kehayov v Bulgaria* (previous note: lawyer not allowed access to case file); *cf. Klimentyev v Russia*, App. No.46503/99, judgment of November 16, 2006 (lawyer had access to case file: no violation).

[28] (1980) 21 D.R. 126.

[29] *ibid.*, at para.16.

[30] *ibid.*, at paras 6–8.

9–09 In *Kamasinski v Austria*[31] the applicant expressed to the judge on several occasions his dissatisfaction with his counsel, and eventually, as a result of a dispute in court, counsel asked the judge to discharge him from his function. The request was refused, and the applicant was convicted. The Court held that even though the trial could have been conducted differently, and even if counsel had sometimes acted in a way that the applicant thought contrary to his best interests, there had been no violation of art.6(3)(c). There was no manifest failure to provide effective legal representation in this case.[32] In *Frerot v France*[33] the applicant had dismissed his lawyer towards the end of a trial. The first replacement lawyer declined to act, so a second lawyer was assigned to him. That lawyer then applied for an adjournment but the French court, taking account of the procedural difficulties this would cause, refused the request. The Commission held that this did not amount to a violation of art.6(3)(c), because the applicant had been advised and represented by the same counsel for all but the last day of the trial, and the late change did not render the trial unfair.

IV. The right to effective representation

9–10 In order to meet the requirements of art.6(3)(c), representation provided by the state must be effective. The state will not generally be responsible for shortcomings in the way a legal aid lawyer performs his duties,[34] but the relevant authorities may be required to intervene where the failure to provide effective representation is manifest or has been sufficiently brought to their attention in some other way.[35] It will depend on the circumstances of the case whether, taking the proceedings as a whole, the legal representation may be regarded as practical and effective.[36] Thus in *Artico v Italy*[37] the accused had been sentenced to custody for various fraud offences in his absence and without his knowledge. Wishing to appeal, he applied for legal aid and was assigned counsel. The lawyer declined to act, pleading ill-health and the onerous nature of the brief. The accused's various efforts to have a new lawyer appointed met with no success for some months, and by the time he succeeded his appeal had already been dismissed. The Court gave short shrift to the Italian government's argument that it had complied with art.6 by appointing the first lawyer, holding that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." In the Court's view, the authorities should have either compelled the lawyer to act or appointed a new one. Nor was it necessary for the applicant to establish that the result of the proceedings would have been different if he had been effectively defended. Whilst the existence or absence of prejudice was relevant to extent of the remedy required by way of just

[31] (1991) 13 E.H.R.R. 36.

[32] *cf. Pakelli v Germany* (1984) 6 E.H.R.R. 1.

[33] (1996) 85–B D.R. 103.

[34] *Artico v Italy* (1981) 3 E.H.R.R. 1, para.36.

[35] *Artico v Italy* (1981) 3 E.H.R.R. 1; *Kamasinki v Austria* (1991) 13 E.H.R.R. 36, para.65; *Czekalla v Portugal*, App. no. 38830/97, January 10, 2003, para.60; *Pavlenko v Russia* (App. no. 42371/02, April 1, 2010, para 99.

[36] *Arcinski v Poland*, App. No. 41373/04, 15 September 2009, para.31.

[37] (1981) 3 E.H.R.R. 1.

satisfaction, it was not a pre-requisite for a finding that art.6(3)(c) had been violated. The Court found a violation on a similar basis in *Daud v Portugal*[38]:

> "The first appointed lawyer had not taken any steps before reporting sick and the second did not have the necessary time to study the file, visit the client and prepare the defence. The time between the notification of the replacement of the lawyer and the hearing was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence."[39]

In those circumstances the state, or the court itself, ought to have ensured that the trial was adjourned until counsel had had adequate time for preparation.

It will only be in "special circumstances" that the manner in which a case is conducted by a defendant's lawyer (even an officially appointed lawyer) will give rise to state liability under the Convention.[40] Decisions often have to be made as to how best to present an accused's defence at trial. In many cases several options will be available and unsuccessful defendants may convince themselves that an alternative defence would have been successful. The Strasbourg Court has stated that it is not in the interests of justice to allow a defendant to seek to advance such an alternative defence after his conviction "unless there are special circumstances which give rise to a real concern that the legal representation at trial was defective in a fundamental respect."[41]

9–11 Where counsel has been instructed so late as to leave insufficient time to master the brief, the accused's right under art.6(3)(b) to adequate time and facilities for the preparation of his defence may be violated. However, the Court is unlikely to find a violation on this ground unless an application has been made for an adjournment to enable the case to be prepared.[42] The adequacy of the time allowed will obviously depend upon the complexity of the case.[43] The defence lawyer must be appointed in sufficient time to enable the case to be properly prepared.[44] Where there is a change of legal representation, the newly-appointed lawyers must be permitted additional time to prepare.[45] Although it was formerly the practice of the Commission to examine a case to determine if the late appointment of the defence lawyer had actually prejudiced the accused,[46] the current emphasis in the court's case-law is upon the necessity for criminal proceedings to have the appearance of fairness, and upon "the increased sensitivity of the public to the fair administration of justice."[47] The provision of legal assistance does not, however, require unlimited access by a defendant to a

[38] [1998] E.H.R.L.R. 634.
[39] *ibid.*, at 635.
[40] *Ebanks v United Kingdom*, App. no. 36822/06, January 26, 2010, para.72; *Arcinski v Poland*, App. no. 41373/04, September 15, 2009, para.31; *Smyk v Poland* (App. no. 8958/04), July 28, 2009, para.54; *Antonicelli v Poland*, App. no. 2815/05, May 19, 2009, para.31; *Kulikowski v Poland*, App. no. 18353/03, May 19, 2009, para.56; *Sialkowska v Poland*, App. no. 8932/05, June 23, 2005, para.99.
[41] *Ebanks v United Kingdom*, App. no. 36822/06, January 26, 2010, para.82.
[42] *Murphy v United Kingdom* (1972) 43 C.D. 1; 2 Digest 794.
[43] See generally *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533 at para.41.
[44] *X and Y v Austria* (1978) 15 D.R. 160; *Perez Mahia v Spain* (1987) 9 E.H.R.R. 145.
[45] *Goddi v Italy* (1984) 6 E.H.R.R. 457.
[46] *X v United Kingdom* (1970) 13 Y.B. 690; *Murphy v United Kingdom* (1972) 43 C.D. 1.
[47] See, in another context, *Borgers v Belgium* (1993) 15 E.H.R.R. 92 at para.24.

lawyer. It may be acceptable for the lawyer to limit the number of consultations so as to ensure that the legal aid budget is not exceeded.[48]

9–12 The approach of the Commission to the question of state responsibility was not always consistent. In *F v United Kingdom*[49] defence counsel had to withdraw the day before the trial, and the defendant met new counsel only on the morning of the trial. Although the trial was for attempted murder, and the new counsel declined to apply for an adjournment to ensure fuller preparation of the case, the Commission dismissed the application on the basis that the conduct of counsel could not be attributed to the state.[50] In *Daud v Portugal*,[51] however, new counsel was appointed only three days before the hearing of a complex drugs case, at the conclusion of which the applicant was sentenced to nine years' imprisonment. The Court found a breach of art.6(3)(c). While respecting the independence of the Bar, the court held that it was the state's duty to ensure that everyone received "the effective benefit of his right". On the facts of this case it should have been obvious to the authorities that the legal representation offered was inadequate.

9–13 The English authorities have traditionally assumed that shortcomings in legal representation must cross the threshold of "flagrant incompetence" before they are capable of amounting to a ground of appeal against conviction.[52] That approach appeared to be softening somewhat in *R. v Clinton*[53] where the Court of Appeal observed that "it is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict". However in *R. v Donnelly*[54] the court retreated to its former position, holding that the practice of criticising trial counsel on appeal without alleging flagrant incompetence should not be followed. This rather arid debate seems to have been put to rest by the Human Rights Act. In *R. v Nangle*[55] the Court of Appeal observed that in view of the requirements of the Convention, flagrant incompetence may no longer be regarded as the appropriate measure of when the court will quash a conviction for the alleged error of legal representatives: "What Article 6 requires in this context is that the hearing of the charges against the accused should be fair. If the conduct of the legal advisers has been such that this objective is not met, then this Court may be compelled to intervene." In *R v G* the Court of Appeal stated that it was "inappropriate to seek to rate the conduct of trial counsel 'according to some scale of ineptitude'".[56]

[48] *M v United Kingdom* (1984) 36 D.R. 155; see also the Canadian decision in *Munroe* (1990) 59 C.C.C. (3d) 446.
[49] (1992) 15 E.H.R.R. CD 32.
[50] See also the court in *Kamasinski v Austria* (1991) 13 E.H.R.R. 36 at para.65: "It follows from the independence of the legal profession of 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."
[51] [1998] E.H.R.L.R. 634.
[52] *R. v Ensor* 89 Cr.App.R. 139 (CA) considering *R. v Irwin* 85 Cr.App.R. 294 (CA) and *R. v Gautam* [1988] Crim.L.R. 109 (CA).
[53] 97 Cr.App.R. 320; See also *R. v Fergus* 98 Cr.App.R. 313.
[54] [1998] Crim.L.R. 131.
[55] [2001] Crim. L.R. 506.
[56] *R v G* [2008] EWCA Crim 241, para.27.

Similarly, in *R v Chima* the Court of Appeal cited *R v Clinton* and emphasised that "incompetent representation is not in itself a ground of appeal". The jurisdiction of the Court of Appeal is to determine whether verdicts were safe. Accordingly, the court "should not be diverted by attempting to assess the degree of alleged incompetence, but rather should concentrate upon the effect that the failure to call particular evidence had on the trial and the verdicts."[57] In the Scots case of *James v H.M. Advocate*,[58] the defendant came to be represented by the same firm as one of two co-defendants, both of whom had incriminated him. It was found that his individual defence was not properly put, and his conviction was quashed since his right to fair trial had been violated.

9–14 In the New Zealand case of *Shaw*,[59] defence counsel informed the Crown of his unavailability on the trial date, but it was not until five days before the trial that the Crown sent a reply objecting to any alteration of the trial date. The judge refused an adjournment at the start of the trial, and the accused was left to conduct his own defence. He was found guilty and sentenced to six months' imprisonment. The Court of Appeal found that the defendant's right to legal representation had been violated, not least because counsel's understanding of the law and ability to cross-examine might have influenced the outcome of the trial.[60]

9–15 There is considerable North American jurisprudence on the provision of "effective assistance" by counsel. In the United States the test is whether counsel's performance fell below a reasonable standard, bearing in mind the Bar's standards of conduct.[61] A similar approach has been adopted in the Canadian cases,[62] where a two-stage test is now applied. The court should enquire: (a) whether counsel's conduct showed a lack of competence; and (b) whether it is probable that, but for that lack of competence, the result of the proceedings would have been different.[63]

V. Legal professional privilege

9–16 The inviolability of legal professional privilege in English law was re-affirmed by the House of Lords in *R. v Derby Magistrates' Court ex parte B*,[64] where Lord Taylor described it as "a fundamental human right protected by the European Convention". B was arrested for murder, and admitted in interview with the police that he was solely responsible. Shortly before his trial he retracted his

[57] *R v Chima* [2010] EWCA Crim 416, para.56.
[58] 2006 S.C.C.R. 170.
[59] [1992] N.Z.L.R. 652.
[60] Under the Strasbourg jurisprudence the requirement to show prejudice is considered as relevant only to the extent of the remedy required: See *Artico v Italy* (1981) 3 E.H.R.R. 1 at para.35.
[61] *Strickland v Washington* 466 US 668 (1984).
[62] E.g. two cases from Ontario, *Silvini* (1991) 68 C.C.C. (3d) 251 and *Collier* (1992) 77 C.C.C. (3d) 570, and the Nova Scotia decision in *Schofield* (1996) 148 N.S.R. (2d) 175.
[63] See *McAuley* (1996) 150 N.S.R. (2d) 1 (counsel relied on submission of no case; no incompetence proved); *B (LC)* (1996) 46 C.R. (4th) 368 (counsel refused to visit defendant in prison; even if incompetent, not established that result would probably have been different.)
[64] [1996] A.C. 487.

confession and alleged that the murder had been committed by his step-father (A). B was acquitted, and the police thereupon arrested A and charged him with the murder. At committal proceedings against A, his counsel sought an order for the disclosure of statements made by B to his solicitor. B declined to waive privilege. The magistrate made the order, considering that B no longer had an interest in maintaining his privilege (since he could not be prosecuted for the murder a second time), and holding that the public interest in the acquittal of the innocent outweighed the public interest in protecting solicitor and client communications. The House of Lords overturned the magistrate's order, Lord Taylor explaining that it breached the "long established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged":

> "[T]he privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence, and ... the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the court ... [T]he privilege is that of the client, which he alone can waive, and ... the court will not permit, let alone order, the attorney to reveal the confidential communications which have passed between him and his former client. His mouth is shut forever."

Having reviewed the English authorities, he continued: **9–17**

> "The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests ... Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The inviolability of legal professional privilege was emphasised by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No. 5)*, where Lord Scott stated that the privilege was absolute and could not be overridden by some supposedly greater public interest. It could only be overridden by legislation.[65] However in *R v Maxwell* (a case concerned with the consequences of gross prosecutorial misconduct) Lord Dyson referred to Lord Taylor CJ's speech in *R v Derby Magistrates' Court, ex p. B* and stated that not every violation would automatically result in a quashed conviction.[66]

It is possible for a defendant to waive his right to legal professional privilege. Waiver, when it occurs, is not all or nothing. It can be, and often is, partial. In every case of waiver, the question what the waiver has let in is determined by the test of fairness, or, expressed another way, what is necessary to avoid there being

[65] [2004] UKHL 48; [2005] 4 All E.R. 948, para.25.
[66] *R v Maxwell* [2010] UKSC 48, para.96.

left a misleading impression by revelation of part only of the privileged communications.[67]

In *R v Seaton* the Court of Appeal provided the following analysis of the principles governing legal professional privilege:

(a) Legal professional privilege is of paramount importance. There is no question of balancing privilege against other considerations of public interest: *R v Derby Justices ex p B*.

(b) Therefore, in the absence of waiver, no question can be asked which intrudes upon privilege. That means, inter alia, that if a suggestion of recent fabrication is being pursued at trial, a witness, including the defendant, cannot, unless he has waived privilege, be asked whether he told his counsel or solicitor what he now says is the truth. Such a question would require him either to waive his privilege or suffer criticism for not doing so. If any such question is asked by an opposing party (whether the Crown or a co-accused) the judge must stop it, tell the witness directly that he does not need to answer it, and explain to the jury that no one can be asked about things which pass confidentially between him and his lawyer. For the same reasons, in the absence of waiver, the witness cannot be asked whether he is willing to waive.

(c) However, the defendant is perfectly entitled to open up his communication with his lawyer, and it may sometimes be in his interest to do so. One example of when he may wish to do so is to rebut a suggestion of recent fabrication. Another may be to adduce in evidence the reasons he was advised not to answer questions. If he does so, there is no question of *breach* of privilege, because a person cannot be in breach of his own privilege. What is happening is that he is waiving privilege.

(d) If the defendant does give evidence of what passed between him and his solicitor he is not thereby waiving privilege entirely and generally, that is to say he does not automatically make available to all other parties everything that he said to his solicitor, or his solicitor to him, on every occasion. He may well not even be opening up everything said on the occasion of which he gives evidence, and not on topics unrelated to that of which he gives evidence. The test is fairness and/or the avoidance of a misleading impression. It is that the defendant should not, as it has been put in some of the cases, be able both to "have his cake and eat it".

(e) If a defendant says that he gave his solicitor the account now offered at trial, that will ordinarily mean that he can be cross-examined about exactly what he told the solicitor on that topic, and if the comment is fair another party can comment upon the fact that the solicitor has not been called to confirm something which, if it is true, he easily could confirm. If it is intended to pursue cross examination beyond what is evidently opened up, the proper extent of it can be discussed and the judge invited to rule.

[67] *R v Seaton* [2010] EWCA Crim 1980, para.41; *R v Loizou* [2006] EWCA Crim 1719, para.79.

(f) A defendant who adduces evidence that he was advised by his lawyer not to answer questions but goes no further than that does not thereby waive privilege. This is the *ratio* of *Bowden* and is well established. After all, the mere fact of the advice can equally well be made evident by the solicitor announcing at the interview that he gives it then and there, and there is then no revelation whatever of any private conversation between him and the defendant.

(g) But a defendant who adduces evidence of the content of, or reasons for, such advice, beyond the mere fact of it, does waive privilege at least to the extent of opening up questions which properly go to whether such reason can be the true explanation for his silence: *Bowden*. That will ordinarily include questions relating to recent fabrication, and thus to what he told his solicitor of the facts now relied upon at trial: *Bowden* and *Loizou*.

(h) The rules as to privilege and waiver, and thus as to cross examination and comment, are the same whether it is the Crown or a co-accused who challenges the defendant.

9–18 For its part, the European Court of Human Rights has recognised that a high degree of protection is to be afforded to the confidentiality of communications passing between a lawyer and his client. Breach of professional privilege can involve a violation of the right to privacy in art.8, as well as having implications for the right to a fair trial in art.6(1) and, in particular, for the right to effective legal representation in art.6(3)(b). In *Schonenberger and Durmaz v Switzerland*[68] the second applicant had been arrested for drugs offences. Whilst he was in police custody his wife instructed a lawyer, the first applicant, to represent her husband. Mr Schonenberger wrote a letter addressed to Mr Durmaz and sent it to the public prosecutor's office, asking that it be forwarded to his client. The letter contained forms of authority and also advised Mr Durmaz that he was not obliged to answer questions, that his answers could be used in evidence, and that it would be to his advantage to maintain his silence. The public prosecutor read the letter and decided to withhold it from Mr Durmaz on the ground that it might jeopardise the proper conduct of the investigation. The Court was in no doubt that this constituted a violation of art.8:

> "[T]he Government relies in the first place on the contents of the letter in issue: according to the Government, it gave Mr Durmaz advice relating to pending criminal proceedings which was of such a nature as the jeopardise their proper conduct. The Court is not convinced by this argument. Mr Schonenberger sought to inform the second applicant of his right 'to refuse to make any statement', advising him that to exercise it would be to his 'advantage'. In that way, he was recommending that Mr Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court's case law—whose equivalent may be found in other contracting states—it is open to an accused person to remain silent. Mr Schonenberger could also properly regard it as his duty, pending a meeting with Mr Durmaz, to advise him of his right and of the possible consequences of exercising it. In the Court's view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution."

[68] (1989) 11 E.H.R.R. 202.

9–19 Neither did the Court accept the argument that the communication did not attract privilege since Mr Schonenberger had not been formally instructed by Mr Durmaz. He had received instructions from Mrs Durmaz and had made attempts to contact his client. In the Court's view, these contacts "amounted to preliminary steps intended to enable the second applicant to have the benefit of the assistance of a defence lawyer of his choice and, thereby, to exercise a right enshrined in another fundamental provision of the Convention, namely Article 6".

9–20 The passing reference to art.6 in *Schonenberger and Durmaz* was taken up in *S v Switzerland*,[69] where the Court implied into art.6(3)(c) the right of an accused person to consult with his lawyer in private, without the risk of infringements of privilege by the state. Although art.6 makes no explicit reference to legal professional privilege, the Court noted that this right was guaranteed under the national law of a number of contracting states, and expressly enshrined in art.8(2)(d) of the American Convention on Human Rights. The Court also attached importance to the fact that within the Council of Europe, an equivalent protection was recognised by art.93 of the Standard Minimum Rules for the Treatment of Prisoners.[70] This provides that "interviews between [a] prisoner and his legal adviser may be within the sight, but not within the hearing, either direct or indirect, of a police or institution official". On the strength of these comparative and international standards, the Court concluded that:

> "[A]n accused's right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."

9–21 As a result, the monitoring of the applicant's correspondence with his lawyer, and the supervision of visits to him in custody, constituted a breach of art.6(3)(c). The possibility that defence lawyers might co-ordinate their strategies could not justify such supervision since there was nothing unusual or unethical about such an approach. Neither was it necessary for the applicant to prove that he had been in any way prejudiced in the preparation of his case since "[a] violation of the Convention does not necessarily imply the existence of injury".

9–22 The leading decision is now *Brennan v United Kingdom*,[71] where the principal complaint was that, when the applicant was eventually allowed to consult his lawyer, this was only permitted in the presence of a police officer. The Court stated the basic principle of confidentiality, reasoning that "if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective." However:

[69] (1992) 14 E.H.R.R. 670, para.48.
[70] Annexed to Resolution (73) 5 of the Committee of Ministers.
[71] (2002) 34 E.H.R.R. 507.

> "the Court's case law indicates that the right of access to a solicitor may be subject to restrictions for good cause and the question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. While it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial, the applicant must be able to claim to have been directly affected by the restriction in the exercise of the rights of the defence."[72]

In this case a police officer was present only at one interview, but this was the first interview between lawyer and client. Noting that the decision in *John Murray v United Kingdom*[73] recognised the significance of an early decision not to answer police questions, the Court found a violation of art.6(3)(c) in conjunction with art.6(1):

> "The Court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him. Both the applicant and his solicitor had been warned that no names should be mentioned and that the interview would be stopped if anything was said which was perceived as hindering the investigation . . . It is indisputable that he was in need at that time of legal advice, and that his responses in subsequent interviews, which were to be carried out in the absence of his solicitor, would continue to be of potential relevance to his trial and could irretrievably prejudice his defence."[74]

In *Ocalan v Turkey*[75] the Grand Chamber reiterated the principles in *Brennan* and found a violation where the applicant had only been allowed to consult his lawyers in the presence of military personnel, and then for restricted periods of time.

9–23 The approach of the English courts has been more equivocal. In the *La Rose* case[76] the complaint was that the applicant had to speak to his solicitor from a telephone on the custody desk in the police station, within the earshot of police officers. The Divisional Court dismissed the application on the ground that no prejudice had been shown and that there was no evidence that a police officer had overheard the applicant's conversation with his lawyer. However, this was the applicant's first contact with his lawyer, and the case was decided before *Brennan*. It should now be approached differently. At the other end of the scale is *Grant*,[77] where the Court of Appeal quashed a conviction after communications between solicitors and their clients in the exercise yard of a police station were recorded by the police. Such recordings had been made in relation to suspects in three major cases. In the other two cases the proceedings were stayed for abuse of process, and the Court of Appeal held that the same remedy should have been applied here. The decision in *Brennan* was cited, but the judgment was founded on the common law and the proposition that deliberate interference with

[72] (2002) 34 E.H.R.R. 507, para.58.
[73] (1996) 22 E.H.R.R. 29, discussed in 13–32 below.
[74] (2002) 34 E.H.R.R. 507, at para.62.
[75] App.No.4622/99, judgment of May 12, 2005, paras 131–137.
[76] *R. (on the application of La Rose) v Commissioner of Police for the Metropolis* [2002] Crim.L.R. 215.
[77] [2005] Crim.L.R. 955.

a detained suspect's right to the confidence of privileged communications with his solicitor seriously undermines the rule of law. Irrespective of the gravity of the crimes alleged, and prosecution would be an abuse of process even though it could not be known what prejudice the defendant suffered as a result of the recordings.

9–24 In *Re McEre and Re M*[78] the House of Lords examined the relationship between legal professional privilege and the surveillance powers established by the Regulation of Investigatory Powers Act 2000. The claimants, who had each been arrested under the Terrorism Act 2000, brought applications for judicial review seeking a declaration that they were entitled to consult with their legal and medical advisers without being subject to covert surveillance. The House of Lords held that ss 27 and 28 of RIPA had the effect of overriding or qualifying the common law and statutory rights of a person to consult in private with a legal adviser. However given the particularly intrusive nature of that type of surveillance, the House of Lords endorsed the Divisional Court's conclusion (which was not challenged by the Secretary of State) that the controls and safeguards established under RIPA and the related code of practice were insufficient to satisfy art.8(2).

9–25 The close relationship between art.6 and art.8 was emphasised in *Niemietz v Germany*,[79] which concerned the execution of a search warrant at the offices of a lawyer in order to ascertain the whereabouts of a third party who was under investigation for a criminal offence. The Commission and the Court both held that the concept of "privacy" extended to a lawyer's dealings with his clients. After noting the principle of professional secrecy guaranteed under the German Federal Regulations for Lawyers, the Commission observed:

> "These features of privacy are particularly strong as regards the lawyer's activities in his own law office. There he exercises domestic authority and general access by the public is excluded. Such privacy is a necessary basis for the lawyer-client relationship . . . The interference complained of affected the applicant in his position as a lawyer *i.e.* as an independent organ in the administration of justice and as independent counsel of his clients, with whom he must entertain a relationship of confidentiality, ensuring the secrecy of information received from his clients and documents relating thereto. Such are also the demands of the right to a fair trial and the effective use of defence rights as envisaged by Article 6(1) and (3) of the Convention in cases of representation by counsel."

In finding a violation of art.8, the Court explained that:

> "[T]he search impinged on professional secrecy to an extent that appears disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repurcussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention."

[78] [2009] UKHL 15.
[79] [1999] Q.B. 966 at 977 to 978.

9–26 The privilege is free-standing, and it is not necessary to show that particular lawyer-client communications were directly concerned with pending proceedings.[80] Moreover in *Foxley v United Kingdom*[81] the Court treated art.8 and art.6 as effectively interchangeable where a violation of legal professional privilege was alleged. In that case, a Receiver and Trustee in Bankruptcy, appointed in the context of proceedings for the enforcement of a confiscation order under the Criminal Justice Act 1988, had obtained an order from the county court under the Insolvency Act 1986,[82] authorising the re-direction of the applicant's mail. The letters opened and copied included correspondence with the applicant's legal advisers. The Court found a violation of art.8, observing that it could find "no justification" for the actions of the Receiver, which were contrary to "the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client". It noted that the government had not sought to argue that "the privileged channel of communication was being abused". Nor were there "any other exceptional circumstances" justifying the intrusion. Having found a violation of art.8, the Court held that it was unnecessary to examine the same complaint under art.6 of the Convention.

9–27 Legal professional privilege does not extend to communications made to a solicitor by his client for the purpose of being guided or helped in the commission of crime,[83] or to communications which are themselves in furtherance of a criminal enterprise.[84] This principle applies whether or not the solicitor is aware of his client's unlawful purpose.[85] It is implicit in the *Schonenberger and Durmaz*, *Campbell* and *Foxley* cases that abuse of a privileged relationship is capable of affording a ground for restricting the protection afforded to legal professional privilege. Nevertheless, the Court has emphasised the need to ensure that the exception is narrowly and carefully defined, and that procedures are in place to ensure that any interference is kept within this limited category. Thus, in *Kopp v Switzerland*[86] the Court held that even where it is alleged that the lawyer himself is involved in criminal activity, special safeguards are required to ensure that a proper distinction is drawn between "matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel". The applicant was a lawyer under investigation in connection with the disclosure of official secrets. The Court considered that the absence of independent judicial authorisation for the interception of the applicant's telephone calls was "astonishing", especially "in this

[80] *Campbell v United Kingdom* (1993) 15 E.H.R.R. 137, paras 46–48.
[81] [1999] 1 W.L.R. 2130 at 2144, para.25, and 2148, para.39.
[82] At 2140, para.5.
[83] *Pretto v Italy* (1984) 6 E.H.R.R. 182, para.21.
[84] *Axen v Germany* (1984) 6 E.H.R.R. 195, para.25; *Pretto v Italy* (1984) 6 E.H.R.R. 182, para.21.
[85] In *T and V v United Kingdom* (2000) 30 E.H.R.R. 121 the presence of the media during a trial of two juveniles, and an order made by the judge lifting reporting restrictions to permit the publication of their identities and their photographs was held to have contributed to a violation of art.6(1). The court referred to the possibility that procedures such as publicity, which are generally considered to safeguard the rights of adults on trial, could have the opposite effect on young defendants, and may need to be abrogated in order to ensure their understanding and participation.
[86] (1995) 20 E.H.R.R. 557.

sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence".

9–28 The European Court of Justice has drawn on the Strasbourg case law when developing its own jurisprudence on legal professional privilege in the context of anti-money laundering legislation. For instance, in *Ordre des Barreaux Francophones et Germanophone and others v Conseil des Ministres (Conseil des Barreaux de l'Union européenne, intervening)* the Court of Justice held that there would be a violation of art.6 of the Convention if lawyers were obliged, in the context of judicial proceedings or during the preparation for such proceedings, to co-operate with state authorities by passing them information about suspected money laundering obtained in the course of legal consultations.[87]

VI. Legal aid in criminal cases

9–29 The second limb of art.6(3)(c) imposes a requirement to provide legal aid in criminal cases. The wording of the English text appears to suggest that the right to free legal representation is an alternative to the right of an accused person to represent himself. In *Pakelli v Germany*[88] the Court held that art.6(3)(c) guarantees three related but independent rights to a person charged with a criminal offence: first, the right to defend himself in person; secondly, the right to defend himself through legal assistance of his own choosing; and thirdly, on certain conditions being met, the right to free legal assistance and representation:

> "Having regard to the object and purpose of this Article, which is designed to secure effective protection of the rights of the defence . . . a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require."

9–30 However, as discussed above, in the Scottish case of *McCarthy v HM Advocate*[89] the High Court of Justiciary examined the judgments in *Croissant v Germany* and *Pakelli v Germany*. In the latter case, the Strasbourg Court compared the French and English texts of art.6(3), noting that the English text used the word "or" on two occasions whereas the French text used "ou" and then "et". Accordingly, the High Court of Justiciary concluded that "the right in Article 6.3 is satisfied if the accused is permitted either to represent himself or is represented by a lawyer".

9–31 The "interests of justice" criterion will take account of the complexity of the proceedings, the capacity of the individual to represent himself, and the severity of the potential sentence.[90] The provision of free legal assistance may also help

[87] Case C-305/05 (See in particular the Opinion of Advocate General Poiares Maduro at paras 41–46).
[88] *ibid.*, at paras 35–41.
[89] [2008] JCJAC 56, para.30.
[90] *X v Austria* (1963) 11 C.D. 31 at 43; *Benham v United Kingdom* [1996], App. no. 19380/92, June 10, 1996, para.61; *Prezec v Croatia*, App. no. 48185/07, October 15, 2009, para.29; *Tsonnev v Bulgaria (No. 2)*, App. no. 2376/03, January 14, 2010, para.40.

to ensure respect for the principle of equality of arms.[91] Legal aid is not necessarily required where the factual and legal issues in the case are straightforward, and there is no requirement for expert cross-examination.[92] On the other hand, the Court has rejected the argument that a violation of art.6(3)(c) will only arise where the absence of legal assistance can be shown to have actually prejudiced the accused.[93] It is not contrary to the Convention that the burden of proving a lack of sufficient means should be borne by the person who pleads it.[94]

9–32 Where the accused faces imprisonment, this will usually be sufficient in itself to require the grant of legal aid.[95] However, the requirements of the Convention go further than this. In *Pham Hoang v France*[96] the Court found a violation of Art.6 where the French courts had denied legal aid to the applicant, despite the fact that "the proceedings were clearly fraught with consequences" for him, because he had been convicted of importing drugs and was ordered to pay a substantial fine. This decision suggests the restriction of legal aid to cases where custody is a real possibility may not be honouring the "interests of justice" criterion in art.6(3)(c).[97] Thus, where a Scottish magistrate peremptorily refused legal aid on the ground that it was not in the interests of justice to grant it in cases of breach of the peace and resisting arrest, the case proceeded to a friendly settlement.[98]

9–33 In practice, the European Court of Human Rights adopts a strict approach to the requirement to provide free legal assistance in criminal cases, which is illustrated by a series of cases against the United Kingdom. In *Granger v United Kingdom*,[99] a Scottish case, the court held that a refusal of legal aid for the applicant's appeal against a conviction for perjury violated art.6(3)(c) taken together with art.6(1). Legal aid had been refused on the ground that the appeal was without substance and had no reasonable prospect of success. The court however held that the interests of justice criterion had to be assessed in the light of all the circumstances of the case. The applicant was serving a five year prison sentence so that there was no doubt about the importance of what was at stake for him. The Court of Appeal had been addressed at length by the Solicitor General who appeared for the Crown. One of the issues which arose was of considerable complexity, but the applicant was not in a position to understand the prepared statement he read out, or the opposing arguments. Nor could he reply to those arguments or answer questions from the bench.

9–34 At first sight the court's decision in *Granger* may appear to turn on the complexity of the issues which arose in the appeal. However, in *Boner v United*

[91] *Tsonnev v Bulgaria*, App. no. 2376/03, January 14, 2010, para.40.
[92] *X v Norway* (1970) 35 C.D. 37 at 48.
[93] Application No.9433/81 (unreported), (1981) 2 Dig. 738.
[94] *Croissant v Germany* (1993) 16 E.H.R.R. 135; *Asenov v Bulgaria*, App. no. 38157/04, January 25, 2011, para.43.
[95] *ibid.*, at 738; *Shabelnik v Ukraine*, App. no. 16404/03, February 19, 2009, para.58; *Tsonnev v Bulgaria (No. 2)*, App. no. 2376/03, January 14, 2010, para.40.
[96] *Ensslin, Baader and Raspe v Germany* (1978) 14 D.R. 64.
[97] *Cf.* Young R. and Wilcox A., "The Merits of Legal Aid Revised" [2007] Crim. L.R.
[98] *McDermite v United Kingdom* (1987) 52 D.R. 244.
[99] (1990) 12 E.H.R.R. 469, at paras 42–48.

Kingdom[100] and *Maxwell v United Kingdom*[101] the court unanimously found a violation of art.6(3)(c) despite concluding that the legal issues were straightforward. Under Scots law there was, at the time, no requirement for leave to appeal. But the decision as to whether legal aid should be granted lay with the Scottish Legal Aid Board which had to decide whether an applicant for legal aid had substantial grounds for appealing and whether it was in the interests of justice that he should be granted legal aid. The Board could therefore refuse legal aid on the ground that the appeal was unmeritorious. The European Court of Human Rights held that the interests of justice required free legal assistance. This was despite the fact that the legal issues in the case were not complex, no point of substance had arisen in the appeal, and prosecution counsel had not addressed the Court of Appeal. The court held that in the absence of legal representation the applicants had been unable to address the court on the issues raised in the appeal and thus had been deprived of the opportunity to defend themselves effectively.

9–35 It is now quite clear that the requirement for effective legal representation will be mandatory not only in the higher courts but in all courts or tribunals where loss of liberty may be at stake. In *Benham v United Kingdom*,[102] the Court was called upon to determine whether the "interests of justice" criterion in art.6(3)(c) was satisfied in Magistrates' Court proceedings leading to imprisonment for non-payment of the community charge. Under the applicable regulations there was no right to full legal aid, but a debtor was entitled to Green Form advice and assistance and, in the discretion of the Magistrates' Court, to representation under the ABWOR[103] scheme. The Government submitted that this level of provision was adequate in the circumstances. In the Government's submission, the proceedings were intended to be straightforward and amounted, in effect, to a means inquiry at which full legal representation was unnecessary. The Court disagreed:

> "[W]here deprivation of liberty is at stake, the interests of justice in principle call for legal representation. In this case B faced a maximum term of three months imprisonment . . . Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and operate, as was evidenced by the fact that, in the judgment of the Divisional Court, the magistrates' finding could not be supported on the evidence before them."

9–36 The Court went on to hold that the existing provision was inadequate since under art.6(3)(c) the applicant was entitled to representation at the hearing *as of right*:

> "The Court has regard to the fact that there were two types of legal aid provision available to B. Under the Green Form scheme he was entitled to up to two hours advice and assistance from a solicitor prior to the hearing, but the scheme did not cover legal representation in court. Under the ABWOR scheme the magistrates could, at their discretion, have appointed a solicitor to represent him, if one had happened to be in court. However, B was not entitled as of right to be represented . . . In view of the severity of the penalty risked by B, and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, B ought to have benefited from free legal representation during the proceedings before the magistrates."

[100] (1995) 19 E.H.R.R. 246.
[101] (1995) 19 E.H.R.R. 97.
[102] (1996) 22 E.H.R.R. 293, at paras 61–64.
[103] Advice by way of representation.

9–37 Despite the Court's reference to the complexity of the domestic proceedings, it is clear that the decisive criterion in *Benham* was the seriousness of what was at stake for the applicant in terms of the potential penalty that the court could impose.[104] On the same principle the Strasbourg Court has held that art.6 requires legal representation before a person is bound over to keep the peace, since imprisonment is the penalty for default.[105] The approach of the United Nations Human Rights Committee under art.14 of the I.C.C.P.R. appears to be broadly the same. In *OF v Norway*[106] the Committee held that a defendant who had been convicted of two minor motoring offences which could only lead to a small fine had not shown that the interests of justice in the particular case required the assignment of a defence lawyer at the state's expense.[107] The Strasbourg Court has likewise held that Art.6.(3)(c) does not require the grant of legal assistance in minor cases.[108]

9–38 In *Procurator Fiscal, Fort William v McLean and anor*[109] the High Court of Justiciary held that a fixed fee for certain summary prosecutions was not incompatible with art.6. The relevant regulation[110] provided for a flat fee of £550 for all work done in summary proceedings up to and including a diet at which a plea of guilty was made and accepted, or a plea in mitigation was made, and the first 30 minutes of any summary trial. The lawyer would receive the same fee regardless of the work done or of how essential or costly any outlays may have been. The defence argued that such a rigid system of payment, with no safeguard to allow for the actual requirements of a given case, imported a substantial risk that even an honourable solicitor acting in good faith might allow professional standards to fall below an acceptable minimum. The court accepted that the system produced what could properly be called a conflict of interest since it was in the interests of the defence lawyer to keep outlays and work done to a minimum. However, on the facts, there was no actual prejudice to the defendants since there was no suggestion that their lawyers had omitted to do anything which was necessary for the presentation of their defence. The court was not persuaded by the more general argument that all defendants were necessarily prejudiced by the regulations since they were at risk of receiving inadequate representation. The suggestion that a lawyer would betray his client's interests was unacceptably speculative. Whether the matter was approached in terms of "conflict of interest" or in terms of "equality of arms" there was no basis for

[104] The court has subsequently ordered the payment of compensation to several others who were denied legal representation in such proceedings prior to 1997: see *Beet v United Kingdom* (2005) 41 E.H.R.R. 23, and *Lloyd v United Kingdom*, App.No.29798/96, judgment of March 1, 2005.
[105] *Hooper v United Kingdom* (2005) 41 E.H.R.R. 1.
[106] Application No.158/1983.
[107] *Cf. Robinson v Jamaica*, App. No.223/1987.
[108] *Gutfreund v France* (2006) 42 E.H.R.R. 48.
[109] *The Times*, August 11, 2000.
[110] Criminal Legal Aid (Fixed Payments) (Scotland) Regulations (S.I. 1999/491).

art.11(2) could equally have supported an exclusion from reliance on that right under art.17.[227] In *WP v Poland*,[228] in declaring inadmissible an application from Polish nationals who had been refused permission to set up an association called the National and Patriotic Association of Polish Victims of Bolshevism and Zionism, the Court concluded that the evidence in the case, which included the anti-semitic tenor of the submissions before the court, justified the need to bring art.17 into play.

F. OTHER ISSUES

18–79 This Chapter has been concerned primarily with the rights guaranteed under arts 8 to 11 of the Convention. In some cases a challenge based on one of those Articles has been combined with an art.14 challenge; but it should be recalled that a challenge based on art.14 alone cannot succeed, since that Article is only engaged where the violation of another Convention right can also be demonstrated, and a challenge attempting to combine art.6 with art.14 has been unsuccessful.[229] However, issues may occasionally arise under other substantive guarantees. In *Family H v United Kingdom*,[230] for example, the applicants were convicted of failing to comply with an order requiring them to send their children to state school or provide evidence of their education at home. They had elected to educate their children at home because of learning difficulties. The family complained that the prosecution infringed their right to education under art.2 of the First Protocol. The Commission rejected the complaint, holding that since the state is entitled to establish a system of compulsory state education, it did not breach art.2 of the First Protocol by requiring parents to co-operate in an assessment of their children's educational standards.

[227] See *United Communist Party of Turkey v Turkey* (1998) 26 E.H.R.R. 121.
[228] (2005) 40 E.H.R.R. SE1.
[229] *Kirk and Russell* [2002] Crim.L.R. 756, alleging violations arising from the availability in s.6 of the Sexual Offences Act 1956 of a defence of reasonable mistake as to age for men under 24 but not for men over 24. See *Thlimmenos v Greece* (2001) 31 E.H.R.R. for successful reliance on art.9 together with art.14.
[230] (1984) 37 D.R. 105.

CHAPTER 19

THE RIGHTS OF VICTIMS OF CRIME

A. INTRODUCTION

19–01 The principal purpose of the Convention is the protection of the rights of individuals from infringement by states. However, the Court has recognised that, if the rights declared in the Convention are to be protected effectively, certain provisions must be read as imposing positive obligations on the state. This chapter examines those positive obligations that protect victims (and potential victims) of crime, and others (notably witnesses) whose rights may be infringed during the criminal process.[1]

19–02 The chapter is divided into seven parts. Part B discusses the duty on public authorities to take steps to protect individuals from the infringement of their rights under art.2 and art.3. Part C examines the state's duty to have in place criminal laws that prohibit certain forms of conduct which infringes Convention rights. Part D concerns the duty to investigate alleged breaches of arts 2 and 3. Part E examines the related duty to bring a prosecution where there is evidence of such a breach. In Pt F there is discussion of the procedural rights of victims and witnesses in the course of a criminal prosecution. Pt G examines the rights of victims and their families in relation to the sentencing process. Finally, Pt H relates the previous discussions to the emerging jurisprudence on art.4.

[1] For a general survey, see Mowbray A., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), esp. Chs 2, 3 and 8.

B. OBLIGATION TO PREVENT INFRINGEMENTS OF RIGHTS UNDER ARTICLES 2 AND 3

19–03 As its starting point in the judgment in *Osman v United Kingdom*[2] the Court made the following general statement:

> "The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[3] It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[4]

19–04 This passage establishes two separate but related obligations. The positive obligation to have "effective criminal law provisions" to protect the art.2 rights of individuals is a duty that lies on the state as a whole. That obligation extends from the law itself to enforcement procedures and systems: there must be courts, police, and prosecutors and so forth. But the focus of the present discussion is the related positive obligation to take *operational* measures in order to secure the protection of art.2 rights in circumstances where particular persons are at risk. The taking of operational measures will usually be a matter for the police, but the state is ultimately responsible for ensuring that art.2 rights are protected.

19–05 In *Osman*, where the applicant and his family had notified the police about the threatening behaviour of a certain schoolteacher, the government argued before the court that the obligation should not arise unless the failure of the police to perceive the risk to life amounted to gross negligence or wilful disregard of the duty to protect life. However, the Court held that the test is whether "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party."[5] Although there will always be difficulties in applying this to the facts,[6] this is a broader standard of liability designed to ensure greater protection for the art.2 rights of individuals.

19–06 The Court acknowledged "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources," and it therefore concluded that the scope of the positive obligation must not be such as to "impose an impossible or

[2] (2000) 29 E.H.R.R. 245.
[3] The court referred here to its judgment in *LCB v United Kingdom* (1999) 27 E.H.R.R. 212, para.36.
[4] (2000) 29 E.H.R.R. 245 at para.115.
[5] (2000) 29 E.H.R.R. 245, para.116.
[6] See also *Keenan v United Kingdom*, (2001) 33 E.H.R.R. 38; and *Mastromatteo v Italy*, Judgement, October 24, 2002, ECtHR.

disproportionate burden on the authorities." However, the Court again rejected the government's argument (summarised at para.107 of the judgment) that gross negligence should be the standard of liability. It held that the test should be whether the authorities "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (i.e. the identified risk to life). Put in terms of the positive obligation, the authorities have a duty to "do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."[7]

19–07 The Court made it clear that a principal reason for imposing a more demanding standard than that for which the government had contended was the fundamental nature of the right declared by art.2. Since the right to life is in one sense the most basic of all the Convention rights, it is appropriate to expect the authorities to take seriously any threats to that right, and to give some priority to preventive measures in cases where the risk of an attack on that right is foreseeable. But, as will be seen in 19–23ff below, those preventive measures must be taken with due regard to the rights of others who may be affected. This means not only the right to life of the person who is alleged to pose the threat, but also wider rights of that person and others. Police powers must be exercised

> "in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention."[8]

19–08 This last consideration was one of several factors which led the Court to conclude in the *Osman* case that there had been no violation of art.2 in failing to prevent the incident in which the schoolteacher shot and killed the father of the boy with whom he was infatuated. Although there had been a sequence of incidents, some strange and others potentially dangerous, the Court held that there was no stage at which it could be said that the police knew or ought to have known that the lives of any members of the Osman family "were at real and immediate risk" from the schoolteacher. The police could not be criticised for failing to arrest him, since they have a duty to act in accordance with the rights of freedoms of all individuals, and the required standard of suspicion was not fulfilled.[9]

19–09 The *Osman* judgment was followed in the context of an alleged violation of art.3 in *Z and ors v United Kingdom*.[10] The applicants were four children who suffered appalling neglect at the hands of their parents, over a period of years. The local authority with statutory responsibility for the children were kept fully informed of the conditions, but devoted their resources to keeping them with their parents instead of removing them into care. There was no dispute that the conditions amounted to inhuman and degrading treatment. The more difficult issue was

[7] (1998) 29 E.H.R.R. 245 at para.116.
[8] (1998) 29 E.H.R.R. 245 at para.116.
[9] See also *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50 for the application of *Osman* to two different cases.
[10] (2002) 34 E.H.R.R. 3.

whether the state could be held responsible for the criminal acts of the parents committed in their own home. The Court held that it could:

> "Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. [The Convention] requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge . . . [The local authority] was under a statutory duty to protect the children and had a range of powers available to them, including removal from their home. The children were however only taken into emergency care, at the insistence of the mother, on 30 April 1992. Over the intervening period of four and a half years, they had been subject in their home to what the consultant child psychiatrist who examined them referred to as horrific experiences. The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence. The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case however leaves no doubt as to the failure of the system to protect these child applicants from serious, long-term neglect and abuse. Accordingly, there has been a violation of Article 3 of the Convention."[11]

19–10 The *Osman* test has also been applied to situations where the authorities have failed to prevent a killing in custody, whether by suicide or third parties. In *Keenan v United Kingdom*[12] the deceased, who was coming to the end of his sentence, hung himself after he was placed in a segregation unit following an offence against prison discipline. He had a documented history of mental instability and self-harm, and had been perceived as a suicide risk in the recent past. After reiterating the test laid down in *Osman*, the Court proceeded "to consider to what extent this applies where the risk to a person derives from self-harm" (para.89). The Court began by noting that "persons in custody are in a vulnerable position and that the authorities are under a duty to protect them" (para.90). It accepted that the preventive measures taken would have to respect the rights of the detainee. (Thus, for example, there would be limits on the state's duty to force feed a prisoner on hunger strike). But the Court noted that "there are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy" (para.91). The Court went on to define the applicable test in these terms:

> "[W]hether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that reasonably could have been expected of them to prevent that risk" (para.92).

On the facts of *Keenan*, the Court found that there was sufficient indication of risk to put the authorities on notice (paras 95–96). However, after a detailed examination of the treatment of the deceased, the Court held that it was not apparent that the prison authorities had failed in their duty of care (para.98). The

[11] See also *E. v United Kingdom* (2003) 36 E.H.R.R. 31.
[12] (2001) 33 E.H.R.R. 38.

Court went on to hold that the lack of effective monitoring of his condition, combined with the disciplinary measures which had been taken against him, amounted to a violation of art.3 (paras 102–115).

In *Edwards v United Kingdom*[13] the Court applied the *Osman* test to the alleged failures of a number of agencies, including medical professionals, the police, the courts and the Crown Prosecution Service. The Court found a violation of art.2 on the basis of inadequate screening procedures and the failure of the relevant authorities to pass on information about a prisoner who subsequently murdered the applicants' son while they shared a cell together.

19–11 In *R. (Amin) v Secretary of State for the Home Department*,[14] the House of Lords considered the failure by the authorities to prevent the racist murder of Zahid Mubarek, a 19-year-old prisoner serving a sentence in Feltham Young Offenders Institute. As Lord Bingham observed (at para.30), the test for a breach of the positive obligation in art.2, laid down by the European Court in *Osman*, is essentially the same as the test for a breach of the common law duty of care:

> "A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746, 747: 'There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.' Such person must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Comr of Police for the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm."[15]

19–12 The European Court continues to recognise different situations where the applicability of the *Osman* test will arise.[16] Special mention should be given to *Oneryildiz v Turkey*.[17] The applicant and his family lived illegally in a shanty town located on a rubbish tip in Istanbul. As a result of a methane explosion in 1993, nine of his close relatives were killed. The applicant complained that the local authority had failed over a number of years to act upon risk assessments that predicted the very disaster that occurred. In addition, he complained that the authorities should have provided the residents with information about the potential risks.[18] The Government argued that the State's responsibility for actions that were not directly attributable to its agents could not extend to all occurrences of accidents or disasters and that in such circumstances the Court's interpretation as

[13] (2002) 35 E.H.R.R. 19.
[14] [2004] 1 A.C. 653, HL.
[15] See also *R. (Wright and Bennett) v Secretary of State for the Home Department* [2002] H.R.L.R. 1.
[16] These include the use of army vehicles to control public order disturbances (*McShane v United Kingdom*, (2002) 35 E.H.R.R. 23); the threat posed by prisoners to the local community when released on home leave (*Mastromatteo v Italy*, Judgment, October 24, 2002, ECtHR); and the waste-management of refuge sites that consitute an environmental hazzard (*Oneryildiz v Turkey* (2005) 41 E.H.R.R. 20).
[17] (2005) 41 E.H.R.R. 20.
[18] Para.67.

to the applicability of art.2 should remain restrictive.[19] Contrary to the Government's submissions, the Grand Chamber held that the positive obligation to protect life under art.2 "must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake", and *a fortiori* in the case of industrial activities, which "by their very nature are dangerous". As to when the positive obligation might be violated, the court gave the following guidance:

> "the harmfulness of the phenomena inherent in the activity in question, the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances, the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are merely factors among others that must be taken into account in the examination of the merits of a particular case, with a view to determining the responsibility which the State may bear under Article 2".[20]

Finally, reference should be made to *Makaratzis v Greece*,[21] where the Grand Chamber re-affirmed the State's obligation 'to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction', which includes the regulation of policing operations 'within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident.' This makes it clear that the state's positive obligations are not merely towards individuals in danger but also for the 'general protection' of society,[22] an aspect further examined in 19.24ff below.

C. Obligation to Have in Place Laws which Penalise Infringements of Basic Rights

19–13 Several decisions of the Strasbourg Court confirm that Contracting States have obligations to ensure that their domestic criminal law penalises the infringement of certain basic rights, so as to provide protection for those rights.

I. Protection of Article 3 Rights

19–14 Article 3 has an obvious application in the field of corporal punishment, which may amount to inhuman and degrading treatment. Two separate questions then arise. First, what degree of physical chastisement constitutes "inhuman and degrading treatment" for the purposes of art.3? And secondly, is the state responsible for what one private individual does to another?

19–15 In the well-known decision in *Tyrer v United Kingdom*[23] the Court held that the use of the birch as a punishment in the Isle of Man was "degrading" and

[19] Paras 72.
[20] Para.73.
[21] (2005) 41 E.H.R.R. 1092, paras 57–58.
[22] *Giuliani and Gaggio v Italy*, App. no. 23458/02, judgment of March 24, 2011, para.247.
[23] (1979–80) 2 E.H.R.R. 1.

therefore contravened art.3. By contrast, in *Costello-Roberts v United Kingdom*[24] the Court held that beating a boy three times through his shorts with a rubber-soled gym shoe did not amount to "degrading punishment", the Court referring to the absence of serious long-term physical effects. Two years earlier, in *Y v United Kingdom*,[25] the Commission had found a violation of art.3 in a case of caning over trousers, where the caning had left the boy with severe bruising and swelling. Neither of the last two cases derived from criminal proceedings, and both of them concerned the use of corporal punishment in schools. Indeed, several applications to Strasbourg have concerned physical discipline at schools,[26] with the Commission particularly ready to find that the treatment or punishment was degrading where it was administered by a male teacher to a teenage girl pupil.[27]

19–16 The question of the limits of Art.3 came squarely before the Court in the case of *A v United Kingdom*,[28] where the applicant's stepfather had been acquitted of assault occasioning actual bodily harm. It was admitted that the stepfather had caned the boy (then aged nine) on several occasions, but the jury evidently did not believe that the prosecution had proved that the canings were more than "moderate and reasonable chastisement." By the time the case reached the Strasbourg Court the United Kingdom government had accepted that there was a breach of art.3. The Commission had found that "the strokes were severe enough to leave bruises which . . . were visible several days later."[29]

19–17 Turning to the issue of state responsibility, the Court held that the United Kingdom was responsible for the violation committed by the stepfather because the criminal law afforded too great a degree of latitude to a jury. The obligation laid on states by art.1 of the Convention, taken together with art.3:

> "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[30]

In principle, therefore, the laws of each state must, at a minimum, be defined in such a way as to ensure that any breach of art.3 constitutes a criminal offence.

19–18 In *A v United Kingdom* the Court held that the breadth of the defence of reasonable chastisement in English law is such that it "fails to provide adequate protection to children and should be amended."[31] The proper test at common law

[24] (1995) 19 E.H.R.R. 112.
[25] (1994) 17 E.H.R.R. 238.
[26] See, e.g. *Mrs X v United Kingdom* (1979) 14 D.R. 205, *B and D v United Kingdom* (1986) 49 D.R. 44, and *Family A v United Kingdom* (1987) 52 D.R. 156.
[27] See *Mrs X and Miss Y v United Kingdom* (1984) 36 D.R. 49, and *Warwick v United Kingdom* (1989) 60 D.R. 5 and 22.
[28] (1999) 27 E.H.R.R. 611.
[29] (1999) 27 E.H.R.R. 611 at 619.
[30] Para.22.
[31] Para.24.

had been considered by the Court of Appeal in *Smith*,[32] where the mother of a six-year-old boy asked her partner to "smack" the child for disobedience and the man gave the child two strokes with his belt. He was convicted of assault occasioning actual bodily harm, the jury having rejected his defence that he did no more than inflict "moderate and reasonable chastisement". The Court of Appeal dismissed his appeal, on the basis that this was the correct test. Subsequently, in *R. v H.*,[33] the common law defence of lawful chastisement was specifically refined in order to bring it into line with the requirements of art.3. The Court of Appeal held that pending the Government's plan to reform the law, a judge should direct the jury that, when they were considering the reasonableness or otherwise of the chastisement, they had to consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering the punishment.

19–19 As a result of s.58 of the Children Act 2004, the defence of reasonable chastisement is no longer available in any proceedings for an offence of assault occasioning actual bodily harm (Offences Against the Person Act 1861 s.47), unlawfully inflicting grievous bodily harm (Offences Against the Person Act 1861 s.20), causing grievous bodily harm with intent (Offences Against the Person Act 1861 ss.18), or cruelty to a child (Offences Against the Person Act 1861 s.16). The law remains unchanged with regard to all other forms of common law assault and battery. This means that there is still a special excepton 'for violent ill-treatment of children in otherwise universally applicable laws against assault', which can be said to breach 'the principle of equal protection under the law.'[34] Moreover, the 2004 Act fails to deal with the extent to which chastisement by a parent, which falls short of a violation of art.3, may nevertheless constitute a violation of art.8;[35] and neither s.58 nor the judgment in *H.* refers to the relevance of whether an instrument was used and whether marks were left on the child's body, matters of significance to the Strasbourg Court.[36]

19–20 In *R. (Williamson) v Secretary of State for the Home Department*,[37] the House of Lords rejected the submission that the prohibition on any form of corporal punishment under s.548 of the Education Act 1996 amounted to a disproportionate interference with the right of practising Christians to send their children to schools that favoured mild physical correction as part of a biblical education. Lord Nicholls held[38] that the legislature was entitled to take the view that "all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable".[39] Lady

[32] [1985] Crim.L.R. 42.
[33] [2002] 1 Cr.App.R. 7.
[34] Commissioner for Human Rights, *Children and Corporal Punishment: "the Right not to be Hit, also a Children's Right"* (2006) 43 E.H.R.R. SE17, p.228.
[35] See paras 18–40 to 18–41, below.
[36] S.51 of the Criminal Justice (Scotland) Act 2003 requires courts to give special consideration to assaults involving a blow to the head, shaking, or the use of an implement (although it does not regard such assaults on children as necessarily unjustifiable).
[37] [2005] 2 A.C. 246, HL.
[38] At para.50.
[39] At para.80.

Hale agreed, relying upon *Pretty v United Kingdom*,[40] that the institution of a universal ban was justified in order to protect a vulnerable class of persons.[41]

19–21 Article 3 has also been relied upon in cases of rape. The first steps were taken in the judgment in *X and Y v Netherlands*, which focussed entirely on Article 8 and is discussed in para.19–59 below. Subsequently the Grand Chamber in *Aydin v Turkey*[42] recognised that rape of a civilian by soldiers could amount to torture contrary to art.3, although in this case there was a great deal of other physical abuse, and the essence of the applicant's case was that the public prosecutor had failed to mount a proper investigation of the case. The major advance came in *MC v Bulgaria*,[43] where the Court, having surveyed the rape laws of various member states, held that:

> "states have a positive obligation inherent in Arts. 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."[44]

In this case two men had had sex with a girl of 14, who alleged that she had been raped. After various enquiries by the police, prosecutor and psychologists, the prosecutor terminated proceedings for rape on the ground that force or threats by the men had not been established, nor was there sufficient evidence of resistance by the applicant. The incident was described as a "date rape." The Court noted the emerging European and international trend not to require evidence of physical resistance or violence and to focus on the absence of consent. It also noted the Council of Europe's declaration that effective protection from rape requires the penalisation of non-consensual acts "including cases where the victim does not show resistance".[45] The Court held that Bulgarian law was equivocal on this, and that prosecutorial practice suggested that force, threats or resistance was required. The prosecutor's description of the incident as a "date rape" appeared to bear this out. The Court therefore concluded that the state had not fulfilled its positive obligation to have an effective criminal-law system punishing all forms

[40] (2002) 35 E.H.R.R. 1. at para.74.
[41] The judgment of Lady Hale also provides a detailed description of the obligations of the United Kingdom under the United Nations Convention on the Rights of the Child and the extent to which they impact on the question of corporal punishment both inside the family and in other institutional settings. She concludes (at para.80) that:
"[The] state has a positive obligation to protect children from inhuman or degrading punishment which violates their rights under article 3. But prohibiting only such punishment as would violate their rights under article 3 (or possibly article 8) would bring difficult problems of definition, demarcation and enforcement. It would not meet the authoritative international view of what the UNCRC requires".
[42] (1998) 25 E.H.R.R. 251; for detailed analysis of this judgment and subsequent developments, see C. McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 I.C.L.Q. 565, and P. Londono, 'Defining Rape under the European Convention on Human Rights' in McGlynn, C., and Munro, V., *Rethinking Rape Law: International and Comparative Perspectives* (2010).
[43] (2005) 40 E.H.R.R. 459; for discussion, see P. Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' [2007] E.H.R.L.R. 158, and I. Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights', [2008] E.H.R.L.R. 357.
[44] [2008] E.H.R.L.R. 357, para.153.
[45] Council of Europe, Rec No. R(2002) 5, on the protection of women from violence.

of rape, since its officials had "put undue emphasis on 'direct' proof of rape" rather than focussing on the absence of consent.[46]

> "Any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of an individual's sexual autonomy."[47]

19–22 Although the Court in *MC* confined its observations to the rape of women, in principle those observations should apply equally to male rape.[48] However, the principal engine for developing the relevant law has been the rights of women. Thus in *Opuz v Turkey,*[49]a judgment finding violations of arts 2 and 3 because of the government's failure to ensure adequate protection for the rights of the applicants, the Court also found that the Turkish system at that time discriminated against women. Finding a violation of art.14, the Court concluded:

> "that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence . . . "[50]

While the Court had earlier acknowledged that in some cases men and children may also be victims of domestic violence,[51] the distinctive attitude towards women as victims was what propelled the Court to its finding of discrimination contrary to art.14 in addition to the violations of other Convention rights.

II. Protection of Article 2 Rights

19–23 Article 2 declares everyone's right to life, but allows exceptions when deprivation of life "results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Justifiable Force

19–24 The scope and application of the exceptions in art.2 were considered in the Gibraltar shooting case, *McCann and others v United Kingdom,*[52] where the European Court differed from the Commission's finding and held (by 10 votes to nine) that the United Kingdom had violated art.2 in the shooting by SAS soldiers

[46] Above, n.43, para.182.
[47] *Ibid.*, para.166.
[48] *Report by Baroness Vivien Stern CBE of an Independent Review into how Rape Complaints are handled by Public Authorities in England and Wales* (Government Equalities Office, 2010), Annex A, p.128.
[49] App.no.33401/02, judgment of June 9, 2009.
[50] App.no.33401/02, judgment of June 9, 2009, para.200.
[51] App.no.33401/02, judgment of June 9, 2009, para.132.
[52] (1996) 21 E.H.R.R. 97.

of three IRA terrorist suspects. The government's argument had been that the three suspects were believed to have a radio-control detonator which would activate a car bomb, and that it was necessary to kill them to prevent the imminent detonation. In the event, neither a radio-control device nor a car bomb was found. The majority judgment began by stating that the purpose of art.2 is to secure practical and effective protection of each individual's life, and it went on to make three significant points:

- it emphasised that a person may only be intentionally killed by the state where "absolutely necessary", a "stricter and more compelling test" than that applicable to the phrase "necessary in a democratic society" under para.2 of Arts 8 to 11.
- it stated that its inquiries concerned not only the actions of the law enforcement officers but also the planning of any law enforcement operation, to ascertain whether it was organised so as to "minimise, to the greatest extent possible, recourse to lethal force".
- it held that the actions of the officers should be judged on the facts that they honestly believed, for good reasons, to exist.

19–25 The Court found that the soldiers themselves had not violated art.2 because, on the information given to them, they did have good reason for the beliefs that led them to fire the shots. However, the majority of the Court added that the immediate reaction of the soldiers, in shooting the three suspects dead, lacked "the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects." The Court went on to hold however that the United Kingdom government had violated art.2, through its failure to ensure that the operation was planned so as to minimise the risk of death: the killings had not been shown to be "absolutely necessary" for the "defence of any person from unlawful violence."

19–26 Despite the narrow and controversial nature of the decision in the *McCann* case, the essential tenets of the judgment have been re-stated and applied in a series of subsequent cases, with only slight modulations. Some of the decisions have been close on the facts—for example *Andronicou and Constantinou v Cyprus,*[53] where in view of the deployment of machine guns in a confined space the Court regretted that so much fire power had been used, but narrowly concluded that the use of lethal force could not be said to have exceeded what was absolutely necessary for the purpose of defending the lives of the hostage (who was killed in the operation) and of the army officers themselves. In *Gul v Turkey*[54] the Court emphasised the need for 'strict proportionality' in finding a violation of art.2. In *Bubbins v United Kingdom*[55] the Court found no violation, in view of the fact that

[53] (1998) 25 E.H.R.R. 491.
[54] (2002) 34 E.H.R.R. 28.
[55] (2005) 41 E.H.R.R. 458.

the law enforcement officer who shot the victim honestly believed that his life and his colleagues' lives were in danger. We return to this judgment below.

19–27 The violation found in *Makaratzis v Greece*[56] was the failure of the government to put in place a legislative and administrative framework on the appropriate use of firearms by the police, leading to the 'chaotic' use of firearms in the case. In *Isayeva v Russia*[57] the Court found a violation in the use of high-explosive bombs in Chechnya, without the requisite degree of care for the lives of ordinary villagers, some of whom were unintentionally killed. In *Juozaitiene and Bikulcius v Lithuania*[58] the Court found that shooting at a fleeing car, killing two young men in the car, showed a lack of caution in the use of firearms resulting in the use of force which was neither strictly proportionate (the alleged dangers presented by their driving not having been established) nor absolutely necessary (because lesser methods should have been tried). And in *Giuliani and Gaggio v Italy*[59] the Grand Chamber held that neither the police officer who shot the marauding demonstrator nor the Italian authorities who organized the policing of the demonstration had failed to provide the requisite level of protection.

19–28 Many of these judgments turn on complex and contested factual circumstances. However, they do involve an assessment of the relevant domestic law, and in relation to English law there remains some controversy. The Court in *McCann* considered the Gibraltar law of justifiable force, contained in art.2 of the Gibraltar Constitution, which provides for a killing to be justified on stated grounds if the force was "reasonably justifiable". The Court observed that "the Convention standard appears on its face to be stricter", but it concluded that the difference was not so great as to justify a finding of a violation of art.2 on this ground alone.[60] This raises the question whether the even less demanding rules in English law give adequate protection to art.2 rights.

19–29 The Strasbourg jurisprudence starts from the proposition that the right to life of everyone (including suspected or actual offenders) should be protected so far as possible. This emphasis on the right to life is not usually to be found as the starting point in English criminal cases, where the focus is upon whether the court has been left in reasonable doubt over the justifiability of the killing. Similarly, the term "absolutely necessary" is undoubtedly stronger than the term "necessary" as it is understood in English law. There has been considerable controversy as to whether the English law of self-defence is Convention-compliant,[61] and that controversy has not been stifled by the enactment of s.76 of the

[56] (2005) 41 E.H.R.R. 1092.
[57] (2005) 41 E.H.R.R. 791.
[58] (2008) 47 E.H.R.R. 1194; cf. also *Nachova v Bulgaria*, n. 83 below and accompanying text.
[59] App.no. 23458/02, judgment of March 24, 2011.
[60] (1996) 21 E.H.R.R. 97 at paras 154–155.
[61] Compare Leverick F., 'Is English self-defence law incompatible with Article 2 of the ECHR?' [2002] Crim.L.R. 347, and Ashworth, A., *Principles of Criminal Law* 6th edn (Oxford: OUP, 2009), pp.113–127, with Buxton R., 'The Human Rights Act and Substantive Criminal Law' [2000] Crim.L.R. 331 and Smith J.C., 'The Use of Force in Public or Private Defence and Article 2' [2002] Crim.L.R. 958. For a thorough analysis, see now Leverick F., *Killing in Self-Defence* (2006), esp. Ch.10.

Criminal Justice and Immigration Act 2008.[62] At least three major issues warrant further consideration.

19–30 First, the art.2 jurisprudence requires law enforcement officers to plan their operations so as to minimise the risk to life. The requirement of proper planning suggests that the ambit of criminal liability might be spread wider than the law enforcement officers who actually caused the death: if it could be established that there had been gross negligence on the part of senior officers which led to deaths, a prosecution for manslaughter might have a realistic prospect of resulting in conviction[63]—the Human Rights Act would not be creating a criminal offence,[64] but the Convention would be grounding the duty of the senior police officer which might then be the basis for a manslaughter conviction. This line of argument is strengthened by the decision in *Osman v United Kingdom*.[65] More generally, one implication of s.6 of the Human Rights Act 1998, requiring public authorities to act in accordance with the Convention, is that senior law enforcement officers should train their personnel and plan their operations so as to preserve life to the maximum degree.

19–31 Secondly, the Court has insisted, in *McCann*[66] and several subsequent judgments, that the beliefs on which officers act when causing death should be based on "good reason." This is an objective test which, in effect, places such a high value on the right to life as to require law enforcement officers to make reasonable attempts to ascertain the true facts before using or authorizing lethal force.[67] In that respect it appears to impose a more demanding standard than s.76(4) of the Criminal Justice and Immigration Act 2008, which states that a defendant should be judged on the basis of a genuinely held mistaken belief (although the reasonableness of a belief is relevant to determining whether it was genuinely held). However, in the one judgment in which the Strasbourg Court had the opportunity to examine the English law on self-defence and justifiable force, it failed to deal with the issue convincingly. In *Bubbins*,[68] where a man appeared to be pointing a gun at police officers who were surrounding his flat, the Court re-stated the *McCann* formulation, that the use of force may be justified under art.2(2):

> "where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others."[69]

[62] The J.C.H.R. took the view that the new law fails to comply with art.2: Joint Committee on Human Rights, *Legislative Scrutiny* (15th report, session 2007–08), para.2.35; cf. the Government response, ibid., Appendix 7.
[63] cf. the facts of the well-known tort case of *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 155, arising out of the Hillsborough football stadium disaster.
[64] S.7(8) of the HRA 1998, discussed at para.19–63 below.
[65] (2000) 29 E.H.R.R. 245. See also *Oneryildiz v Turkey* (2005) 41 E.H.R.R. 20.
[66] (1996) 21 E.H.R.R. 97 at para.200.
[67] See also *Ramsahai v Netherlands* (2006) 43 E.H.R.R. 823, re-asserting the strictness of the applicable test at [376–377] and [382].
[68] See n.55 above.
[69] (2005) 41 E.H.R.R. 458, para.138, citing *McCann* (1996) 21 E.H.R.R. 97, para.200.