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Recent Judgments and Decisions of the European Court of Human Rights towards Estonia

1. Introductory remarks

This article reviews the judgments^{*1} and decisions^{*2} that have been made by the European Court of Human Rights (ECHR) towards Estonia. It does not analyse every single case decided by the ECHR in the time span addressed here but instead looks at certain groups of decisions and judgments. First, it should be noted that in 2005 several cases were decided where the applicants complained about similar convention violations — about the refusal to grant residence permits to Russian nationals having served in the Soviet military or security forces, and their families. In these decisions, the ECHR adopted an approach to substantiating the inadmissibility of the applications that is largely novel from the perspective of general Strasbourg case law. Secondly, there is a group comprising decisions that address the question of whether Estonian courts when convicting some individuals for crimes against humanity for their actions in the late 1940s and early 1950s acted in accordance with the convention's requirements. These decisions do not offer significant new aspects

¹ Judgments of the European Court of Human Rights are passed on the merits of the case, and they either establish that a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms has occurred or establish that there has been no violation. It should be mentioned that the ECHR is not a fourth-instance, or appellate, court, and, e.g., it cannot reverse or quash the judgments of domestic courts. On the basis of the principle of subsidiarity, it is up to the domestic judicial system to establish rules concerning if and how to re-open proceedings after the finding of a convention violation by the Strasbourg court.

² Decisions of the ECHR are not made on the merits. Usually the decisions relate to the admissibility of the case, which means that the case shall either be referred for observation on its merits by one of the Chambers of the Strasbourg court or be declared inadmissible according to article 35 of the convention. Sometimes, the decisions that declare a case inadmissible provide quite lengthy reasoning by the Strasbourg court, and frequently the decisions declaring a case inadmissible offer also guidelines for similar or comparable cases for future reference — as shall also be demonstrated in this paper with reference to some of the cases originating from applicants against Estonia.

from the perspective of Strasbourg case law development but do place Estonia into the group of former Soviet bloc countries from which cases dealing with crimes of former state officials have reached Strasbourg.^{*3}

After consideration of these groups of decisions and judgments, the article proceeds to examine whether some areas where Estonia has before been found in violation of human rights continue to be problematic and whether any new patterns of this sort can be noticed.^{*4}

The total number of judgments and decisions made in January 2005 through January 2006^{*5} and entered into the HUDOC (Human Rights Documents) database is 15.^{*6} The total number of entries in the database through January 2006 is 51. This figure by itself is not informative, as cases that are finally decided on their merits are included in the database on multiple occasions — first when the decision is made about admissibility and then for the judgment on the merits. However, the number of entries in the HUDOC database may be indicative of a possible growing frequency with which individual applicants from Estonia seek the protection of the ECHR. The first entry is from 1998, and for the years between 1998 and 2004, inclusive, the annual number of entries in the HUDOC database has been between two and eight.^{*7} Without the month of January 2006, in 2005, there were 12 entries made in the HUDOC database. This is around 50% more than in the previous year and a significant increase over the figures for 2001 through 2003.^{*8} At the time of the writing of this article (May 2006), there were 11 judgments on the merits included in the HUDOC database.^{*9} Four of these were made in 2005, which is slightly under one third of all cases decided towards Estonia. The trend is certainly growing.^{*10}

It is important to note that — leaving aside one case out of the 11 where judgment was made on the merits (this case being one where the parties reached a friendly settlement^{*11}) — there are 10 cases to consider where the Strasbourg court ruled on the merits of the case. In eight of these cases, the court ruled in favour of the applicant, establishing a convention violation as having occurred, and in only two cases was there found to be no violation of the convention.

It is possible to draw some preliminary conclusions through examination of these statistics. First, there is a growing trend in the decisions and judgments of the European Court of Human Rights towards Estonia.^{*12}

³ It was demonstrated by Aeyal M. Gross already in 1996 that one of the three main groups of complaints made to Strasbourg from the former Soviet block countries comprised cases concerning public officials and the change of regime. According to the study, such cases originated from Bulgaria, the Czech Republic, Hungary, Poland, and the Slovak Republic. Although the Estonian cases discussed in this article are not directly assignable into this category, as they dealt with events occurring not during the collapse of the regime but when the occupation regime seemed at its peak, nevertheless the cases deal with former Soviet officials. See A. M. Gross. *Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries — a Study of the Case Law.* – European Journal of International Law 1996 (7) 1, pp. 89–102.

⁴ Kalle Merusk and the author have argued that an area in which there may seem to be a systematic problem of the Estonian judiciary in committing or not noticing human rights violations is that of court judgments in violation of article 7. These are cases where a reasonable individual cannot understand from the wording of the criminal law, not even with the assistance of courts or legal counsel, what behaviour may make him criminally liable. See K. Merusk, M. Susi. *Ten Years since Ratification — the European Convention on Human Rights and its Impact on Estonia.* – German Yearbook of International Law 2005 (48), pp. 327–367.

⁵ The time period in question is one year and one month. The author has included January of 2006 in the analyses, as some interesting decisions fall into this month — underlying some of the assumptions of this article about the existence of certain problem areas for Estonia in terms of human rights violations.

⁶ One may access the HUDOC database via <http://www.echr.coe.int/>. The total number of entries made during this period is 17, but two of these relate to information given by the Estonian government in the cases Puhk v. Estonia and Veeber No. 2 v. Estonia. Both adverse parties reported to the ECHR that, due to various individual and collective measures — like the change of the Penal Code, the quashing of some of the judgments in question by the Estonian Supreme court, and wide public debate on television and by relevant authorities — there “no longer exists any risk of new violations similar to those found in this case”. See Resolution ResDH (2005)61 concerning the judgment of the European Court of Human Rights of 10.02.2004 (final on 10.05.2004) in the case filed by Puhk against Estonia. Whether the public and judicial authorities in Estonia are truly aware of the nature of the violation in these cases and whether the risk of new, similar violations has indeed been effectively eliminated can be the subject of an entirely separate article and are thus not the focus of our attention here.

⁷ The number of entries made in the HUDOC database for 2004 was eight, and it was seven for 1999, six for 2000, four for 2001, three for 2002, four for 2003, and seven for 2004.

⁸ The somewhat higher number of decisions in the 1990s can be attributed to the fact that after Estonia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1996, there appeared a backlog of applications that had been awaiting a time when the ECHR could be involved. Often, these dealt with property matters or alleged violations falling into the time prior to Estonia’s ratification of the convention. All of these applications were declared inadmissible *ratione temporis*.

⁹ There had not yet been any judgments on the merits for 2006.

¹⁰ The HUDOC database does not include all decisions with which a case has been declared inadmissible. Frequently, the reasons for not reviewing a case on the merits may not necessitate deeper analysis and the applicant or his/her counsel is informed about the decision of inadmissibility through a simple and short decision. It would make the HUDOC database difficult to operate if all such decisions were included.

¹¹ ECHR, Slavgorodski v. Estonia, judgment (struck out of the list) of 12.09.2000, application No. 37043/97.

¹² This conclusion is not surprising, given the various reports about the growing frequency with which applicants from the Member States of the Council of Europe apply to Strasbourg.

And, secondly, at the time of this writing, 80% of the judgments made by the ECHR towards Estonia on the merits had established occurrence of a convention violation. It may therefore be safe to state that at this stage a decision by the ECHR that declares an application admissible is in itself more than half of a victory for the applicant, as the finding of a violation is likely to follow. This finding can be justifiably accorded additional weight by means of comparative data for Estonia's neighbouring countries of Latvia and Lithuania.^{*13} The current experience of the Baltic countries with the Strasbourg judicial system involves, on average, 85% of the cases declared admissible ending with the finding of a convention violation.^{*14} The other side of the coin is, as shall be demonstrated below, that often in decisions where a case is declared inadmissible, the ECHR also provides a comprehensive analysis of the case with references to relevant Strasbourg case law. This trend may be prompted by the need to economise on time and the human resources of the court while at the same time giving the applicants the opportunity to understand the position and reasoning of the ECHR on their particular case.^{*15}

It cannot be excluded that the practice by which the decision to admit an application means the strong likelihood of establishing a Convention violation, is a way by the Court to address the concerns of long proceedings within the Strasbourg system. When the future of Protocol No. 14 to the Convention, which is meant to considerably increase the effectiveness of the ECHR, is not at all clear, there is a need for temporary measures to shorten the time of uncertainty connected with the waiting of the final judgment.^{*16} This practice undoubtedly affects the majority of applicants. Recent statistics for 2005 show, that the ECHR made 28,581 decisions on the admissibility and at the same time handed down only 1105 judgments on the merits.^{*17}

2. Decisions about inadmissibility in cases of former officers of the Soviet Army

During the period under review in this article, three applications were decided upon by the ECHR where complaints from former officers of the Soviet Army and the Russian Army are concerned.^{*18}

In all three cases, the male applicant (the head of the family) had agreed to participate in the aid programme established in April and July 1993 by the president of the United States of America and the president of Russia, under which it was agreed to provide 5,000 units of housing for Russian military officers demobilised from the Baltic countries or elsewhere outside Russia. The former military officers were provided with funds by the US government to enable them to obtain a 'housing certificate' allowing them to purchase or construct an appropriate dwelling in Russia.^{*19} In order to become eligible for the programme, the former officers had to present a signed application "containing declarations that upon obtaining housing under this programme, the officer and his family would vacate their present dwelling(s) in the Baltic countries and would not seek permanent residency in any of the Baltic Republics, and from then on would enter the Baltic Republics only as foreign guests", according to the court.^{*20} The applicants indeed were able to obtain living space in Russia, but when in the early 2000s they wished to renew their temporary residence permits for

¹³ In the case of Latvia, at the time of writing of this article there had been 10 judgments made on the merits of the case (excluding one of the cases on the HUDOC list as detailed in the body of this work). Out of these 10 cases, the ECHR established occurrence of a convention violation in nine. In the case of Lithuania, there is available on the HUDOC site information on 19 cases that have been decided on their merits. Out of these 19 cases, the ECHR has established a convention violation in 16 instances.

¹⁴ The total number of cases filed against Estonia, Latvia, and Lithuania by May 2006 that were decided on their merits is 39, and in 33 instances a convention violation was established.

¹⁵ It is interesting to note that even in a country with long 'Strasbourg' traditions like the United Kingdom, for January 2005 through May 2006 there were 20 judgments on the merits. Of these, in 14 the ECHR established a convention violation; this is 70% of the cases and, if indicative of anything, confirms the general trend of the Strasbourg judiciary and perhaps the possibility for the British government to allocate more attention to presenting its arguments in Strasbourg.

¹⁶ For an analysis about Protocol No. 14, see Tilmann Laubner. *Relieving the Court of its Success? – Protocol No. 14 to the European Convention on Human Rights.* – German Yearbook of International Law 2004 (47), pp. 691–721.

¹⁷ See European Court of Human Rights, *Survey of Activities 2005*, available at www.echr.coe. According to the survey, only in 1,000 decisions on the admissibility out of 28,581 the application was declared admissible. 2,842 applications were communicated to the national governments. This statistical data shows, that once the application is communicated to the government for observations, there is around 1/3 chance that the case will be admitted and judgments on the merits delivered.

¹⁸ ECHR, *Nagula v. Estonia*, decision (inadmissible) of 25.10.2005, application No. 39203/02; *Vladimir and Nina Dorochenko v. Estonia*, decision (inadmissible) of 5.01.2006, application No. 10507/03; *Nikolai, Ljubov and Oleg Mikolenko v. Estonia*, decision (inadmissible) of 5.01.2006, application No. 16944/03.

¹⁹ The value of a housing certificate was usually 25,000 USD.

²⁰ *Dorochenko v. Estonia* (see Note 18), p. 7.

Estonia, these requests were denied. Domestic courts upheld the respective decisions of the authorities. The applicants (the former officers and their wives) were forced to leave Estonia. The applicants complained to the ECHR of various violations of the convention, of which the most comprehensive was the violation of article 8 of the convention — the claim being that the refusal to extend the residence permits violated their right to respect for their private and family life. It also deserves attention that they complained of violation of article 14; in the view expressed by the applicants in the Dorochenko and Mikolenko cases, many other individuals in comparable situations had received extension of their residence permits, the applicants thus receiving discriminatory treatment and, secondly, the wives of the applicants believed that their residence permits were not extended due to their marriage to the former Soviet Army officers.

Although the Strasbourg court had not ruled on comparable complaints from Estonia before 2005, it had made a major decision in a case from Latvia. On 9 October 2003, the Grand Chamber of the ECHR, by a vote of 11 to six, established that a violation of the convention's article 8 had occurred in the case of *Slivenko v. Latvia*.²¹ Here, the ECHR relied on analysis of the circumstances of the case from the perspective of the well-known principle of the margin of appreciation doctrine.²² The *Slivenko* case may be considered among the most significant ones decided by the Strasbourg court towards Latvia and addressing the somewhat sensitive question of 'Russian minorities' in the former Soviet bloc countries. As Michael Hutchinson has pointed out, the ECHR has often relied on the principle of the margin of appreciation in its more important and controversial judgments²³ — this was confirmed in the *Slivenko* case. According to the case law of the ECHR, three questions need to be asked in determining whether the state has violated the convention rights of individuals under its jurisdiction and overstepped its responsibilities under the margin of appreciation doctrine: whether the interference with the convention right has been "in accordance with the law", whether it pursued a legitimate aim, and whether the interference was "necessary in a democratic society".²⁴ The Strasbourg court decided that, although in the case of *Slivenko* the Latvian state acted in accordance with the law and pursued a legitimate aim when removing the applicants from the country, these actions were not necessary in a democratic society.²⁵

The Strasbourg never got to those questions in the Estonian cases.²⁶ The ECHR simply declared all of the applications concerning the alleged convention violations manifestly ill-founded. The reasoning of the Strasbourg court was substantially different from that applied in the *Slivenko* case — according to the ECHR, the applicants had 'waived' their rights to the protection extended by article 8 of the convention to their staying in Estonia.²⁷

The Strasbourg court does not mention even with one word the margin of appreciation doctrine in these three decisions. This cannot be an oversight²⁸ towards cases from Estonia; it must be indicative of a substantive and new approach of the ECHR in addressing matters where an individual can be claimed to have

²¹ ECHR, *Slivenko v. Latvia*, judgment of 9.10.2003, Reports of Judgments and Decisions 2003 – X.

²² For discussion of the concept of the margin of appreciation, see J. Schokkenbroek. The basis, nature, and application of the margin-of-appreciation doctrine in the case-law of the European Court of Human Rights. – Human Rights Law Journal 1998 (19) 1, pp. 30–36 and Y. Arai-Takashi. The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Antwerp: Intersentia 2002, pp. xiii, 300.

²³ See M. R. Hutchinson. The Margin of Appreciation Doctrine in the European Court of Human Rights. – International and Comparative Law Quarterly, July 1999 (48), pp. 638–639.

²⁴ These questions are used to determine the existence of the conditions set forth in article 8 (2) of the convention.

²⁵ See judgment cited in Note 21 *supra*, paragraphs 113–129.

²⁶ It is noteworthy that the Estonian Supreme Court considered a similar case concerning the removal of an individual from Estonia in 2004. Referring to *Slivenko v. Latvia*, the Supreme Court declared certain parts of Estonia's Aliens Act unconstitutional, thus eliminating the potential of an appeal to Strasbourg. Perhaps such exhibition of the spirit of 'subsidiarity' had been noted by Strasbourg. See Supreme Court of Estonia, Judgments of the Constitutional Review Chamber of the Supreme court of 21.06.2004, case No. 3-4-1-9-04, available — also in English — at <http://www.nc.ee>.

²⁷ The formulations used by the ECHR are: "The Court finds, on the evidence before it, in particular the applicant's express declarations and the steps he took to honour his part of the resettlement agreement, that he must be considered to have unequivocally waived any rights he may have had under article 8 to remain in Estonia." See the citation in Note 18, of the case of *Nagula v. Estonia*, p. 10. The same reasoning in another formulation is: "The Court considers the applicants' waiver of rights to be established irrespective of the fact that they failed subsequently to fulfill all their undertakings under the resettlement agreement, which could not reasonably found any legitimate expectation on their part to remain in Estonia permanently. It finds that that the respondent State cannot be held responsible for the applicants' subsequent change of mind." See the citation in Note 18 *supra*, for the case of *Dorochenko v. Estonia*, p. 13, and *Mikolenko v. Estonia*, pp. 14–15.

²⁸ To verify this, let us mention that in another case decided during the period under review here — the case of *Davydov v. Estonia* — the ECHR had to decide whether the refusal to grant a residence permit to an individual who had served long prison sentences in Estonia and was a Russian national violated article 8 of the convention. In its arguments when declaring the case inadmissible, the ECHR relied on the concepts of national security and public safety, and it examined whether the measure in question was "necessary in a democratic society". The court applied the three-level questioning process established in its case law. See ECHR, *Davydov v. Estonia*, decision (inadmissible) of 31.05.2005, application No. 16387/03, p. 5.

waived a convention right. This approach seems to suggest that, before one may consider the usual three questions related to the bounds of the state's margin of appreciation, it needs to be answered whether the applicant him- or herself has 'waived' the convention right in question. If the latter is deemed to be the case and the applicant may have waived the right, no further analysis is necessary and no violation has occurred.

The concept of the waiver of a convention right is not frequently encountered in the case law of the ECHR. The court has not used this concept, as far as is known to the author of this article, when deciding cases that impose upon states an obligation to refrain from interfering with the convention rights of individuals under their jurisdiction. It needs to be noted that in the articles and monographs analysing the concept of the margin of appreciation it is not mentioned that an individual could waive his or her rights and in this way step out from under the protective 'umbrella' of the convention.^{*29} One of the most popular handbooks for practitioners in Strasbourg proceedings suggests that according to Strasbourg case law it may be possible for an individual to waive his or her right to the impartiality of the court, to his or her own presence in court, and to a public hearing.^{*30} It is not theoretically clear whether an individual may waive his or her rights under the convention at all, nor to what extent or exactly which convention rights may be waived.^{*31} Where the instances mentioned by Karen Reid — all of which are related to article 6 (1) of the convention as to the fairness of the proceedings — are concerned, the author of this article wishes to refer to the principle whereby the ECHR looks at the fairness of the proceedings as a whole. It follows hence that the waiver of a procedural or fair trial right does not necessarily mean that the individual 'waives' the right under the convention to a fair trial in its entirety.

The ECHR uses the following formulation of the 'waiver of a convention right': "Admittedly neither the letter nor the spirit of this provision prevents a person from waiving from his own free will, either expressly or tacitly, the entitlement to have his case heard in public."^{*32} In addition to the principal question discussed above, here are presented two additional issues. The first is related to the timing of the 'waiver'. The applicants decided to participate in the aid programme in 1995. This was one year before Estonia ratified the convention. It is hard to disagree with the view that an individual cannot waive a right that he or she does not yet possess.^{*33} The second issue is related to the question of whether the wives of the applicants in the Dorochenko and Mikolenko cases indeed fully knew what obligations their husbands had accepted when signing their applications to participate in the aid programme. The ECHR paid attention to this matter and stated that it was not convinced that the wives of the main applicants never consented to participate in the aid programme, even though they never signed the petitions. The ECHR also noted that this issue had never been raised during the domestic proceedings.^{*34}

Finally, both applicants argued that the Estonian authorities had granted "a huge number" of residence permits to persons in situations similar to those of the applicants. It is interesting to note that the ECHR does not comment on this statement at all. This is despite the fact that, for example, the counsel of Mr and Mrs Dorochenko in the letter of 10 February 2005 again directed the attention of the ECHR to the differential treatment of the applicants — however, by referring to only one particular case.^{*35} Failure to present concrete factual evidence as to this violation may have prevented the Estonian courts likewise from taking a stance in relation to this complaint.^{*36}

In summary of these three cases there can also be three different explanations answering the question of why the ECHR decided against admitting the applications.^{*37} First, it is possible that by introducing the concept

²⁹ See, for example, references in Note 20. Note also that one of the most popular textbooks on the European Convention on Human Rights — J. G. Merrills, A. H. Robertson. *Human Rights in Europe: A Study of the ECHR*. 4th ed. Juris Publishing, Manchester University Press 2001, pp. xxi — does not mention that it is possible to waive the convention rights protected under articles 8 to 11.

³⁰ K. Reid. *A Practitioner's Guide to the European Convention on Human Rights*. 2nd ed. 2004, p. 648.

³¹ The possibility of the waiver of a convention right also seems to contradict the obligations taken up by Member States of the Council of Europe under article 1 of the convention — to guarantee to everyone under their jurisdiction the rights and freedoms specified in article 1 of the convention.

³² ECHR, *Hakansson and Sturesson v. Sweden*, judgment of 21.02.1990, Series A, No. 171-A, paragraph 66.

³³ Professor Bill Bowring of London Metropolitan University, who was listed in both the Dorochenko and the Mikolenko decision as among those representing the applicants, endorsed this view when approached by the author of this article — namely that the approach in which the ECHR considers the applicants to have waived their convention rights prior to Estonia joining the convention is problematic.

³⁴ See *Dorochenko v. Estonia* (Note 18), pp. 12–13, and *Mikolenko v. Estonia* (Note 18), p. 14.

³⁵ This letter has been made available to the author of this article.

³⁶ The author of this article had an informal discussion with an Estonian judge who was involved in deciding the case within the domestic judicial system. The judge mentioned that the courts were not presented with any proof of other individuals in a comparable situation receiving different treatment.

³⁷ The author of this article is almost convinced that, had the ECHR not rejected the applications through using the somewhat questionable convention right waiver concept, it would have probably had to rule in favour of the applicants. It would be difficult to consider necessary in a democratic society events such as these reported by the applicants in the Dorochenko case: "The applicants submitted that the first applicant's mother had suffered a heart attack on 4 October 2004 in Estonia, having been deprived of the support of the applicants. The first applicant's father of an advanced age also had serious health problems." See *Dorochenko v. Estonia* (Note 18), p. 11.

of the waiver of a convention right the Strasbourg court introduced a major novelty in its case law. This would be almost akin to establishing a prior ‘threshold test’³⁸ that needs to be passed by an applicant (by demonstrating that he or she has not waived the convention right in question) before the ECHR or domestic courts start to analyse the case from the perspective of the margin of appreciation doctrine. The second explanation can emerge from a more general question of international law in relation to the practices of states in protecting refugees. As Ryszard Piotrowicz and Carina van Eik have asked, “the question remains, to what extent is that practice based on obligation rather than goodwill alone?”³⁹ Can it be the case that the good will of the Strasbourg court toward the former Soviet Army officers and their families had simply withered away? The third possible explanation cannot be overlooked either. In all cases that are decided on their merits, a High Contracting Party of the Convention one of whose nationals is an applicant shall have the right to submit written comments and take part in hearings.⁴⁰ The Russian government exercised this right in the Slivenko case. The three cases from Estonia never passed the admissibility phase, and thus no question related to the intervention of the Russian government emerged.

3. Decisions about inadmissibility in cases of crimes against humanity

Two cases falling into the category of cases concerning crimes against humanity were decided upon during the 13-month period reviewed in this article: the cases of *Penart v. Estonia*⁴¹ and *Kolk and Kislyiy v. Estonia*.⁴² The applicant in the first case had been involved in planning and directing the killing of several civilians hiding in the woods, whereas the applicants in the second case had been involved in the deportation of civilian citizens. The acts of the first applicant took place in the years 1953 to 1954 and of the second and third applicant in 1949. All of them were convicted by the Estonian courts for crimes against humanity. Their complaint to Strasbourg stated that their conviction had been based on the retroactive application of criminal law.⁴³

Both applications were declared inadmissible as manifestly ill-founded. The Strasbourg court simply stated that it was satisfied that the Estonian courts had found that the acts of the applicants constituted crimes against humanity under international law at the time of their commission.⁴⁴ By doing this, the Strasbourg court continued the approach it had taken in similar cases before — not to interfere in the judgments of the domestic courts on matters related to crimes against humanity at times when the convention had not yet been adopted and not to provide a comprehensive analysis of the exception provided in article 7 (2) of the convention.⁴⁵

The ECHR devotes some attention to the question of whether the applicants should have been aware that their acts constituted crimes against humanity. This question is one of the central issues in the application of article 7 (1) of the convention in situations where the applicants have made an argument that the law was not clear enough for them to understand which conduct can bring about criminal liability.⁴⁶ The ECHR had avoided addressing this question of foreseeability in previous, French cases and did not change its course in the Estonian cases.⁴⁷ It did, however, point out that from the formal point of view the crimes of which the

³⁸ The term ‘threshold test’ in relation to the case law of the ECHR has been analysed in the following article: T. R. Hickman. The “Uncertain Shadow”: Throwing Light on the Right to a Court under Article 6 (1) ECHR. Public Law 2004, pp. 122–145.

³⁹ R. Piotrowicz, C. van Eik. Subsidiary Protection and Primary Rights. – International and Comparative Law Quarterly 2004 (53), p. 112.

⁴⁰ This right is provided by article 36 (1) of the convention and Rule 61 (2).

⁴¹ ECHR, *Penart v. Estonia*, decision (inadmissible) of 24.01.2006, application No. 14685/04.

⁴² ECHR, *Kolk and Kislyiy v. Estonia*, decision (inadmissible) of 17.01.2006, application No. 23052/04.

⁴³ In both applications, the complaint relied on article 7 of the convention.

⁴⁴ See *Penart v. Estonia* (Note 41), p. 10, and *Kolk and Kislyiy v. Estonia* (Note 42), p. 9.

⁴⁵ Article 7 (2) provides the following exception to the general prohibition of retrospective application of criminal law, contained in article 7 (1): “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.” So far, this exception has been relied on only in some French cases (see ECHR, *Papon v. France* (No. 2), decision of 15.11.2001, ECHR 2001 – XII).

⁴⁶ The ECHR uses this formulation regarding the clarity of criminal legislation: “A norm cannot be regarded as law, unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail.” See ECHR, *The Sunday Times v. the United Kingdom*, judgment of 26.05.1979, Series A, No. 30 (1979–80), 2 E.H.R.R. 245, paragraph 49, and ECHR, *Rekvenyi v. Hungary*, judgment of 20.05.1999, Reports of Judgments and Decisions 1999 – III, paragraph 49.

⁴⁷ The question referred to in the previous Note would become ironic in the context of a totalitarian regime. Imagine an official, before carrying out a deportation order, seeking appropriate advice from the courts, lawyers, or representatives of the state on the question of whether his action might make him criminally liable.

applicants were convicted were described in relevant provisions of international documents. It referred to the Charter of the International Military Tribunal, adopted in 1945; to Resolution 95 of the General Assembly of the United Nations Organisation, adopted in 1946; and to the Principles of the Nuremberg Trial, formulated by the International Law Commission of the United Nations Organisation in 1950.^{*48} With these referrals the ECHR wished to demonstrate that the idea of the actions of the applicants as offences was grounded in earlier law. An oversight in the ECHR decisions is referral to the Principles of the Nuremberg Trial, which were adopted in 1950. These principles had been passed by the time Penart committed his acts in 1953 and 1954, but in 1949 — when Kolk and Kislyiy participated in the deportations — they had not yet been passed and accusation of the applicants could not in any court be based on this international document.^{*49}

The matter of accessibility of criminal legislation^{*50} also has certain aspects that remain unaddressed in the decisions under review here. The question is whether the international documents referred to above were adequately accessible to individuals under Soviet jurisdiction. The ECHR has this answer: “As the Soviet Union was a member state of the United Nations Organization, it cannot be claimed that these principles were unknown to the Soviet authorities. Thus, the Court considers groundless the applicant’s allegations [...] that he could not reasonably be expected to have been aware of that.”^{*51} In a way, the Strasbourg court is right: certainly these principles were known to Soviet authorities — at least to some of them. Whether this awareness was limited to a small number of high-level authorities and whether this awareness also meant the possibility of being introduced to the text of these international documents remains unanswered.

4. Estonian court judgments in violation of article 6 (3) d): Conviction without the questioning of witnesses at a public trial

There were two cases from Estonia before the Strasbourg court between January 2005 and January 2006 that dealt with the issue of questioning of witnesses in a public trial. One of them — the case of *Taal v. Estonia* — was decided on its merits, and the ECHR unanimously established that violations of article 6 (1) and 6 (3) d) had taken place.^{*52} Another case was declared admissible.^{*53}

The *Taal v. Estonia* case received a great deal of publicity when the offences took place and subsequently when Mr. Taal was convicted in the Estonian courts. According to the charge, Taal had made, on several occasions, phone calls with bomb threats to a supermarket in one of the seaside living districts of Tallinn (Pirita). His conviction was based on witnesses supposedly recognising his voice from the tape recordings. All of the witnesses failed to appear at the first-instance court hearing, despite the requests of the defence. The court judgment relied on the statements that the witnesses had given during the pre-trial investigation. The Court of Appeal dismissed the appeal, and the Supreme court refused to grant the applicant leave to appeal.^{*54}

Usually, cases decided by the ECHR with reference to violation of article 6 (3) d) are not so black and white.^{*55} It was easy for the Strasbourg court to conclude that “the applicant’s conviction was based to a

^{*48} See *Penart v. Estonia* (Note 41), pp. 6–7, and *Kolk and Kislyiy v. Estonia* (Note 42), pp. 6–7.

^{*49} It is interesting to note that the ECHR here made the same mistake as it highlighted in relation to the conduct of the Estonian government in the well-known *Veeber No. 2 v. Estonia* and *Puhk v. Estonia* cases. In backing up its position, the Estonian government referred to judgments of the Supreme court that were passed in 1997 and 1998. The omissions of *Veeber* and *Puhk* took place in 1993 and 1994. The ECHR mentioned that the applicants could in 1993 and 1994 not anticipate and foresee the position of the Supreme court five years later. See ECHR, *Veeber v. Estonia* (No. 2), judgment of 21.01.2003, Reports of Judgments and Decisions 2003 – I, paragraph 37, and ECHR, *Puhk v. Estonia*, judgment of 10.02.2004, paragraph 32.

^{*50} For an individual to be criminally liable for his conduct, he or she should be able to have adequate access to laws that stipulate such liability. See ECHR, *G. v. France*, judgment of 27.09.1995, Series A, No. 325 – B, 21 E.H.R.R. 288, paragraph 25.

^{*51} See *Penart v. Estonia* (Note 41), p. 10, and *Kolk and Kislyiy v. Estonia* (Note 42), p. 9.

^{*52} ECHR, *Taal v. Estonia*, judgment of 22.11.2006.

^{*53} ECHR, *Pello v. Estonia*, decision of 5.01.2006, application No. 11423/03.

^{*54} The argument of the Estonian government during the Strasbourg proceedings was that the case was primarily about the issue of the admissibility of evidence. See *Taal v. Estonia* (Note 52), paragraph 30. This is a defence usually raised by governments in such circumstances.

^{*55} Most of the problem areas are related to the reasons for which the courts decided not to summon some of the witnesses to the hearing: whether the court should admit statements of anonymous witnesses, whether the witnesses had disappeared, and whether the courts had refused to call the witnesses (as suggested by the defence).

decisive extent on the statements of witnesses he had been unable to question”.⁵⁶ To the inability of the applicant and his lawyer to question the witnesses was added the fact that even the court did not question the witnesses directly.⁵⁷

The facts in the case of *Pello v. Estonia* are not so clear-cut. Here the domestic court questioned some of the witnesses at the public hearing. However, the applicant claimed that he had been unable to question two witnesses whose statements might have been decisive for his defence.⁵⁸ The developments in this case and the final position of the ECHR are interesting not only from the perspective of the individual applicant. It is noteworthy that the Supreme court, when analysing the appeal, considered in depth the Strasbourg case law. It referred to 10 Strasbourg cases, in total.⁵⁹ On the basis of its analysis of the facts and the case law of the ECHR, the Supreme court concluded that the conviction of the applicant had not been based entirely or to a decisive extent on the statements of the witnesses not questioned at the public court hearing.⁶⁰ Thus the judgment on merits by the Strasbourg court in this case is going to be also, in a way, an assessment of the Estonian Supreme court’s interpretation of the Strasbourg case law.

5. Estonia’s prison conditions

Until recently, there were no judgments or decisions from Strasbourg related to the prison conditions in Estonia. There is one now — in the case of *Alver v. Estonia*.⁶¹ It was established that for several periods during the detention of the applicant after he was sentenced to imprisonment by the domestic court the conditions of the imprisonment violated article 3 of the convention. The judgment lists in detail the apparent facts of the prison conditions from June 1996 to March 2000 — evidently, the applicant had kept good records of conditions. The Estonian government did not respond at all to some allegations, which led the ECHR to conclude: “The Court considers that it can legitimately draw inferences from the Government’s failure to provide more specific information on this point.”⁶²

There is nothing surprising in this judgment, as the prison conditions were to some degree a legacy of the socialist regime. However, what about the other individuals who stayed in the same conditions as Alver and whose prison conditions probably also violated convention requirements? If they wished to receive comparable monetary satisfaction to that enjoyed by Alver (the ECHR awarded him 3,000 EUR), would they have to turn to Strasbourg, or would there be a national remedy available for them? The issue of whether member states of the convention need to provide a national remedy for systematic convention violations is of great importance for the functioning of the principle of subsidiarity between the international court and domestic judicial systems. For example, the ECHR requires the member states to provide an effective remedy in their legal system in cases of complaints of unreasonable delay. The court has made the following observation and request of the member states: “If article 13 is, as the Government has argued, to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.”⁶³ Following this same reasoning, we find it only justified to suggest that the Estonian judicial system would also need to provide a remedy for individuals who can legitimately claim to be victims of human rights abuses due to their detention conditions. Until now, such cases have not proceeded in Estonia and the Supreme court has not had the opportunity to rule on this matter.

⁵⁶ See *Taal v. Estonia* (Note 52), paragraph 33.

⁵⁷ It is interesting to note that, although the ECHR judgment was made on 22.10.2005, the information reached the Estonian media almost five months later — in April 2006.

⁵⁸ See *Pello v. Estonia* (Note 53), p. 5.

⁵⁹ Estonian Supreme court, judgment of 16.10.2002, registration No. 3-1-1-98-02, available in Estonian at the homepage of the Supreme court <http://www.nc.ee/>.

⁶⁰ See *Pello v. Estonia* (Note 53), p. 5.

⁶¹ ECHR, *Alver v. Estonia*, judgment of 8.11.2005.

⁶² *Ibid.*, paragraph 52.

⁶³ ECHR, *Kudla v. Poland*, judgment of 26.10.2000, Reports of Judgments and Decisions 2000 – XI, paragraph 155.

6. Conclusions

The period of January 2005 through January 2006 has signified new developments in the Strasbourg case law towards Estonia.

First, the number of decisions and judgments is on the increase.

Second, the concept of the waiver of a convention right (used in the cases of former officers of the Soviet Army who wished to extend their residence permits) with reference to article 8 of the convention is a novel approach in the context of general Strasbourg case law. It raises the question of whether the court wishes to introduce a new judicial paradigm to complement the concept of the margin of appreciation or whether it relied on the concept of a waiver for practical reasons — on account of the need to find a reason for declaring the applications inadmissible.

Third, with the decisions in the cases related to offences in the late 1940s and early 1950s the ECHR reinforced its position that it will not intervene in the judgments of the domestic courts with respect to crimes against humanity.

Fourth, the violation of article 6 (3) d) in the failure of the Estonian courts to provide opportunities for the accused and his counsel to question the witnesses in a public court hearing may appear to be a newly emerging area of systematic convention violations by the Estonian courts. One anticipates with great interest the judgment of the ECHR on a case^{*64} related to the violation of this article that was declared admissible and where the Estonian Supreme court provided a comprehensive analysis of the Strasbourg case law.

Fifth and finally, although there is nothing surprising in the fact that Estonian prison conditions in the 1990s were not in accordance with the convention's requirements, there emerges a question as to whether the national judicial system provides remedy at a national level for potential complaints about the prison conditions.

⁶⁴ See *Pello v. Estonia* (Note 53).