2 Just Satisfaction under the Convention
Is There a Southern Dimension?*

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Introduction

When the European Court of Human Rights finds a violation of any protected right, the Convention relies on 'just satisfaction' to re-establish the equilibrium disturbed by the national authorities through the agency of that violation. The Court, mindful of its supranational character and desirous to intrude as minimally as possible in the sphere of national sovereignty, has deliberately imposed on itself a self-discipline that is mostly manifest in how far it will go in ordering the offending state to redress the wrong inflicted

From its early days the Court determined never to order violating states any acts of specific performance, but to limit itself to a declaratory judgement that the Convention has been violated, followed occasionally, but not always, by an order to the state to pay a sum of money to the victim by way of compensation. The Court does not declare laws or administrative acts which it finds in breach of the Convention to be null, nor does it enjoin a *restitutio in integrum*, even in cases where this would be factually possible. In the final analysis, the applicant can at best, expect a certificate of having been a victim of a human rights abuse, and a payment of a sum of money to cover real damages, moral damages and reimbursement of costs.

The process by which the offending law, and the administrative action or inaction are rectified in the domestic arena are no direct concern of the Court. A political process, entrusted to the workings and monitoring of the Committee of Ministers of the Council of Europe, sees to that.

It is hardly short of a platitude that, by their very nature, human rights are the common heritage of all mankind. The Universal Declaration of Human Rights (1948) starts by referring to the 'equal and inalienable rights of all members of the human family' as the foundation of freedom, justice and peace in the world. And the European Convention of Human Rights aims at securing to 'everyone' within the jurisdiction the rights and freedoms listed therein.

In theory it would amount to an offensive contradiction in terms to speak of a southern or northern perspective of human rights. Objectively, the moment the Court acknowledged that a western perception or enforcement of human rights can be different from an eastern one, or that different criteria should govern the application of human rights depending on which geographical area is at issue, the whole philosophical fabric of human rights would be nullified. The values enshrined in Art. 14 of the Convention that, in the enjoyment of fundamental rights any discrimination based on race, colour or national origin is impermissible, would be infringed, and not by some rogue state, but by the Court itself. In fact, one of the unwritten functions of the Court I perceive to be the harmonization of the enforcement of the Convention throughout all member states, aiming at a substantial, rather than a fictitious, uniformity in the application of the Convention.

Judge Rozakis's intervention focused on how the Court attempts to face the challenges posed by the occasionally huge differences that exist between Convention states in matters, among others, of cultural sensibilities, historical traditions, religious beliefs, national economic wealth, and conflicting legal systems. It is well to launch any discussion asserting the universal primacy of human rights, and that they should be enjoyed even-handedly across the continents; the Convention protects Europe from the Atlantic to the Urals, from the polar regions to the south Mediterranean.

The Court will always keep in mind as a long term objective a homogeneous interpretation and enforcement of the Convention throughout the whole of Europe; but it would be slow, at the same time, to ride roughshod over sensitive issues by imposing its own world-views when these jar stridently with deeply-felt sectional convictions and aspirations. It is easy to feel good about the international bonding brought about by a common human rights practice. But how is the Court to cope with single issues that, at the present stage of European fragmentation, evoke the most diverse evaluations in different societies? Take abortion, an issue which spans the whole gamut of legal experience. Abortion, a universally controversial subject, ranges from a protected fundamental right in the USA, to a decriminalized practice in many Con-

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vention states, to a criminal offence in some others, like Ireland and Malta. You cannot have a wider spectrum than that. In the name of standardization, how would the Court deal with such temperamentally-charged issues?

My remit is to explore if the profound divergences underlying European thought, often reflected in conflictual values, have left an imprint in the application of Art. 41 (formerly Art. 50) which deals with just satisfaction. Can it be said that the Court's case-law evidences different criteria, attributable either to the victim's or to the violating state's geographical identity? Are there a first and a second Europe? We have to keep in mind that the Court is the sum-total of 41 individual judges, of whom 31 are from the north and central Europe, 24 from the older democracies and 17 from the newer ones. They sit in delicately calibrated formations which strive towards a fair balance between all the different personal backgrounds. However, except for Judge Rozakis, from Greece, Senior Vice-President, all the other seven officials of the Court come from the old democracies from north and central Europe.

How Others See Us

Let me say from the outset that I consider the European Convention and the European Court of Human Rights to be the greatest single contribution to the assertion of human rights, in the whole span of history. Their success has been astounding, their benefits bountiful, their achievements inspiring. Any criticism I may make or borrow from human rights literature should always be perceived keeping in mind the unqualified respect I have for this hallowed institution. Every giant has its Achilles's heel. The Court, in my view, has Articles 6 and 41.

In fact these are two areas in the Court's case-law that, more than any other, have attracted consistent and widespread criticism in legal circles: its unsteady, and perhaps irrational waverings as to which 'civil rights and obligations' attract the guarantees of Article 6 (fair hearing) together with the wayward manner in which 'just satisfaction' is awarded or denied, and the methods used to asses it. This bane has perplexed the Court since its earliest days.

Criticisms against the way Strasburg awards 'just satisfaction' after a finding of a violation have received what is possibly the most damning expression in the very recent report by the English and Scottish Law Commission on damages under the Human Rights Act, 1998.[1] It would not be practicable to summarize here that voluminous report; one can only try to reproduce its main heads.

The report opens by referring to the 'Absence of clear principles in the Strasburg case-law' as to when damages should be awarded and how they should be measured. This lack of transparency and coherence is attributed to various reasons, among which is the fact that the Court does not, differently from British courts, apply a strict doctrine of precedent: 'apparently irreconcilable inconsistencies sometimes result'. The fact is that within Europe there are very diverse traditions as to the calculation of compensation. While the UK, German and Dutch systems have detailed rules governing the assessment of damages, other systems proceed empirically 'swayed by considerations of fairness' which give the judge a degree of 'unstructured discretion to adjust the award as he or she deems fit'.

Another reason for the lack of clear and precise rules as to the award and the liquidation of damages stems from the fact that the Court is an international tribunal, that has to digest a heavy mix of legal systems, always careful to strike a viable balance 'between exercising moral leadership in the field of human rights law' and, at the same time, 'ensuring that it does not... alienate the support for the European Court of Human Rights in particular states'. Judges are drawn from different backgrounds and diverse jurisdictions, and have varied experiences in awarding damages. Inevitably their views as to the proper levels of compensation will differ, sometimes very widely. When it comes to moral damages, in Strasburg quaintly called non-pecuniary damages, their assessment, as Lord Carnwath observed, is inevitably 'something of a jury exercise'. That was not meant as a compliment.

A jurist, recently summarized the position thus: 'It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the ECHR privately states 'We have no principles'. Another judge responds 'we have principles; we just do not apply them".[2]

Two other commentators warned against wasting time attempting to identify principles that do not exist.[3] This is echoed by other authorities, who commiserate with domestic courts 'largely frustrated in their search for principles'.[4] The English and Scottish report singles out my dissenting opinion in *Nikolova v. Bulgaria*[5] for 'the vigour of the language' by which I distanced myself from the Court's failure to give any reasons why it refused to grant damages after finding a violation of fundamental rights. The report concludes, that 'the Strasburg Court's explanations of its awards for just satisfaction are often perfunctory or non-existent'

1 CM 4853, October 2000.
2 Dinah Shelton, *Remedies in International Human Rights Law*, 2000, p. 1.
3 Lester & Pannick, *Human Rights Law and Practice*, 1999, para. 2.8.4.
4 Grosz, Beaston, and Duffy, *The 1998 Act and the European Convention*, 2000, para. 6.21.
5 25 March 1999.

'The inconsistencies of the Court's jurisprudence on Article 41 make it extremely difficult, even for informed legal advisers to manage their expectations [those of prospective litigants] by being able to advise with confidence on the possible outcome'.[6]

Offensive as it may sound, Jean-François Flauss recently described the liquidation of damages by the Strasburg Court as, at best, empirical, a sort of do-it-yourself (bricolage).[7]

One of the major ideals of the Court – of any court really – is the attainment of legal certainty. In this particular field of just satisfaction, none currently exists. Rights are not automatically armed with remedies. Remedies often have the trappings of princely largess. Lord Devlin famously said 'The discretion of the judge is the first instrument of tyranny'.[8] I do not know whether it is the first. It certainly is not a pleasant one.

Reimbursements of Costs

This is one of the provinces of just satisfaction in which the unfettered discretion of the Court manifests itself most. The idiosyncrasies and the weaknesses, of the system speak out loudly.

Costs of legal proceedings fall naturally into two categories – those costs incurred in the domestic jurisdiction, and those incurred in the Strasburg organs. While the first present no major difficulties, the second are fraught with surprises and underscore dramatically a north/south divide.

Legal Costs in the Domestic Jurisdiction

As the Convention makes it imperative that the applicant should have exhausted unsuccessfully all domestic remedies, it is normal that the applicant, before forwarding his complaint to Strasburg, would have incurred costs and expenses. It is only in exceptional cases when no form of remedy is available in the domestic jurisdiction that the applicant's legal costs start in the Strasburg Court. Of course, the fact that the domestic system offers no internal remedy to redress the alleged violation, in itself constitutes an autonomous breach of the Convention, which requires that every fundamental right should be fortified by a remedy in case of breach (Art. 13).

As for domestic legal costs whose reimbursement is claimed by the applicant, the Court will only check that they were 'actually and necessarily incurred' and were 'reasonable as to quantum'.[9] Costs will be considered necessary if they were incurred by the applicant to prevent or to redress the breach identified by the Court.[10] The Court usually allows all the costs of the domestic jurisdiction which have not been disputed by the government, even when they are higher than the legal costs current in other Convention states. In general the Court allows in favour of the applicant, fees and costs in line with domestic scales and practices.

Legal Costs in the Strasburg Jurisdiction

Here we are squarely within the Strasburg minefield where huge discrepancies in the taxing of legal costs and fees can be identified. In principle – though subject to various exceptions – I believe it is fair to say that some northern law practices fare infinitely better than southern ones.

The underlying, though silent principle seems to be that the Court will award lawyers appearing in Strasburg a fee comparable to that due when appearing before the highest court of the respondent state, occasionally with a bonus for such extras as whether a hearing was held or not, how complex the case was, the necessity of more than one lawyer and the number of violations found.

Having said that, I believe that it is safe to claim that the Court often awards fortunes in favour of northern lawyers, when, in substantially similar cases, their southern colleagues are awarded risible amounts.

The first Maltese case in Strasburg, *Demicoli v. Malta*[11] came up for hearing at virtually the same time as *The Observer* and *The Sunday Times* applications against the UK. At issue in all these cases were serious matters affecting freedom of the press and the right to a fair trial. In the Maltese case the Court was called upon, in addition, to overturn a formal resolution passed by Parliament and a judgement of the Constitutional Court. As the common-law institute of breach of parliamentary privilege was at stake, the judgement in the Maltese case was bound to reverberate in the UK and Ireland, where identical systems were in place. The Court decided the applications within a few weeks of each other. For five levels of jurisdiction it awarded the Maltese lawyers a fee of LM5,000.00 (from which LM1,800.00 travelling expenses had to be deducted) and the English lawyers a cumulative fee of £200,000.

The trend of awarding high fees to some UK lawyers, and denying the same fees to southern ones, started very early on. In 1962, in the UK case of Young, James and Webster regarding the dismissal of workers who failed to join closed-shop trade unions, the costs of the British lawyers were assessed at £65,000.[12] Since then, the Court has rarely let British lawyers down.

6 Liberty's pleadings in *Kingsley v. UK*, pending.
7 'La reparation due en cas de violation de CEDH', in *Journal des tribunaux droit Europeen*, 1996, No. 25, p. 15.
8 *Report of the Committee on Evidence in Identification*, HMSO, London, 1976.
9 *Minelli v. Switzerland*, 25 March 1983, A 62.
10 *Scozzari & Giunta v. Italy*, 3 July 2000, § 257.
11 27 August 1991, A. 210.
12 18 October 1982, A 55, p. 8.

I will not bore you with details, and acknowledge that it is often difficult to be sure that one is comparing like with like. But a few examples may be enlightening.

Selmouni v. France was a watershed case, in which the Court redesigned its thinking about torture. The costs awarded to the French legal team were *c.* 113,000 FF.[13] In *Aydin v. Turkey*, a rather more 'routine' torture case, the British defence lawyers were awarded 300% more – 340,000 FF.[14] In two Right to Life cases (Art. 2), the Turkish lawyer in the Ogur case got the equivalent of £3,000[15] while the British lawyer in the Caciki case got £20,000.[16]

Even more obvious were the cases of *Gregoriades v. Greece*[17] and *Bowman v. UK*,[18] both Art. 10 violations. In the Greek case the legal fees were *c.* 15,000 FF. In the British case, *c.* 250,000 FF – over fifteen times more.

Compare also two cases in which the central issue was unlawful telephone tapping: *Halford v. UK*[19] and *Kruslin v. France*.[20] In the French case the French lawyers' fees were taxed at 20,000 FF. A minimal award, compared with the UK case, in which the British lawyers were awarded 250,000 FF.

Two further examples to illuminate this subject. The Court quite often refuses to award damages, declaring that the finding of a violation shall, in itself, constitute just satisfaction. This finding of violation, doubling also as compensation, is presumably made when the Court, from the moral high ground on which it sits, would find it uncomfortable to reward with a prize a particularly undeserving applicant. I say presumably, because very rarely, if ever, does the Court explain why it reaches this conclusion. However, two British cases in which the Court refused to go further than merely finding a violation and in which it rejected the claims for material and moral damages, all the same rewarded the lawyers with fees of £35,000[21] and £45,000[22] respectively.

The high legal fees taxed in favour of northern lawyers defending applicants against southern states, bring about another unsavoury bye-product – the lawyer often ends up getting more than the victim he or she has defended. The relatives of Mahmet Kaya who disappeared – presumably killed – during police custody, got £17,500, while their British lawyers got £22,000.[23] Mrs Sukran Aydin, who was raped and savaged by the security forces, was fortunate to get £25,000, but her British lawyers were more fortunate still; they got £34,360.[24] Lest you think there is an element of racial discrimination, let me refer you to the recent case of *Hatton and seven others v. UK* which dealt with the high level of noise round Heathrow airport at night. Each of the victims was compensated with £4,000, but the Court awarded the victims' lawyers a fee of £70,000.[25] I, for one, find myself quite uncomfortable with a situation in which the pain and suffering of the close relatives of a person assassinated by security forces during detention, are valued less then the exertions of a lawyer on their behalf.

Of course, it is quite easy to reduce these issues to exercises in bewilderment. The reality, however, is much more complex than that. Fees charges by northern lawyers in domestic litigation, as compared to those of their southern colleagues, are, in general, substantially higher. They usually relate to current levels of income in each particular country. Lawyers who habitually charge 'northern' fees will be unwilling to act in Strasburg for less. This places the Court in a dilemma. Must it tell the applicants to scout around for the cheapest lawyer on the market because the court will not sanction the reimbursement of a high fee? Can it tell an applicant in a Greek case not to engage an English lawyer? What happens if the Court awards a British lawyer a 'Greek' fee? The problem, in my view, appears quite insurmountable. If the Court awarded British lawyers 'Maltese' fees, they would obviously desert the Strasburg venue. If it awards Maltese lawyers, in cases against the Maltese state, 'British' fees, it would disturb profoundly the social, political and financial realities of the Maltese economy.

Now, while I recognize the objective difficulties that underlie the north/south divide in the matter of legal fees taxed by the Court, I nonetheless find other related situations quite unexplainable. To the best of my knowledge, two cases are on record in which the applicants were professional lawyers

13 28 July 1999.
14 24 September 1997.
15 *Ogur v. Turkey*, 20 May 1999.
16 *Çakici v. Turkey,* 8 July 1999.
17 Rec. 1997-VII, No. 57.
18 Rec. 1998-I, No. 63.
19 Rec. 1997-III, No. 39.
20 A 176-A.
21 *D. v. UK*, Rec. 1999-III, No. 39.
22 *Chahal v. UK*, Rec. 1996-V, No. 22.
23 *Mahmet Kaya v. Turkey*, 28 March 2000.
24 *Aydin v. Turkey*, 25 September 1997.
25 2 October 2001.

who chose to defend themselves in Strasburg proceedings: Dr Joe Brincat who successfully sued Italy[26] and Dr K. F. who sued Germany.[27] They both claimed lawyer's fees for conducting their own defence. The Court rejected Dr Brincat's claim for professional fees, but granted Dr K. F.'s, taxing 10,000 DM in his favour. Both cases related to unlawful detention. The German lawyer complained of being deprived of his liberty for 45 minutes over the statutory period allowed to the police. Dr Brincat's claim, also endorsed by the Court, related, not to an illegal detention of 45 minutes, but in excess of three weeks.

The problem has no easy short-term solution. Perhaps it is too early, in view of the dramatic discrepancies between the economies of the various Convention states, to aspire to anything like a common European scale.

Non-Pecuniary Loss

This is another area in which grave contradictions, inconsistencies and obscurities arise. Having established a violation, the Court faces the dilemma of whether to grant moral damages or not, and, if so, to what extent.

The case-law of the Court has had various occasions to subdivide the diverse heads under which moral damages may be granted. In general it is safe to say that ideally they should constitute a *restitutio in integrum* for physical and mental suffering resulting from a violation of Convention rights. Compensation has been, and may be, awarded in case the violation found has caused anxiety[28] inconvenience[29] frustration[30] loss of reputation[31] loss of family relationship[32] feeling of injustice,[33] sensation of isolation, confusion and neglect[34] and psychological harm.[35]

The Court has, on principle, also accepted that 'by reason of its very nature, non-pecuniary damage of the kind alleged cannot always be the object of concrete proof. However it is reasonable to assume that persons… may suffer distress and anxiety'.[36] It is difficult to comprehend why this very useful and reasonable presumption of suffering has sometimes been relied on, but more often not.

The overriding principle seems to be that both the award and the extent of compensation for moral damages stem from the virtually absolute discretionary powers of the Court. The other side of the coin is that awards quite often have no verifiable foundation other than 'an equitable basis'.[37]

The exercise of the Court's discretionary powers in the granting or not of moral damages brings about a situation of uncertainty, and maybe arbitrariness. In what seem to be very similar circumstances, the Court awards moral damages in one case and denies them in another. Some examples, limited to Art. 5 (freedom from unlawful detention) will suffice:

When the Court found detention to be in breach of Art. 5 §1, moral damages were awarded in *Van der Leer v. Netherlands*[38] and denied in *Ciulla v. Italy*.[39]

In applications in which the breach consisted in failing to bring the detained person promptly before a judicial authority (Art. 5 §3), moral damages were awarded in some cases[40] but denied in others.[41]

In cases where the Court held that domestic proceedings for reviewing the lawfulness of the detention had been defective or failed the test of promptness, (Art. 5 §4) compensation was withheld in some cases[42] and liquidated in others.[43]

The Court's finding that the domestic system did not have in place a remedy to test the legality of detention (Art. 5 §4) was followed by an award of moral damages in some cases[44] but not in others.[45]

It is difficult to reconcile the reasonings behind the award of moral damages for illegal detention. In a French case, in

26 26 November 1992, A 249-A.
27 27 November 1997, Rec. 1997-VII.
28 *Lopez Ostra v. Spain*, 1995, A 2, p. 277.
29 *Olson v. Switzerland*, No. 2, 1994, A 17 p. 134.
30 *Van der Leer v. Netherlands*, 1990, A 12, p. 267.
31 *Salik v. Turkey*, 1998, 26, p. 662.
32 *H. v. UK*, 1998 A 136-B.
33 *Ringeisen v. Germany*, 22 June 1972, A 15.
34 *Artico v. Italy*, 13 May 1980 A 37, §. 47.
35 *Aydin v. Turkey*, 25 September 1997, § 131.
36 *Abdullaziz, Cabales, Balkandali v. UK*, 1985, A 94, p. 96.
37 *Guzzardi v. Italy*, 6 November 1990, A 39, § 114; *Silver et v. UK*, 24 October 1983, A 67, § 9.
38 A 170, 21 February 1990.
39 A 148, 22 February 1998.
40 *Huber v. Switzerland*, A 188, 23 October 1990.
41 *Duinhof & Duijf v. Netherlands*, A 79, 22 May 1974.
42 *Koendjbiharje v. Netherlands*, A 185, 25 October 1990.
43 *De Jong et v. Netherlands*, A 77, 22 May 1984.
44 *Weeks v. UK*, A 14, 5 October 1988.
45 Thynne, Wilson & Gunnell, A 190, 25 October 1990.

which the deprivation of liberty lasted eleven hours, the amount granted the victim was 60,000 FF in all (*c.* LM360.00 per hour).[46] In the Maltese case *T.W. v. Malta*, the Court also found that the applicant's detention had been illegal, but awarded the applicant no moral damages at all, though in this case the unlawful detention lasted nineteen days, not eleven hours.[47]

This litany could go on almost endlessly. When the breach consisted in the lack of access to a court, Strasburg occasionally grants compensation,[48] and occasionally refuses it.[49] If certainty of the law is a fundamental value to which each legal system should aspire, it is a value that occasionally tends to be glaringly absent. Even when the violation consists in undue delay in terminating civil disputes where the issues are generally quite straightforward, surprises are never absent. On the same day the Court gave two judgements in length of proceedings cases regarding deaths in car accidents. In *Casciaroli v. Italy* it awarded Lit 60,000,000[50] while in *Tusa v. Italy*, it only awarded Lit. 10,000,000, though the proceedings had lasted two years longer.[51] Today, it must be said, the sums awarded appear more standardized.

While the Court can be quite ungenerous with awards of moral damages, a swing in the opposite direction can sometimes be detected in some 'length of civil proceedings' cases. In an application regarding the eviction of an 'illegal' tenant in which the court proceedings lasted almost fourteen years, the Court awarded the illegal tenant moral damages for the delay – although he had clearly benefited from that delay, both by hanging on to his illegal occupation of his residence for may years, and by not paying any rent in the very long interval.[52]

Coming closer to the southern dimension, I would exclude outright any overt or covert determination to treat differently similar cases which arise in different geographical areas. The problem, in my view, is neither racial, ethnic or geopolitical. It is part of the general inability, in the particular province of just satisfaction, to fix clear standards and abide by them. The Court candidly admitted the inconsistencies in its approach to moral damages in *Nikolova v. Bulgaria*.[53] Steps have been taken internally to overview these problems and seek solutions.

Even allowing for the very different indexes of economic well-being between various Convention states which obviously have to be factored into the equation, the discrepancies between some awards appear unconvincing. *Aydin v. Turkey*[54] and *Selmouni v. France*[55] both related to particularly repulsive cases of torture during police detention, which, in Mrs Aydin's case included rape. The Court awarded Selmouni almost double the amount granted to Mrs Aydin, although the Court expressly emphasized that it took into account the extraordinarily terrifying ordeal Mrs Aydin had to go through.

But then this disturbing inconsistency appears even between two French cases. In *Tomasi v. France*, the issue included torture and the length of detention on remand and trial, and the award was 700,000 FF.[56] In Selmouni the award was substantially less: 500,000 FF. In a way Mrs Aydin was particularly lucky. In another case in which the Court found torture, only 100,000 FF were awarded.[57]

Subtly linked with the determination of moral damages is the question of what weight, if any, is to be given to the racial or ethnic background of the complaint. As far as I am aware, the Court has never acknowledged the existence of particular situations of ethnicity, like that of the Kurdish people in Turkey, nor has it ever declared that the several violations of fundamental rights the Kurds have been found to be victims of, have anything to do with their Kurdish origin. All suggestions that they are treated differently from other Turkish citizens because of a different ethnic origin, have always been disregarded by the Court. Not a single application by Kurdish applicants based on discrimination arising from their different ethnic origin, has ever been entertained by the Court. Their misfortunes and misadventures are always, unrealistically in my view, attributed to other reasons or to no reason at all.

The same could be said about gypsies, with the complex uniqueness of their life-style which should call for solutions diverse from other non-nomad populations. Their applications have, so far, received no sympathy at all from the Court. Not one of their actions claiming intrusive violations of the

46 *Quinn v. France*, 22 March 1995, A 311.
47 19 April 1999.
48 *Skarby v. Sweden*, A 180, 28 June 1990.
49 *Boden v. Sweden*, A 125, 27 October 1987.
50 27 February 1992.
51 27 February 1992.
52 *Di Mauro v. Italy*, 28 July 1999.
53 25 March 1999.
54 25 September 1997.
55 28 July 1999.
56 A 241-A.
57 *Tekin v. Turkey*, Rec. 1998-IV, No. 7.

state into their way of life, into their cultural imperatives, has been successful. For the Court it is as if gypsy problems do not call for different solutions. The Court found against gypsies who had parked their caravans in unauthorized sites, even when the authorities had failed in the duty imposed on them by law to provide legal camping sites for gypsies.

In a recent revolutionary decision, the Court defined impermissible discrimination not only in the classical sense of treating equals unequally. It went one fearless step further: impermissible discrimination is also treating unequals equally. The Court said: 'The right not to be discriminated against ... is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.[58] Unfortunately this brave new world found little echo in gypsy scenarios. Here national authorities persist in treating in a similar manner peoples (like gypsies) who have intrinsically different needs and features, as if they were sedentary Europeans races with traditional cultures.

One particular country in the southern area has been exemplary – and rightly in my view – penalized by the Court for repeated violations of the same fundamental right. Our good neighbour Italy has an evident problem of court delays in civil cases, fortunately unknown in Malta. The Court has recently expressly established that the Italian breach is so widespread, long-standing and intractable that, what in similar circumstances in other Convention states would be an individual violation, in Italian cases amounts to 'an administrative practice'.[59] Although you will not, I believe, find it expressly stated in any judgement, it is easily noticeable that moral damages for delays in civil proceedings are markedly higher against Italy than other awards in carbon-copy cases against other Convention states. 'Perhaps' commented a jurist, 'larger awards are deemed necessary [against Italy] to exert pressure for change'.[60] And that is certainly one of the functions of the Court, when an abusive system of conduct becomes so widespread as to be formally recognized as 'an administrative practice'.

Less explainable is the fact that the Court, though expressly requested to, has failed to acknowledge the existence of an 'administrative practice' in the far more serious cases of violations of the right to life and the prohibition of torture in states in which a consistent sequence of such violations have been registered. The Court has also expressly refused, though requested, to award punitive damages for particularly heinous violations by states which have repeatedly been found to be relapsers in the same infringements. At best, in the exemplary case of *Askoy v. Turkey*, in which the applicant was killed by security forces after he had lodged his complaint in Strasburg, the Court stated that in view of the extremely serious violations of the Convention suffered by Mr Ziki Askoy and the anxiety and distress that these undoubtedly caused to his father (who continued with the application after his son's death), 'the Court has decided to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damages'.[61] For the Court to award a damage claim in its fullness, does not happen often..

It is equally difficult to reconcile the extent of the award of moral damages for pain and suffering in another case in which the applicant's son had wantonly been killed by the security forces of the state, with the case of *Halford v. UK* in which the applicant's phone had been tapped by the police. In the latter case the Court felt bound to place on record that there was no evidence that the stress the applicant suffered from was directly attributable to the interception of her calls, rather than to her other conflicts with the Merseyside police. All the same the Court awarded her £10,000 for moral damages.[62] The parents of the young man murdered cold-bloodedly by the security police got slightly less.[63]

Pecuniary Loss

In general the liquidation of pecuniary loss suffered by the victim of a human rights violation does not raise as many difficulties as that of moral damages. Proved *lucrum cessans* and *damnum emergens* constitute the basis of that head of compensation. Thus the case-law of the Court has taken into account medical expenses, loss of pension rights, reimbursement of fines paid, loss of past and future earnings, payment of the value of unlawfully expropriated effects, loss of interests, loss due to inflation etc.

But a few problems do occasionally arise, as, for example, the just valuation of property, the causal link between the violation and the damages, loss of opportunities and the quantum of proof required to establish real damages.

An early classic was the case of *Sporrong and Lonroth v. Sweden*[64] which concerned an official order that froze building permits on the applicants' property and was left in force for a considerably long time. The applicant submitted one

[58] *Thlimmenos v. Greece*, 6 April 2000.
[59] *Bottazzi v. Italy*, 28 July 1999.
[60] Dinah Shelton, *Remedies in International Human Rights Law*, 1999, p. 220.
[61] 1996, EHRR 553.
[62] 1997, 24 EHHR 523.
[63] *Ogur v. Turkey*, 20 May 1999.
[64] A 88, 18 December 1984.

way of calculating the losses, the respondent state a radically different one. The Court rejected both methods and made an assessment on an equitable basis, the workings of which were not disclosed. That propelled the Court right away into the grey areas of unfettered discretion. It must be recognized that the Court has neither the structures in place, nor the expertise, to determine complex matters of valuation of property, or of dealing with expert evidence. The Court had intended to neutralize this weakness in property compensation proceedings, by appointing its own expert valuers. The results, however, have hardly been any more encouraging. In a Greek case, as the fees due to the experts were proportional to the amount they assessed, the respondent government accused the experts of being 'scandalously favourable' to the applicants in their valuation.[65]

A complex issue from the legal standpoint relates to what Strasburg case-law refers to as 'speculative losses'. The Court, often, refuses to make an award of pecuniary losses where there is some uncertainty whether the applicant would all the same have suffered the loss if the violation had not occurred. In some cases, mostly related to illegal detention and to the breach of the fair hearing guarantees in civil and criminal proceedings, the Court often dismisses the claim with the formula that it is 'unwilling to speculate' what the outcome of the domestic court proceedings would have been had the breach not occurred, and denies damages, placing the onus of proof on the applicant and resorting to the strictest of causation tests.

This failure to award any damages, in my view, brings about an extremely serious situation. Had the result of the finding of a breach of the fair hearing guarantees automatically resulted in the re-opening of the vitiated domestic proceedings, then one could perhaps understand this reluctance to grant compensation. But, as it is, the Court only finds that the applicant has not received a fair hearing, and stops there. He neither gets a re-hearing from the Strasburg Court (which is not a court of appeal), nor is his case reopened in the domestic court. Nor is he awarded any compensation. In effect, he is told he is a victim, that he did not receive a fair hearing, and that this is the end of the matter. One then asks what the scope of the Strasburg proceedings is, if they neither redress in any manner the violation by procuring a rehearing of the tainted proceedings, nor by ordering any form of compensation.

The problem is compounded by the fact that in some other cases, however, when the outcome of the domestic proceedings would have been equally uncertain, the Court that was unwilling to speculate on the outcome, equally awarded damages, but under the heading of 'loss of opportunities'. This trend is notable in some UK cases, though not exclusively so.[66]

The report by the English and Scottish Law Commission highlights the state of uncertainty when no compensation is granted because of the Court's unwillingness to speculate, and when compensation is granted as 'loss of opportunities': 'There are numerous cases falling on either side of the line. It is impossible to reconcile these decisions... One can only guess that in some cases the Court feels sympathy towards certain applicants based on particular circumstances, and will go out of its way to award damages, despite [the absence of] the usual requirement of a clear causal link'. (§ 3.66, 3.69)

I would certainly agree 'that it is impossible to reconcile these decisions', but would suggest that it is possible to come to an equitable conclusion by reconciling the two extremes. In my view, when a causal link between the violation and the loss suffered has not been sufficiently established, it would be inconsequential to award material damages. However, as it is to be presumed that the applicant has suffered a sense of frustration, anxiety, stress and dismay through the unlawful detention or through his participation in unfair court proceedings, then, if the breach can be considered to have had an impact on the applicant, compensation for that pain and suffering, correlative in amount the matter at stake, ought to be ordered under the head of non-pecuniary or moral damages.

A final set of observations concerning material damages. The Court does not seem to have been too consistent with its response to the failure of the applicant or his lawyers to provide detailed proof of the material loss suffered. The Rules of Court specify that it is the duty of the applicant to satisfy the Court with itemized particulars of all the claims, otherwise the Court may dismiss the claim (Rule 60 §2).

However, the Court's reaction to a failure by the applicant to produce this justification of material damages has ranged from the excessively tolerant to the downright draconian. When an applicant fails to quantify his material damages, the Court has at least four options open to it: it may, at any stage of the proceedings before the finding of a violation, request him or her to furnish any information it deems lacking (Rule 60 §3). It may, in the judgement finding a violation, declare that the issue of just satisfaction is not yet ready for determination and invite the parties to substantiate their claims. Thirdly, it may, in the absence of precise data in the case-file, proceed to liquidate the amount of pecuniary damages, using its discretionary powers 'on an equitable basis'.[67] Or, fourthly, it may dismiss the case outright.

[65] *Papamichaloupulos v. Greece*, A 330-B, 31 October 1995.

[66] *Weeks v. UK*, A 143-A, 5 October 1988; *H v. UK*, A 136-B, 9 June, 1988; but see also *De Geouffre de la Pradelle v. France*, A 253-B, 16 December 1992; *Goddi v. Italy*, A 76 9 April 1984; *Delta v. France*, A 191-A, 19 December 1990.

[67] As it did, for example, in *Doustaly v. France*, Rec. 18998-II, 70, 23 April 1998; *Allenet de Ribemont v. France*, A 308, 10 February 1995; *Heintrich v. France*, A 320-AQ, 8 June 1995; *Gaygusuz v. Austria*, Rec. 1996-IV, 14, 16 September 1996.

I have in mind some disturbing cases, like that of a young victim who was killed during police detention, employed at the time of his death and the breadwinner of the household. His family's lawyers failed to come up with evidence of what his earnings had been. The Court dismissed any claim for material loss suffered by his survivors, and awarded zero pecuniary compensation.[68] It would have been so easy for the Court to asses the material damages suffered, basing itself on the minimum wage current in the country at that time.

This has repeatedly occurred in Turkish applications. In the Gerger case, the applicant had been convicted and had spent one year and nine months in prison in violation of the Convention; he had also actually paid a fine imposed on him, equally in violation of the Convention. The Court established that his rights had been infringed, but did not award him any compensation for material damages, as it considered he had failed to supply evidence in support of his claims for loss.[69] In the Gulec case, which concerned the unlawful killing of the applicant's son who was a high school student and worked after school, the Court equally refused any compensation for material damages, as these had not been proved.[70]

It is in the area of just satisfaction that the judgements of the Court can best exercise that institution's three major functions: that of reinstating the victim of the violation, that of censuring the culprit state, and that of discharging its pedagogical responsibilities. These are core obligations that the Court mostly, but not invariably, manages to fulfil.

[68] *Ogur v. Turkey*, 20 May 1999.
[69] 8 July 1999.
[70] 19 February 1996, Rec. 1998-IV, 80.