INTERNATIONAL LAW

Case studies 2

Case 1

Case concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)

History of the proceedings and submissions of the Parties

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter "Belgium") in respect of a dispute concerning acts allegedly committed by Belgium

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case: the Yugoslav Government chose Mr. Milenko Kreća and the Belgian Government chose Mr. Patrick Duinslaeger. Referring to Article 31, paragraph 5, of the Statute, the Yugoslav Government objected to the latter choice. The Court, after deliberating, found that the nomination of a judge ad hoc by Belgium was justified in the provisional measures phase of the case.

By letter of 12 May 1999 the Agent of the Federal Republic of Yugoslavia submitted a "Supplement to the Application", invoking as a further basis for the Court's jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Belgium, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning Legality of Use of Force, the questions of the presence on the Bench of judges ad hoc during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges ad hoc chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Belgian Government,

at the hearing of 22 April 2004:

> "In the case concerning the Legality of the Use of Force (Serbia and Montenegro v. Belgium), for the reasons set out in the Preliminary Objections of Belgium dated 5 July 2000, and also for the reasons set out during the oral submissions on 19 and 22 April 2004, Belgium requests the Court to:
>
> (a) remove the case brought by Serbia and Montenegro against Belgium from the List;
>
> (b) in the alternative, to rule that the Court lacks jurisdiction in the case brought by Serbia and Montenegro against Belgium and/or that the case brought by Serbia and Montenegro against Belgium is inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

> "For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:
>
> to adjudge and declare on its jurisdiction ratione personae in the present cases; and
>
> to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction ratione personae."

Before proceeding to its reasoning, the Court includes a paragraph (para. 25) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains

that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Case 2

Spain v. Canada

THE HAGUE, 4 December 1998. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today declared that it had no jurisdiction to adjudicate upon the dispute brought in 1995 by Spain concerning Fisheries Jurisdiction (Spain v. Canada).

The decision was taken by twelve votes against five. Since the Court included on the Bench no judge of the nationality of Spain or Canada, these two States had each appointed a judge ad hoc, bringing the total number of judges to 17.

Background information

On 28 March 1995, Spain filed an Application instituting proceedings against Canada following the boarding on the high seas by a Canadian patrol boat, on 9 March 1995, of a fishing boat, the Estai, flying the Spanish flag. The boarding was carried out in pursuance of the Canadian Coastal Fisheries Protection Act (as amended on 12 May 1994) and of its implementing regulations.

In its Application, Spain maintained that Canada had violated the principles of international law which enshrine freedom of navigation and freedom of fishing on the high seas, and had also infringed the right of exclusive jurisdiction of the flag State over its ships on the high seas. As a basis of the Court's jurisdiction, Spain relied upon the declarations by which both States accepted that jurisdiction as compulsory (Article 36, paragraph 2, of the Statute of the Court).

On 21 April 1995, Canada informed the Court that, in its view, it lacked jurisdiction to deal with the case by reason of a reservation made in its declaration of 10 May 1994. In this declaration, Canada stated that the Court had compulsory jurisdiction "over all disputes . . . other than . . . disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the [Northwest Atlantic Fisheries Organization's] Regulatory Area . . . and the enforcement of such measures".

Case 3

THE M/V "SAIGA" CASE

(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)

Press release

HAMBURG, 13 November. Today, the Registrar of the International Tribunal for the Law of the Sea received the first application instituting a case before the Tribunal. This follows almost immediately after the adoption of the Rules of the Tribunal and one year after its inauguration. The Tribunal has also adopted Guidelines concerning the Preparation and Presentation of Cases before the Tribunal and a Resolution on the Internal Judicial Practice of the Tribunal.

The application of Saint Vincent and the Grenadines institutes proceedings against the Government of Guinea with regard to the alleged arrest of the "M/V Saiga" off the coast of West Africa. Saint Vincent and the Grenadines requests the Tribunal to order the prompt release of the "M/V Saiga", its cargo and crew detained in Conakry, Guinea. The vessel was allegedly:

> "attacked by representatives of the Guinean Government who shot at the ship and crew and injured four of them before taking control of the vessel. The vessel was brought into Conakry, Guinea at around 21:00 on 28 October 1997. Two seriously injured crew have since been allowed to leave. The vessel and remaining crew continue to be held hostage at Conakry."

The application is based on article 292 of the United Nations Convention on the Law of the Sea. Accordingly, where the authorities of a government of a State that is a party to the Convention have detained a vessel flying the flag of another State also party to the Convention and it is alleged that the detaining State has not complied with the requirements of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to the Tribunal if, as is the present case, the parties have not agreed within 10 days from the time of detention, to submit the case to another court or tribunal.

According to the application of Saint Vincent and the Grenadines:

> "Guinea has not to date sought any bond or other financial security in respect of the detention of the 'SAIGA', nor has it advised any interested party of the reasons for its action, nor has it allowed their representatives access to the crew remaining on board."

The Registry has transmitted a copy of the application with all its attachments to the Government of Guinea which is the respondent in the case. Guinea has until twenty-four hours before the date of the first hearing to provide its response to the application.

Under the Rules of the Tribunal, the date for a hearing is to be set within ten days of the receipt of the application. The application having been received today, 13 November 1997, the Judges are due to meet in Hamburg, the seat of the Tribunal, on 20 November, and the first hearing is expected to take place on Friday, 21 November 1997. At the hearing each party will be accorded one day to present their evidence and arguments. A second date for the hearing will probably be 24 November. The Judges then have ten days to deliberate, reach a decision and deliver the judgement of the Tribunal. The reading of the judgement is tentatively set for 4 December 1997. The judgement will be read at a public sitting of the Tribunal. Since the Tribunal has not yet entered into its permanent premises, which are still under construction, the authorities of the host country, Germany, are taking steps to provide a suitable courtroom and facilities for the hearing. It is to be recalled that the ceremonial inauguration of the Judges took place in the elegant Great Hall of the Hamburg City Hall.

Case 4

CASE OF DONICHENKO v. UKRAINE

(Application no. 19855/03)

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1919 and lives in the village of Lebedyn.

A. Court proceedings

5. On 16 August 2000 the applicant instituted proceedings in the Boryspil Town Court against the Boryspil Town Police Department and the State Treasury, seeking compensation. The applicant alleged that Messrs K. and M. had unlawfully attempted to enter and search his flat and insulted him in the presence of his neighbours. Messrs K. and M. took part in the proceedings as third parties. On 30 August 2000 the court found against the applicant. On an unspecified date the Kyiv Regional Court of Appeal quashed that decision and remitted the case for a fresh consideration.

6. On 11 September 2001 the Boryspil Town Court found in part for the applicant and awarded him UAH 12,125.09[1] in compensation for non-pecuniary damage and court expenses. On an unspecified date the Kyiv Regional Court of Appeal quashed that decision and remitted the case for a fresh consideration.

7. On 24 May 2002 the Boryspil Town Court ruled in part for the applicant. It found that two acting police officers, Messrs K. and M., had been ordered by the Boryspil Town Police Department to check the applicant's flat. On 25 April 2000, in the course of execution of the above order, they had unlawfully attempted to enter the applicant's flat and had made abusive statements in his respect. The court held that the State authorities were responsible for the acts of the police officers and ordered the State Treasury to pay the applicant UAH 2,393.09[2] in compensation for non-pecuniary damage and court expenses. The court, referring to Article 25 of the Police Act (see paragraph 18 below), further ordered Messrs K. and M. to apologise for their unlawful actions in the presence of the applicant and his neighbours who had witnessed the incident.

8. On 1 July 2002 the same court rejected the applicant's request for leave to appeal for failure to pay court fees and to comply with other procedural formalities. On 9 August 2002 and 2 January 2003, respectively, the Kyiv Regional Court of Appeal and the Supreme Court of Ukraine upheld the decision of 1 July 2002.

B. Enforcement proceedings

9. On 26 April 2003 the Pecherskyy District Bailiffs' Service initiated enforcement proceedings in respect of the monetary award of 24 May 2002.

10. On 27 August 2003 the applicant was paid the full amount of the award.

11. On 5 September 2003 the applicant submitted to the Boryspil Town Bailiffs' Service a writ of execution for the non-pecuniary part of the judgment.

12. On 8 September 2003 the Bailiffs' Service initiated enforcement proceedings in respect of the obligation of Mr K. to apologize to the applicant.

13. On 3 and 14 October 2003 the Bailiffs' Service fined Mr K. for his failure to comply with the judgment of 24 May 2002.

14. On 22 October 2003 the Bailiffs discontinued the enforcement proceedings against Mr K., no reasons having been given for this decision.

15. On 23 March 2004 Mr K. retired. His present place of residence is unknown.

16. On 25 April 2006 Mr M. together with two other police officers visited the applicant's place of residence. According to the Government, the applicant and his daughter received the apologies from Mr M. for the events of 25 April 2000. The applicant stated that he had been absent during that visit.

17. On 14 September 2006 the *Trudova Slava* local newspaper (*газета "Трудова Слава"*) published an announcement which read as follows:

"...[Mr M.], an employee of the MIA [Ministry of Internal Affairs], officially apologizes to [Mr] Donichenko, Ivan Petrovych, for the moral damage caused to him by the police officer in the course of exercise of his duties in 2001."

II. RELEVANT DOMESTIC LAW

A. The Police Act of 20 December 1990

18. Article 25 of the Police Act regulates the questions of legal responsibility of the police officers.

19. Paragraph 1 of that Article provides that police officers shall act in accordance with the Police Act, shall make decisions on their own, and that they shall be disciplinary or criminally liable for their unlawful acts or inactivity.

20. Pursuant to paragraph 2, if a police officer violates citizen's rights or lawful interests, the police shall adopt measures necessary for restoration of these rights and for payment of compensation for pecuniary damage. The police shall also publicly apologise upon the citizen's request.

21. Paragraph 3 releases the police officer from a responsibility to compensate damages, if he carried out his duties in accordance with law. The damage shall be compensated at the expense of the State.

22. Under paragraph 4, the lawfulness of the acts of a police officer may be challenged before the police, prosecutors or courts.

23. Paragraph 5 provides that a person serving in the police, who violated the law or failed to carry out his duties, shall be liable in accordance with the law.

B. The Constitution of Ukraine

24. The above provisions of the Police Act are applied in the light of the Constitution, adopted on 28 June 1996, and, in particular, the following provisions:

Article 56 : “Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicant complained about the State authorities' failure to enforce the judgment of the Boryspil Town Court of 24 May 2002 in full and in due time. He invoked Article 6 § 1 of the Convention which provides, insofar as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

26. The applicant argued that, while the money awarded by the above judgment was paid to him with a substantial delay, the non-pecuniary part of the judgment remained unenforced.

27. The Court notes that this aspect of the application concerns two parts of the judgment at issue, namely the monetary award and the non-pecuniary obligation, the length of the non-enforcement of which vary considerably. Therefore, the Court will examine the complaints concerning the two parts of the impugned judgment separately.

A. Admissibility

1. The applicant's complaint about the length of the non-enforcement of the monetary award of 24 May 2002

28. The Government contended that the delay in the payment of the monetary award to the applicant did not exceed the “reasonable time” requirement contained in Article 6 § 1 of the Convention. They therefore proposed that this part of the application be declared inadmissible.

29. The applicant disagreed.

30. The Court observes that the enforcement proceedings in respect of the award of 24 May 2002 commenced on 26 April 2003 and were completed by the Bailiffs' Service on 27 August 2003. Therefore, the period during which the enforcement proceedings were pending lasted around four month. The Court notes that, given its findings in previous, similar cases against Ukraine (see, for instance, *Kornilov and Others v. Ukraine* (dec.), no. 36575/02, 7 October 2003), this period is not so excessive as to disclose any appearance of a breach of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant's complaint about the failure of the State authorities to enforce the non-pecuniary obligation under the judgment of 24 May 2002

a. Responsibility of the State

31. The Government contended that the obligation to apologise under the judgment of 24 May 2002 was imposed on Messrs M. and K. as private persons and the State therefore could not be held responsible for their failure to fulfil it in due time.

32. The applicant disagreed.

33. The Court notes that under the domestic law in force at the material time, in particular Article 25 of the Police Act, the police bore responsibility for implementation of measures necessary to remedy a violation of citizen's rights because of the acts of its employees (see paragraph 20 above). The same provision envisaged several remedies for such violation, including restoration of the citizen's rights, compensation for damages, and public apologies. The above provisions of the Police Act was further reinforced by Article 56 of the Constitution which guaranteed everyone a right to compensation from public authorities for losses sustained as a result of unlawful decisions, acts or omissions of these authorities or their agents in the performance of their official duties (see paragraph 24 above).

34. The Court further notes that, in its judgment of 24 May 2002, the Boryspil Town Court found that the applicant's right to a good reputation had been infringed by the police officers, acting in their official capacity. The court held the domestic authorities responsible for the acts of these officers. It further decided that the non-pecuniary damage caused to the applicant was to be compensated at the expense of the State Budget.

35. In the Court's view, the fact that the two police officers were mentioned personally in the operative part of the judgment at issue, and not the police station to which they were attached or the Ministry of Interior, did not release the police, and, accordingly, the State, from their responsibility to remedy the faults of their agents.

36. In these circumstances the State must be held responsible for the full enforcement of the judgment of 24 May 2002, including its non-pecuniary part.

b. The applicant's victim status

37. The Government submitted that, given that Mr M. had presented his apologises to the applicant personally and through a newspaper, the judgment of 24 May 2002 had been enforced in full. The applicant could therefore no longer claim to be a victim of a violation of his rights under Article 6 § 1.

38. The applicant argued that he had not received apologies from Messrs M. and K. in the presence of his neighbours. Thus, the former had not fulfilled their obligations under the judgment of 24 May 2002.

39. The Court, assuming that the judgment may be regarded as enforced once Mr M. has published his apologies in September 2006, recalls that the fact that the judgment in the applicant's favour was enforced does not deprive him of his victim status in relation to the period during which it remained unexecuted (see *Voytenko v. Ukraine*, no. 18966/02,

§§ 34-35, 29 June 2004). Accordingly, the Court rejects the Government's preliminary objection as to the applicant's lack of victim status.

Case 5

CASE OF STOIMENOV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 17995/02)

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Jordan Stoimenov who was born in 1963 and lives in Vinica, in the former Yugoslav Republic of Macedonia.

6. On 30 January 2000 the Ministry lodged with the public prosecutor a criminal complaint against the applicant and four other persons for the unauthorised production of, and trade in, drugs and narcotic substances, which was an offence under section 215 of the Criminal Code.

7. On 28 January 2000 the Forensic Science Bureau *(Управа за криминалистичка техника)* ("the Bureau") at the Ministry drew up an expert report (no. X-121/2000) on the quality of poppy-tar that had been confiscated from Mr I.P. According to this opinion, all 23 cakes of poppy-tar contained substances which indicated that it was opium.

8. On 30 January 2000 another expert opinion (no. X-122/2000) was issued concerning the quality of 12 cakes of poppy-tar that had been confiscated from Mr M.

9. Both expert opinions were given by the same expert at the Bureau, were almost identically worded and provided succinct information about the technique used to determine the composition of the poppy-tar and the conclusion that it was opium. They read, *inter alia*, as follows:

"... [S]everal tests were carried out on the samples of the substance. Positive results were received as to the existence of alkaloids... A chromatography analysis was made of the samples to determine the chemical composition of the substance. Samples of several alkaloids from our collection and a sample of opium were used for comparison... The analysis of the chromatogram revealed that it was identical to that of the opium, i.e. that the analysed substance contained several alkaloids... The analysis led to the conclusion that the unidentified substance was opium."

10. According to depositions taken on 30 January 2000 in the pre-trial proceedings, the applicant stated, *inter alia*:

"... When I was a child, I heard from my grandmother and grandfather that they used to have in their possession poppy-tar which they used for medicinal purposes. Mr D. [the third accused] asked me on several occasions whether they still had any... I went to see Mr M. [the first accused], my uncle, and told him about this. We both searched the cellar in my grandfather's house where my uncle used to live. We found about 12 kg of poppy-tar in a plastic bag... I gave the bag to Mr D... The agreement was to divide the money from the sale of the poppy-tar into three parts if Mr D. sold it. He said that he could sell it for 30,000 German marks (DEM)... Some time later Mr D. said that the poppy-tar was of poor quality, as it had been mixed with soil and had [therefore] been difficult to sell. I asked him to return it if he could not sell it so that I could put it back where it came from. However, Mr D. did not return the poppy-tar... Once I visited his house, but he was not there... Mr M. did not know that there was poppy-tar in the cellar. The idea to search for it was mine and I was incited to do so by Mr D..."

11. Mr D. stated, *inter alia*:

"...Jordan [the applicant] told me that he had some 40-50 year old poppy-tar and asked me if I could find a buyer... He said that the price was DEM 40,000... After a while I met with Mr M.G. [the fourth accused] and asked him whether he

could find a buyer for the poppy-tar... A week or two later, Mr M.G. came to my house and told me that he could find a buyer and asked me for a sample... Mr M.G. said the price was too high... I met Jordan and asked him to take the poppy-tar as there was no one interested in buying it at that price. However, Jordan did not come because of the bad weather: it was snowing. On 27 January 2000 Mr M.G. came to my house and told me that he had found a buyer. On 28 January 2000 Mr M.G. came accompanied by Mr I.P. [the fifth accused] ... and said that a buyer from Skopje had offered DEM 2,500 per kg of poppy-tar..."

12. On 18 February 2000 the public prosecutor lodged an indictment (*обвинителен акт)* with the Kočani Court of First Instance against Mr M., the applicant, Mr D., Mr M.G. and Mr I.P. They were charged with having been in possession in the spring of 1999 of about 14 kg of opium and on 28 January 2000 of offering for sale and selling about 8.7 kg of opium. The charges were based, *inter alia*, on the statements of the accused in the pre-trial proceedings and the expert opinion no.X-121/2000 dated 28 January 2000.

13. At the trial on 9 March 2000, Mr D.S., the applicant's grandfather stated, *inter alia*:

"... the poppy-tar was collected by my parents and my wife. I cannot say where it was stored. Maybe it was buried; there was a war. It was the period between 1941 and 1955; people said that it was of poor quality. I have never seen the poppy-tar nor do I know where it was stored. I never told Jordan or Mr M. where it was, nor did they ask me about it... I offered the poppy-tar for sale to the Bilka company, but it turned it down as it was of poor quality. This happened after the Second World War, but I cannot say when exactly..."

14. The applicant's representative lodged a request for an alternative expert opinion to be obtained from a scientific institution concerning the quality of the poppy-tar for the following reasons: the Bureau operated within the Ministry, which had lodged the criminal complaint against him; the poppy-tar was old and had been buried for many years; and an authorised organisation had refused to buy it as it was of poor quality. The counsel representing the other persons accused made a like request.

15. At the hearing on 10 March 2000 the court refused the request for another expert opinion. In his concluding remarks the applicant's representative reiterated, *inter alia,* his arguments about the poor quality of the poppy-tar and about the report drawn up by the Ministry.

16. The same day the Kočani Court of First Instance gave judgment. It found the applicant and the other accused guilty and sentenced them to terms of imprisonment of three to four years. The applicant obtained the longest sentence (four years' imprisonment). All other four defendants received sentences below the statutory minimum for crimes of that kind (5 years) on the ground that they had no previous convictions and some of them were young and/or had not played a crucial role in the crime.

17. The trial court found that the applicant and his uncle Mr M. had found 14.4 kg poppy-tar in the latter's cellar, i.e. opium belonging to Mr M.'s father, who had kept it from the Second World War. They had agreed to keep the opium at Mr M.'s house and to prepare it for sale. Later, the applicant had offered about 8.7 kg of the poppy-tar for sale to the third accused, Mr D., whose task was to find a further buyer. Then Mr D. and the fourth accused, Mr M.G., had checked the quality of the opium and given it to the fifth accused, Mr I. P., whose task had been to sell the drugs to Mr N.N., an unidentified final buyer from Skopje. As Mr I.P. feared detection, he had tried to escape and had thrown the bag with the opium out of his car. He was later arrested by the police and the bag containing the opium was found.

18. The court found that the accused had acted in concert, namely that the applicant had firstly found the opium and then offered it to Mr D., who had offered it to Mr M.G. The opium was finally offered for sale to Mr I.P., the fifth accused. The court made reference in its decision to the statements of the applicant and the other accused in the pre-trial proceedings concerning their roles in the crime. It also referred to the applicant's statement at the hearing, but disregarded it as self-serving. The testimony of several witnesses and items of real evidence were also taken into account, along with the expert opinions nos. X-121/2000 and X-122/2000 provided by the Bureau.

19. The court held that the poppy-tar, a term used by the accused, was in fact opium, the production of and trade in which was classified as a criminal offence. It based its findings entirely on the written expert opinion provided by the Bureau, stating *inter alia* :

"... the court established that it was a psychotropic substance on the basis of the written evidence, namely the expert opinions nos. X-121/2000 and X-122/2000 submitted by the Bureau, in which it was definitely indicated that it was opium containing several alkaloids..."

20. It noted that the Bureau was a state body authorised to perform such expert examinations and that section 234(2) of the Criminal Proceedings Act did not prohibit it from providing such an expert opinion. It further stated:

"...The court disregards the defence's argument that the opium was of poor quality i.e. what its quality and [opium] percentage was, because the expert report undoubtedly established that it was opium containing all the necessary substances to be considered a psychotropic substance..."

21. In his appeal, the applicant complained, *inter alia*, of the trial court's refusal to order an alternative, independent analysis of the quality of the poppy-tar. He claimed that it was not a type of opium prohibited by law, but poppy-tar that had been buried for a long time and that moisture was known to destroy its morphine content. In support of his arguments about the quality of the poppy-tar, he noted that after the Second World War its owner, Mr M.'s father, had been unable to sell it to an authorised buyer because it was of such poor quality. As it had not been properly stored its quality had deteriorated over time. He considered that a chemical analysis was necessary to determine the quality of the poppy-tar and proposed an institution which in his opinion had the equipment necessary to make the required analysis. He also complained that the expert examination of the opium had been performed by the Ministry which had then brought the criminal charges against him.

22. The applicant also argued that the offence had been set up by a police agent provocateur and would never have been committed without his intervention (he claimed that the unidentified final buyer N. N. was that agent). He further argued that he had been wrongly convicted as he had voluntarily called off the sale of the opium at one point, when he had changed his mind and asked the third accused to give him the poppy-tar back. He also appealed against sentence.

23. At a public hearing held on 14 June 2000 the Štip Court of Appeal dismissed the applicant's appeal and upheld the lower court's decision. It found that the lower court had not erred in refusing the applicant's request for an alternative expert examination of the quality of the drug, as the expert opinion provided by the Bureau was unambiguous. It also noted that it was known that the older the poppy-tar, the better it was for opium use. It further stated that the expert examination by the Bureau had been carried out properly and that the lower court had relied entirely on the Bureau's report and had therefore dismissed the applicant's request for an alternative examination by another institution.

24. The Court of Appeal also found that although the identity of the final buyer of the opium had not been established, it was irrelevant to the applicant's conviction: he had been convicted for having the opium in his possession and offering it for sale. It did not accept the applicant's assertion that he had decided not to proceed with the offence, finding that the lower court had correctly based its findings on the applicant's statements in the pre-trial proceedings in which he had described the whole event and had made a confession. It also found that the applicant had failed throughout the proceedings to put forward any evidence in support of his allegations.

25. In a request to the Supreme Court for extraordinary review of a final decision (*барање за вонредно преиспитување на правосилна пресуда)*, the applicant referred to the complaints he had already raised in his appeal.

26. On 12 April 2001 the Supreme Court dismissed the applicant's request for extraordinary review and upheld the lower courts' decisions. It found that the lower courts had not erred in establishing the facts and evaluating the evidence concerning the applicant's assertion that he had decided not to proceed with the offence.

27. As to the applicant's complaint that his defence rights had been violated as the trial court had refused to order an alternative expert examination of the quality of the poppy-tar, the Supreme Court stated:

"... such complaint is ill-founded because the trial court could reasonably establish on the basis of the expert opinion provided by the Ministry of the Interior that it was opium of good quality. There were no doubts in the expert opinion that would have warranted ordering a fresh examination or an opinion by other experts. The expert opinion submitted by the Ministry of the Interior does not contain any shortcomings or deficiencies which would raise reasonable doubts as to its validity..."

28. On 12 April and 2 November 2001 the Supreme Court dismissed the applicant's request for extraordinary mitigation of the penalty imposed (*барање за вонредно ублажување на казната)*.

29. The Government have also indicated that on 29 May 2002 the Supreme Court rejected a second request by the applicant for extraordinary review of the final decision.

II. RELEVANT DOMESTIC LAW

1. Criminal Proceedings Act (Закон за кривичната постапка)

30. In accordance with section 234(1) and (2) of the Criminal Proceedings Act ("the Act"), an expert examination is requested by a written order of the body which carries out the procedure. The order specifies the facts for which the examination is required and the person appointed to perform it. If a special institution exists or if the examination can be carried out by a State body, the examination, especially in more complex cases, is as a rule entrusted to that institution or body. The institution or body appoints one or more experts to carry out the expert examination.

31. Section 243 of the Act provides that the opinion of other experts must be ordered if the expert opinion already given contains inconsistencies or deficiencies or if there are reasonable doubts as to its accuracy and these cannot be eliminated by referring to the experts who gave the opinion.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained that the courts had refused his request for an alternative expert examination concerning the quality of the poppy-tar and that they had based their decisions on the expert reports produced by the same Ministry as had brought the criminal charges against him. He further complained that he had been incited by a police agent acting as an agent provocateur to commit the offence of which he was later convicted. He also alleged that the courts had refused to accept that he had decided to call off the sale of poppy-tar. He alleged procedural unfairness, in breach of Article 6 of the Convention, which, in so far as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

1. The principle of equality of arms with regard to expert evidence

A. Admissibility

33. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

Case 6

Communication No. 288/2006 : Norway. 01/12/2006. CAT/C/37/D/288/2006. (Jurisprudence)

Convention Abbreviation: CAT
Committee Against Torture

1.1 The complainant is H. S. T., a Mauritanian national, who was denied asylum in Norway and issued with a departure order on 14 April 2004. His whereabouts are currently unknown (see para. 5.2 below). He claims that if he is returned to Mauritania, **(1) he** will be subjected to torture, cruel, and inhuman and degrading treatment, which will constitute a violation by Norway of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The application was initially submitted by the complainant himself, but his lawyer provided comments on the State party's submission on the complainant's behalf. **(2)**

1.2 On 3 February 2006, the Special Rapporteur on New Communications rejected the complainant's request for interim measures of protection.

The facts as presented by the author

2.1 The complainant claims to be a member of the prohibited movement Force de Libération des Africains de Mauritanie (FLAM). This militant organisation transmitted information to members in exile to alert international human rights organisations and the international press about human rights violations in Mauritania. His role in the organisation was "to recruit and sensitise younger members".

2.2 In Mauritania, the complainant was arrested three times. In 1995, after a student demonstration against "arabisation", he was detained for three days but was not interrogated. In 1996, he was arrested and detained for 14 days in relation to his father's opposition to agricultural reform. From 1996 to 2001, he studied and graduated in engineering in Jordan. Upon his return to Mauritania, he was again arrested in June 2001. He was interrogated and allegedly tortured so as to make him explain his role in the FLAM, and to reveal his brother's whereabouts (his brother obtained asylum in Sweden on the basis of his role as secretary general of FLAM). He was released after two days. In December 2001, he learned that he was wanted by the police and left the country for Norway. In February 2002, he arrived in Norway and applied for asylum on 21 February 2002.

2.3 On 21 February 2003, the complainant's application was denied by the Directorate of Immigration (UDI). On 31 March 2004, his appeal to the Immigration Appeals Board (UNE) was rejected. On 14 April 2004, he was issued a departure order. He initiated judicial proceedings and requested an injunction to stay the order to leave the country until his asylum case had been reviewed by the courts. On 13 September 2005, the Court of First Instance (Oslo byfogdembete) rejected his request. On 8 December 2005, the Court of Appeal (Borgarting lagmannsrett) rejected his appeal. As the complainant did not obtain an injunction to stay the order to leave the country, he did not institute principal court proceedings. In addition, he states that he cannot afford such proceedings.

The Complaint

3.1 The complainant claims that he fears inhuman and degrading treatment if returned to Mauritania, as he would be arrested and tortured or even killed, because of his political activism and his father's and brother's political activities3.2 He claims that he was ordered to leave Norway before his case was heard by the courts, and that the Norwegian court system does not provide for effective remedies. He adds that proceedings have been unreasonably prolonged, and that this is solely the government's fault, which gave as justification its lack of knowledge about Mauritania.

Case 7

Communication No. 284/2006 : Canada. 21/11/2006. CAT/C/37/D/284/2006. (Jurisprudence)

Convention Abbreviation: CAT
Committee Against Torture

1.1 The complainant is R.S.A.N., a national of Cameroon born in 1969, currently residing in Canada and awaiting deportation to his country of origin. He claims that his forcible return to Cameroon would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 The Committee transmitted the complaint to the State party on 13 January 2006, without requesting interim measures of protection.

The facts as submitted by the complainant

2.1 In August 1995, the complainant, then a student at the University of Yaoundé, participated in a strike organized by a student assembly opposed to President Paul Biya. During a peaceful student march, he was forced into a police car, handcuffed, beaten and brought to a police station. He was accused of being one of the leaders of the student assembly and arrested together with 50 other students, with whom he had to share a cell designed for no more than 10 persons. One after the other, they were interrogated by police, forced to sing and dance and beaten with a stick. Those who resisted were subjected to more severe torture. The complainant was thrown on the ground and dragged by his feet for at least 5 meters, as a result of which he has a scar on his back measuring 7 cm in length and 3 cm in width. After 24 hours of torture and humiliation, he was released and warned never to take part in a student demonstration again. Following the strike, some student leaders were arrested and sentenced to heavy prison terms. One student was allegedly burned alive in his dormitory so as to bring false charges against members of the student assembly; several others were shot to death during demonstrations. The government also adopted a decree prohibiting the recruitment of participants in the strike to the public service or to any of the country's large public and private companies.

2.2 In October 1995, the complaint left Cameroon for Côte d'Ivoire where he continued his studies and obtained a Master degree in psychology from the University of Abidjan. In July 1997, together with three fellow students, he founded and became secretary-general of an NGO to assist women and child victims of sexual violence ("SOS Violences Sexuelles"). He organized press conferences and continued to protest against the Cameroonian government, e.g. by participating in a sit-in on the premises of the Cameroonian Embassy in Abidjan on 11 October 1997, the day before the Presidential elections in Cameroon. He also gave radio and television interviews and wrote a number of newspaper articles on the human rights situation in Cameroon. After his NGO had uncovered a pedophile ring in Côte d'Ivoire in which a Minister and an Ambassador were involved, the premises of the organization were devastated and the complainant received anonymous death threats.

2.3 On 9 June 2000, the complainant entered Canada on a visitor's visa to participate in a human rights conference from 11 to 30 July. During his stay in Canada, the political situation in Côte d'Ivoire deteriorated following a failed coup d'état. After a colleague from "SOS Violences Sexuelles" had warned the complainant that he would not be safe in Côte d'Ivoire, he applied for refugee status in Canada on 12 July 2000. On 20 July 2001, the Canadian Immigration and Refugee Board rejected his application, based on the following contradictions in his counts: (a) His contention that the President of Yaoundé University had removed the names of all participants in the August 1995 strike from the student register and the fact that he was nevertheless able to submit grade reports dated October 1995 to the Board as evidence; (b) inconsistencies between the complainant's chronology of events and official records according to which the student strike took place in August 1996 rather than in August 1995; (c) his inability to produce any newspaper articles or other evidence that would confirm his participation in the alleged events of 1995; and (d) the fact that official documents suggest that the punishment of strike participants was not as severe as claimed by the complainant.

2.4 The complainant did not apply for leave to appeal the decision of the Immigration and Refugee Board to the Federal Court, but followed the advice of his lawyer to file an application in the Post-Determination Refugee Claimants class instead. On 8 December 2004, his application was transformed into a Pre-Removal Risk Assessment application under the new Immigration Law. On 13 October 2005, Citizenship and Immigration Canada rejected his PRRA application, in the absence of sufficient grounds to believe that he would be exposed to a personal risk of torture in Cameroon. The PRRA officer based her decision, *inter alia*, on the following grounds: (a) The fact that the complainant had manipulated a date and pasted his name into a copy of the report of the UN Special Rapporteur on Torture on his visit to Cameroon (E/CN.4/1999/61) which he submitted as evidence; (b) his failure to raise his torture claim before the Immigration and Refugee Board and the late submission of that claim on 7 January 2005; and (c) his low political and journalistic profile. The complainant did not appeal the PRRA decision to the Federal Court, as he was advised by his lawyer that 99 percent of such appeals were unsuccessful.

2.5 In the meantime, the complainant established a common law relationship with a woman from Cameroon with permanent residence in Canada with whom he has been living since March 2004. A son was born out of their relationship on 20 December 2004.

2.6 On 9 November 2005, the complainant was informed that his removal from Canada had been scheduled for 6 December 2005 and that an arrest warrant would be issued against him, if he failed to present himself to the immigration authorities at Montreal International Airport. Subsequently, he filed an application for permanent residence based on his common-law relationship with a Canadian resident. On 21 November 2005, the complainant unsuccessfully requested the suspension of his deportation order, as well as priority consideration of his application for permanent residence. On 28 November 2005, the mother of his child filed an application to sponsor him as a common-law partner in the family class; the application was subsequently suspended at the mother's request.

2.7 The complainant was allegedly unable to comply with the removal order on 6 December 2005 as he fell ill and had to go to hospital. An arrest warrant was subsequently issued against him. No further date has been set for his deportation but the police came looking for the complainant at his partner's apartment.

Case 8

Communication No. 280/2005 : Switzerland. 22/01/2007. CAT/C/37/D/280/2005. (Jurisprudence)

Convention Abbreviation: CAT
Committee Against Torture

1.1 The complainant is Gamal El Rgeig, a Libyan national born in 1969, currently residing in Switzerland where he submitted an application for asylum on 10 June 2003; the application was rejected on 5 March 2004. He claims that his deportation to the Libyan Arab Jamahiriya would constitute a violation by Switzerland of his rights under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 On 16 September 2005, in accordance with rule 108, paragraph 1, of its rules of procedure, the Committee, acting through its Rapporteur for new complaints and interim measures, requested the State party to suspend the expulsion of the complainant while his complaint was being considered. In a note verbale dated 27 October 2005, the State party informed the Committee that it acceded to this request.

The facts as submitted by the complainant

2.1 In February 1989, the complainant was arrested for his "political activities" and was held at the Abu Salim prison for six years, without ever having been accused or tried. He claims that, during his detention, he was repeatedly subjected to ill-treatment and acts of torture.

2.2 The complainant was released in 1995 and allegedly continued to be harassed by the security forces. He claims to have been summoned regularly to the security office where he was threatened and tortured and, in 2000, State agents allegedly burst into his home to confiscate his computer. He alleges that, following that incident, he was arrested and tortured on several occasions. The last arrest took place in 2002, and on that occasion the acts of torture were more severe.

2.3 In March 2003, he learned that one of his friends, who had been imprisoned at the same time as the complainant and for the same reasons, had been sent to prison again because his name appeared on a list. The complainant concluded that his name also appeared on that list. Following these events, the complainant left the Libyan Arab Jamahiriya for Egypt, where he claims to have obtained an Italian visa through "an acquaintance" at the Italian Embassy. He arrived in Italy, and from there proceeded to Switzerland. On 10 June 2003, upon his arrival in Switzerland, he filed an application for asylum and produced official documents indicating that he had been imprisoned for six years, as well as one of the summonses, dated December 1997, that he had received after his release.

2.4 The complainant states that he continued his political activities in Switzerland, where he maintained contact with various organizations and associations campaigning for human rights in the Libyan Arab Jamahiriya. He claims that he received two letters from his family informing him that the security forces had come looking for him on several occasions and that they had threatened members of his family. Following those events, his family was forced to move.

2.5 On 5 March 2004, the complainant's application for asylum was rejected by the Federal Office for Refugees, now the Federal Office for Migration, which ordered his expulsion from Swiss territory by 30 April 2004. The complainant notes that the Federal Office for Refugees acknowledged that he had been imprisoned without trial, but concluded that it had not been established that he had been tortured and persecuted after his release in 1995. On 5 April 2004, the complainant lodged an appeal against this decision and, on 7 July 2004, the Swiss Asylum Review Board rejected the appeal, considering that there were many factual inconsistencies in the complainant's allegations and that his presentation of the facts was not believable. The Commission therefore upheld the decision of the Federal Office for Refugees, ordering the complainant's return under threat of expulsion.

2.6 On 8 September 2005, the Geneva Police Commissioner issued an order for the administrative detention of the complainant. On 9 September 2005, the Cantonal Aliens Appeal Board (*Commission cantonale de recours en matière de police des étrangers*) upheld the order for the complainant's detention for a period of one month, that is, until 8 October 2005. On 19 September 2005, the complainant appealed to the Geneva Administrative Tribunal against the decision of the Geneva Cantonal Aliens Appeal Board of 9 September 2005, which upheld the order for his administrative detention. Attached to his appeal to the Administrative Tribunal were letters in support of his application for asylum from non-governmental organizations that deal with the Libyan Arab Jamahiriya and political refugees in Switzerland. The complainant was released on an unspecified date, and on 27 September 2006, the Administrative Tribunal decided to strike his appeal from the list of cases, since it was no longer necessary. **(1)**