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Thomas Thiede* and Erdem Büyüksagis**

I. Preliminary Remarks

A. Reduction of Damages in National and European Tort Law

In most European legal systems it is generally acknowledged in national as well as international law that any damage must be restituted completely,[1] as long as the claim is admitted on its merits. If this proposition is accepted, the tortfeasor is liable for the *complete damage* resulting from the infringement of rights of the victim,[2] ie the victim should, as far as possible, be placed in the same position as if the violation of his or her rights had not occurred (*restitutio ad integrum*). However, this principle is not enforced fully in any European country or in the European Union. **15/1**

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1 See *G Dannemann*, Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention (1994) 232; *U Magnus*, Comparative Report on the Law of Damages, in: U Magnus (ed), Unification of Tort Law: Damages (2001) no 2 ff. However, it has to be noted that in many European countries the extent of compensation depends on the degree of fault. In Austria, for instance, see § 1324 Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, ABGB). If the tortfeasor acted with slight negligence, then the victim is entitled to the actual loss. The tortfeasor is only liable for full compensation (actual loss and loss of profits) if he behaved with gross negligence or intent. See *H Koziol*, Damages under Austrian Law, in: Magnus (supra) nos 3, 5.

2 However, in the given context one should remember that compensation should restore the victim only to the position he would have been in had the infringement of human rights not occurred. Hence, any benefit to the victim resulting from the payment of any compensation by the State must be refused. On the other hand, we recognize that, in many cases, it is not so easy to determine what the victim's situation would have been if the violation of his or her rights had not occurred. Concerning this issue, see *E Büyüksagis*, Yeni Sosyo-Ekonomik Boyutuyla Maddi Zarar Kavramı [Material Loss in Light of Recent Socio-Economic Developments] (2007).

Instead it seems characteristic in many jurisdictions that damages may be reduced albeit the liability on the merits has already been established.

15/2 Generally, two different legal approaches to the reduction of damages can be observed. Firstly, concepts such as the adequacy of damage, the protective scope of a provision and the contributory fault of the victim are often responsible for an eventual reduction – albeit that they separately fulfill different functions within the universe of tort law. One may label this as *assessment* of damages. Secondly, a series of countries have codified a general *reduction clause*, often in addition to the various concepts mentioned above, and a list of countries, including Denmark,[3] Finland,[4] the Netherlands,[5] Portugal,[6] Sweden,[7] Spain,[8] Poland,[9] Switzerland,[10] Turkey,[11] and the draft of a new Austrian Tort Law[12] have all developed provisions to take into account the economic capacity of the tortfeasor additionally as a further factor for reducing damages.

15/3 Accordingly, the *Principles of European Tort Law* (PETL)[13] generally accept in art 10:101 PETL a *restitutio ad integrum*[14] but state additionally in art 8:101 PETL that liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters, eg foreseeability of the damage and the nature and the value of the protected interests (art 3:201 PETL), which would be relevant to establish or reduce liability if the victim were the tortfeasor. In addition, PETL allow in art 10:401 (1) that damages may be reduced in exceptional cases, for instance if in light of the financial situation of the parties, compensation would be an oppressive burden to the defendant.

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3 § 19 Erstatningsansvarloven (Damages Act, 885/2005).
4 Ch 2 § 1 Vahingonkorvauslaki (Tort Liability Act, 412/1974).
5 Art 6:109 Nieuw Burgerlijk Wetboek (New Civil Code, 1992).
6 Art 494 Código Civil (Civil Code,1966-344)
7 Ch 6 § 2 Skadeståndslag (Tort Act, 1972:207).
8 Art 1103 Código Civil (Civil Code, 1889).
9 Art 440 Kodeks cywilny (Civil Code, no 16 item 93/1964).
10 Art 44 (2) Code des obligations suisse (Swiss Code of Obligations, SwCo 220/1911).
11 Art 52 (2) Türk Borçlar Kanunu (Turkish Code of Obligations, TBK 6098/2011), which will take effect on 1st July 2012.
12 See § 1318 of the Draft, Juristische Blätter (JBl) 2008, 365 = Zeitschrift für Verkehrsrecht (ZVR) 2008, 168. On the draft see *E Karner*, Geldersatz für ideelle Schäden, Minderung der Ersatzpflicht, Beweislast, Verjährung, in: I Griss/G Kathrein/H Koziol (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 89 ff; *BC Steininger*, Austria, in: H Koziol/BC Steininger (eds), European Tort Law 2005 (2006) 118 ff.
13 *European Group on Tort Law*, Principles of European Tort Law, Text and Commentary (2005) ongoing.
14 See *U Magnus*, Commentary ad art 10:101 PETL, in: European Group on Tort Law (fn 13) no 7.

Even in European Community law, tendencies towards the reduction of damages are noticeable. In the first instance, a reference to the law of the European Union appears astonishing, since art 340 (2) Treaty on the Functioning of the European Union (TFEU) merely states that, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, compensate any damage caused by its institutions or by its servants in the performance of their duties. On the basis of this provision, the European Court of Justice (ECJ) has developed case law concerning the law of damages, basing its decisions on the principles inherent in the European legal systems. As part of this, the topic of reduction of damages was dealt with in the judgments *Oleifici Mediterranei v EEC*[15] and *Ireks-Arkady v Council and Commission*.[16] The Court held that in general the reduction of damages is part of the *acquis communitaire* and that, for example, damages should at least be reduced in cases where the injured person has contributed to the damage by their own unlawful behaviour;[17] a further reference to reduction due to the economic situation of the tortfeasor was not made. **15/4**

B. Principles Governing the Reduction of Damages

Because all of these approaches to reducing damages are exceptions to the principle of full compensation, they require further justification. Two different principles which fulfil this function can be identified: reduction demanded by corrective justice and reduction demanded by distributive justice.[18] Both principles may be found to justify reducing damages; **15/5**

15 European Court of Justice (ECJ) 26/81, *SA Oleifici Mediterranei v European Economic Community* [1982] European Court Reports (ECR) 3057, 3078 f.

16 ECJ 238/78, *Ireks-Arkady Gmbh v Council and Commission of the European Communities* [1979] ECR 2955, 2974.

17 See ECJ 26/81, *Oleifici Mediterranei v EEC* [1982] ECR 3057, 3078 f.

18 In general see *DB Dobbs*, Direct and General Limits on Tort Damages in the United States, in: J Spier (ed), The Limits of Liability: Keeping the Floodgates Shut (1996) 35; Restatement Second of Torts § 435 (1) (1965).
In cases where the reduction finds its grounds in the relationship between claimant and defendant, the reduction is justified by corrective justice. Corrective justice takes into account only the harmful action at hand and not the financial circumstances of the parties. Examples of corrective justice are reduction based on the applicant's contributory negligence or the low degree of the defendant's fault. In contrast, distributive justice observes the situation of the litigating parties, eg their age or financial situation, and it analyses the effects damages would have on them. See *F Bydlinski*, Juristische Methodenlehre und Rechtsbegriff (1991) 357 ff and 339 f; *K Larenz/C-W Canaris*, Methodenlehre der Rechtswissenschaft (3rd edn 1995) 168 ff, 202 ff; *W Fikentscher*, Methoden

however, the methodological grounds for reduction are not always explicitly connected to one principle or the other. Explicit justification is more likely only where existing national law does not provide any existing guidance thus forcing literature and courts to set out their reasoning. Academic literature and national courts usually refer to other considerations, for instance arguing that harm has partly been caused by external factors outside of the defendant's sphere, that the extent of damage was not foreseeable,[19] that there was only slight negligence on the part of the defendant, that the defendant enjoys the special protection of the law (eg children and mentally impaired people),[20] that the defendant had acted with altruistic motives[21] or that the imposition of full liability would ruin the defendant.[22]

II. Analysis of the ECtHR Jurisprudence

15/6 In the following, the authors generally apply a broader perspective, ie seek to identify some of the above-mentioned justifications for reduction in the ECtHR's case law.[23] However, the authors also want to emphasize that the general weight given to any particular justification or principle may be minimal, with the more likely scenario seeming to be that any interpretations are only valid in relation to the given facts of the particular case. The following indications of how damages are subject to reduction within the jurisdiction of the European Court of Human

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des Rechts in vergleichender Darstellung, vol III: Mitteleuropäischer Rechtskreis (1976) 651 ff.
The notion of corrective justice has been criticized on the ground that it provides no practical guidelines for providing only normative guidance and failing to accommodate what the tort law actually says. In *A Ripstein/BC Zipursky*, Corrective Justice in an Age of Mass Tort, in: GJ Postema (ed), Philosophy and the Law of Torts (2001) 214 ff, these ideas are explicitly dealt with and refuted.

19 See in Germany Reichsgericht (RG) in Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 155, 37; Bundesgerichtshof (BGH) in Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 20, 137 (139); BGHZ 107, 359 (363); BGH Neue Juristische Wochenschrift (NJW) 1974, 1510. Concerning the questions about the limitation of liability, see *W Wilburg*, Die Elemente des Schadensrechts (1941) 242 ff; *F Bydlinski*, Probleme der Schadensverursachung (1964) 62.

20 In general see *M Martín-Casals*, Comparative Report, in: M Martín-Casals (ed), Children in Tort Law, Part I: Children as Tortfeasors (2006) no 1.

21 See *F Werro*, La responsabilité civile (2005) no 1147.

22 See *WVH Rogers/J Spier/G Viney*, Observations, in: Spier (fn 18) 10; *Werro* (fn 21) no 1140.

23 For an extensive analysis as to what is deemed by the ECtHR to be damage and in what cases damages are awarded, see *K Oliphant/K Ludwichowska*, Damage (contained in this volume) nos 6/18 ff; *C Kissling/D Kelliher*, Compensation for Pecuniary and Non-Pecuniary Loss (contained in this volume) no 11/13 ff all with extensive further references.

Rights (ECtHR) are not suitable for precise dogmatic analysis. Hence, different interpretations are up for debate:[24] in the following, the authors attempt to present more than one perspective.

Despite these different stances, it was generally agreed that the most striking feature of the case law described below is the fact that the ECtHR neither deals explicitly with the reduction of damages nor unpacks the underlying criteria, whilst obviously applying such reductions in many cases; there is very miniscule indication of how the amounts awarded were calculated, which makes it difficult to draw conclusions regarding when and why damages were reduced.[25]

15/7 To begin with, the Court observes the principle of full reparation; under art 41 of the European Convention on Human Rights (ECHR), damages can only be awarded when the national tort law of the High Contracting Party fails to provide full compensation for the damage incurred.[26] However, the fact that merely partial as opposed to complete restitution is the basis for the ECtHR's competence to award damages does not mean that the Court must award the amount of the shortfall from full compensation under the national law – the incompleteness of the restitution is only the starting point in deciding whether a claim is admissible and proper. Art 41 ECHR itself does not require that the Court *instead* of the State should award the shortfall from full reparation. It only foresees 'just satisfaction'. Hence, it is clearly also foreseen that this just satisfaction may be less than the full amount of damage.[27]

15/8 This departure from the starting point of total reparation requires special reasoning, which regrettably is often not tackled prominently but only incidentally addressed under certain terms such as 'equity', 'just satisfaction', the 'missing causal link' or the 'nature of the proceedings in the case'. When examining the judgments of the ECtHR, one must assume that these keywords are used as a substitute for different considerations.[28] Compared

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24 See *A Fenyves*, Concluding Remarks on Contributory Negligence and Reduction Clause (contained in this volume) no 23/5 ff.

25 Nevertheless, we hope to ascertain principles regarding the reduction of damages by applying a teleological argumentation based on the fundamental purpose of the Convention, ie effective human rights' protection and just satisfaction for the applicant. See *F Bydlinski*, Methodological Approaches to the Tort Law of the ECHR (contained in this volume) no 2/55.

26 See *Bydlinski* (fn 25) no 2/20.

27 See ibid, no 2/24 ff.

28 See, eg, the recent decision ECtHR *Svetlana Orlova v. Russia*, 30.7.2009, no. 4487/04, § 58: 'The Court considers that the applicant must have sustained non-pecuniary damage as a result of the unreasonably long examination of her claims by domestic courts. However,

to the very precise and extended analysis leading to the establishment of an infringement of human rights, the questions of the liability consequences under art 41 are dealt with in quite a brief manner. In some cases the Court justified the granting of compensation as well as its calculation therefore only by referring to 'equity', although the plaintiff did not even specify the amount of the damages claimed.[29] Potential factors for calculating reduction are not elaborated on in greater detail and only the afore-mentioned aphorisms are given as the criteria for the assessment of damages.

A. Incapacity and Vis Maior

1. *Assanidze v. Georgia* [GC][30]

15/9 In this case the violation of the Convention had indisputably caused the applicant substantial damage. The Court held that the founding principles of the rule of law were breached and that the applicant was in a frustrating situation that he was powerless to rectify.

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the amount claimed appears to be excessive. Having regard to the nature of the proceedings in the present case and ruling on an equitable basis, it awards her EUR 2,100'.

29 See recently ECtHR *Ong c. France*, 14.11.2006, no. 348/03, §§ 47–49. In this case, the plaintiff argued that the damage he suffered was so severe and so widespread that it was not possible for him to estimate its exact extent. The government replied that the claim should be refused as inadmissible since the plaintiff was not able to prove his damage.

30 ECtHR 8.4.2004, no. 71503/01. The applicant, Tengiz Assanidze, was a Georgian national who was in custody in Batumi, the capital city of the Ajarian Autonomous Republic in Georgia. He was accused of illegal financial dealings in the Batumi Tobacco Manufacturing Company and of unlawful possession and handling of firearms. In 1994 he was convicted and sentenced to eight years' imprisonment; his assets were confiscated and he was required to reimburse the pecuniary losses of the tobacco company. On 1 October 1999, the applicant was granted a presidential pardon but he was not released because the Ajarian High Court declared the pardon null and void. In 1999, the applicant was charged with further criminal offences concerning a separate case of kidnapping. On 2 October 2000, the applicant was convicted and sentenced to twelve years' imprisonment. On 29 January 2001, the Supreme Court of Georgia heard the applicant's appeal. Its verdict resulted in the acquittal of the applicant and order of his immediate release. In spite of all this, the applicant remained in custody in the Ajarian Autonomous Republic. The applicant complained about the violation of his right to liberty, since he continued to remain in the custody of the Ajarian Autonomous Republic in spite of the fact that he had received a presidential pardon for his first offence and been acquitted of the second offence by the Supreme Court of Georgia. The applicant claimed reparation for pecuniary damage: for the loss of his monthly income, € 12,000 and for non-pecuniary damage € 3,000,000. The State of Georgia submitted that it was not able to enforce either the Supreme Court's order or the presidential pardon and was therefore generally not able to free the applicant from custody in the Ajarian Autonomous Republic.

Theoretically, the ECtHR could then have awarded damages under the heads of pecuniary and non-pecuniary loss. Regrettably, however, the Court did not separate its awards into these respective heads of damages: concerning the applicant's pecuniary loss, the Court mentioned that it had been unable to make a precise calculation and therefore fell to an assessment in equity for both pecuniary and non-pecuniary damages, which were awarded as a global sum of € 150,000 to cover all of the applicant's losses.

Obviously, there must have been a certain reduction of damages in this case: the Court awarded just 5 % of the damages requested. However, any examination of the evident reduction proves rather difficult since the Court provides no guidance as to which basis was relevant in reducing the damages so severely.[31] The Court apparently preferred a more intuitive assessment without highlighting the material circumstances leading to the reduction. The fact that the compensation was awarded for both pecuniary and non-pecuniary damage leads to further difficulties since the different items cannot be distinguished in a uniform sum.

Certainly of more interest in the context of this report is the indirect **15/10**
reference by the State of Georgia to the idea of corrective justice. The State invoked the defence that the executive was simply not able to enforce the judgments delivered by the Supreme Court. Since the damage was caused directly by the Ajarian authorities, it was implied that there was not any fault on the part of the State.[32] The Court held that the State is liable for damage caused by subordinate authorities and the infringement of the victim's rights under the Convention is the sole basis for the State's liability.[33] Thus, based on the (particular) absence of any consideration of fault on the side of the State with respect to the establishment of liability, the denial of a defence of unenforceability was inevitable; if the State's liability generally does not depend on its faulty behaviour, any

31 In a more recent case involving the violation of art 8 ECHR, the ECtHR awarded € 6,000, whereas the plaintiff had claimed 8 million Slovakian korunas (approx € 265,000) in non-pecuniary damages. In other words, the Court awarded just 2.26 % of the damages claimed. However, it did not provide any special reasoning for such a reduction. For this case, see ECtHR *Kučera v. Slovakia*, 17.7.2007, no. 48666/99, §§ 36–38. For recent similar cases, see *Stankov v. Bulgaria*, 12.7.2007, no. 68490/01, §§ 69–71; *Nešťák v. Slovakia*, 27.2.2007, no. 65559/01, §§ 104–106.

32 Furthermore, the State requested that the Court restrict the damages for pecuniary damage to a reasonable level because the claim was grossly exaggerated and also in view of its severe socio-economic crisis and financial situation, which would make it impossible to pay out large sums to the applicant over any length of time. This is of course a reference to distributive justice. See no 15/5 ff above and no 15/12 ff below.

33 See *BC Steininger/N Wallner-Friedl*, Wrongfulness and Fault (contained in this volume) no 8/21 ff; *D Hinghofer-Szalkay/BA Koch*, No-Fault or Strict Liability (contained in this volume) no 10/13 ff; *Dannemann* (fn 1) 84 ff; *Bydlinski* (fn 25) no 2/58 ff.

absence of fault cannot be deemed a defence. Therefore, the Court made it absolutely clear that any incapacity of a State to perform its duties under the Convention is not regarded a defence.

15/11 Apparently the Court delivered this with good grounds. Beyond the clear inability to provide a satisfactory level of human rights protection, the State failed to allocate the necessary funds and personnel to enforce its legal decisions. It is to be assumed prima facie that an appropriate funding of the tasks necessary for human rights' protection would have been possible. One may assume that the Court refers to an abstract possibility to provide the agreed protection.[34]

2. *Mykhaylenky and Others v. Ukraine*[35]

15/12 In significant contrast to the case described above, where the incapacity of the State was clearly no defence since there were several possible ways to raise the necessary funds and, hence, there was an abstract possibility of human rights protection, the *Mykhaylenky* case should perhaps be assessed in the context of its history, which is the Chernobyl disaster of 1986. One should bear in mind that this catastrophe, which occurred in a Ukrainian nuclear power plant, is widely regarded as the worst accident in the history of nuclear power. As a result, one reactor was completely destroyed and large areas within Europe became contaminated with radiation. Over time the incidence of different types of cancer has risen greatly in the Ukraine and neighbouring Belarus, onto which a vast amount of nuclear fallout rained. In addition to the fatal effects on the population's health, the economic situation of the Ukraine declined tremendously, mainly due to the shutdown of the remaining working

34 See also *Fenyves* (fn 24) no 23/10 f.

35 ECtHR 30.11.2004, nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02. In the *Mykhaylenky* case, 11 Ukrainian nationals complained about the non-enforcement of individual court decisions enjoining the state-owned company Atomspetsbud to pay them salary arrears. Atomspetsbud was the company running the reactors in Chernobyl and the applicants carried out construction work at Chernobyl within the zone that had been compulsorily evacuated. In June 1999, the Ministry of Energy informed the applicants that the delay in payment of salary arrears was due to the debtor company's difficult economic situation, caused by the failure of third parties to pay their debts to the company. In 2001 it transpired that the Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Catastrophe was the company's largest debtor and, due to the above described economic reasons, not able to pay the remaining amounts to the applicants. See also ECtHR *Sharenok v. Ukraine*, 22.2.2005, no. 35087/02, § 15; *Hinghofer-Szalkay/Koch* (fn 33) no 10/8.

reactors, industry being cut off from energy supplies, and, of course, the enormous medical expenses for the Ukrainians exposed to radiation. As a result of this catastrophe, the State of Ukraine lost a total of between approximately $ 120 billion and $ 130 billion – a sum six times greater than its annual budget.[36]

In its decision, the Court did not weigh the fact that the Ukraine suffered (and is still suffering) severe economic difficulties due to the Chernobyl catastrophe and reiterated in this decision once again that a State authority's lack of funds can not excuse the non-enforcement of a court decision, in this case the non-payment of the salaries.

15/13 On the face of it, one has to affirm this judgment since the infringed guarantee of the rule of law naturally extends to judgments delivered by the national court. Moreover, the enforcement of the various court decisions required the State to pay only € 14,366 to satisfy the claims of the 11 applicants. For a State to pay such a sum cannot be considered an oppressive burden. Last but not least, this decision of the Court is evidently influenced by the idea that certain principles such as the non-admissibility of the defence of severe economic burden should be upheld.[37]

15/14 Nevertheless, catastrophic circumstances like the Chernobyl incident and the lack of even an abstract possibility to protect human rights (eg by allocating the necessary funds) in such extreme circumstances should be taken into account since the Court's rigidity is not required (to this extent) by art 41 ECHR.[38] By all means, one has to bear in mind that neither the victim nor the tortfeasor had any influence on that tragic event. In contrast to the *Assanidze v. Georgia* [GC] case, where the Georgian Government at least had the abstract and general possibility and the time to raise the funds necessary to enforce the decisions of the Supreme Court, in the *Mykhaylenky and Others v. Ukraine* case the full catastrophic circumstances appeared from one day to the next and are still causing economic turmoil.

15/15 In short, in cases of absolutely unforeseen and unavoidable external catastrophes (*force majeure*), an exception from the rule that lack of money or the absence of personnel resources is not a defence should be estab-

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36 Cf <http://news.bbc.co.uk/2/hi/world/monitoring/83969.stm>.

37 However, it may be noted that the Court does not apply a very strict doctrine of precedent, though as a matter of practice it will generally regard itself as bound by its case law.

38 See *Bydlinski* (fn 25) no 2/213.

lished, allowing the consideration of an abstract possibility to provide human rights protection and, hence, of such external and natural events as a weighting factor for the reduction of damages; thus allowing such to be invoked as a reason justifying the reduction of a claim already established on its merits.[39]

B. Benefits Received and Risks Taken

15/16 While it has been suggested above that there is no prerequisite of fault with respect to the State's conduct, the Court actually does refer to the concept where such conduct was actually offensive. In *Smith and Grady v. the United Kingdom*,[40] the Court explicitly took into account the respondent's behaviour (the United Kingdom), in particular its '*especially grave interferences with the applicant's private lives*'. Hence, the Court's decision as to the appropriate level of just satisfaction was influenced by its view of the conduct of the respondent State. The detailed submissions[41] concerning pecuniary losses were examined, however the Court reduced the award of damages significantly and held furthermore that any amount awarded would necessarily be speculative.[42]

The wording of the decision in the context of the damages awarded in this case begs multiple observations: to begin with, the grave fault of the respondent State is taken into account (wording) – nevertheless, the amount of damages awarded to the applicants is reduced significantly (numbers).

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39 See art 10:401 PETL and no 15/3 above.

40 ECtHR 25.7.2000, nos. 33985/96 and 33986/96. The applicants, Jeanette Smith and Graeme Grady, were members of the United Kingdom armed forces. Despite their very good service records, they were administratively discharged on the basis of the Ministry of Defence policy of excluding homosexuals from the armed forces. In November 1995, the Court of Appeal rejected their judicial review applications. The applicants claimed £ 30,000 and £ 20,000 respectively for non-pecuniary damage. The ECtHR awarded £ 19,000 to each applicant on an equitable basis.

41 Both applicants made detailed submissions concerning pecuniary losses. The first applicant claimed compensation for both past and future pecuniary losses, in each case based on the difference between her civilian income and her service income, as well as for loss in respect of her service pension, in total £ 590,222. The second applicant claimed compensation for future pecuniary loss, since his service earnings would have exceeded his potential civilian income, and also for loss related to the service pension scheme, in total £ 784,714.

42 Therefore, it fell back to an assessment on an equitable basis and awarded the first applicant £ 59,000 compensation for pecuniary damage and the second applicant £ 40,000 for pecuniary damage.

The latter may be explained by the fact that compensation for pecuniary loss was reduced because the victims had already been granted a certain amount of money for their pension. Although the Court did not explicitly say so, one has to assume that the applicants saw their claim for pecuniary loss reduced because of these benefits received.[43] This perception fits in with the above-mentioned interpretation of art 41 ECHR: the Court shall *not* simply award the shortfall from full reparation. It only foresees 'just satisfaction' as compensation where this is deemed necessary.[44] **15/17**

Another possible explanation for this severe reduction might be that the Court had taken into account the fact that, on their enlistment, the applicants were aware of the risk of being discharged from the armed forces on the ground of their homosexuality in pursuance of the relevant official policy of the Ministry of Defence, which had been brought to their attention.[45] **15/18**

C. Contributory Conduct or Activity[46]

In the European civil law systems it is widely accepted that to the extent to which damage cannot be imputed to third parties, the victim must bear the loss himself.[47] Generally, the contributory conduct or activity of the victim leads to a reduction of the sum of damages that would be awarded if the victim contributed to the damage or to its aggravation. Therefore, the normal apportionment procedure is, first, to establish the victim's full damage and then to reduce it in proportion to the victim's contribution. This regularly results in a certain percentage by which the original **15/19**

43 See *Dannemann* (fn 1) 226 ff.

44 No 15/7 above.

45 See the partly dissenting and partly concurring opinion of Judge Loucaides in this decision.

46 It should be remarked that the term 'negligence' is misleading in this context since the conduct of the victim cannot be properly qualified as 'fault' or 'negligence' in a strict technical sense, since no one is under a legal duty not to cause damage to his or her own sphere. See *M Martín-Casals*, Contributory Conduct or Activity, in: European Group on Tort Law (fn 13) no 8.

47 This rule stems from the old Roman rule *ex culpa sua* which attributed the harm to the victim when the victim has contributed by his own act or omission to the creation or the extent of the damage. See *KD Kerameus*, Contributory Negligence under Greek Law, in: U Magnus/M Martín-Casals (eds), Unification of Tort Law: Contributory Negligence (2003) no 2 and *U Magnus/M Martín-Casals*, Comparative Conclusions, in: Magnus/Martín-Casals (supra) no 2.

amount of damages is reduced, but may also result in total exclusion of any compensation.[48]

1. *Rehbock v. Slovenia* and *Wenerski v. Poland*[49]

15/20 In *Rehbock v. Slovenia*,[50] the Court referred convincingly and explicitly to contributory conduct, namely the applicant's refusal to consent to the recommended and necessary treatment for his injuries and accordingly reduced the award for damages to 1/40 of the sum claimed by the applicant for non-pecuniary damage and thus granted – compared to the original claim – a more or less symbolic sum. Hence, the Court recognises contributory conduct as a ground for reduction.

15/21 On the other hand, the fact that, in some similar cases, the Court similarly reduced the award of damages to a considerable extent, without mentioning the victim's contributory conduct as a reason for reduction raises some reservations as to the cogency of this approach. For example, in a recent case with eminently comparable facts, *Wenerski v. Poland*, the Court stated that

> '... the applicant was not provided with adequate medical assistance while he was detained for a period of six years, although such assistance had been found to be urgent and necessary. The Court has further found that this must have undoubtedly caused him both physical and mental suffering. In consequence, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 3,000.'

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48 See *Martín-Casals* (fn 46) no 18.

49 ECtHR *Rehbock v. Slovenia*, 28.11.2000, no. 29462/95 and *Wenerski v. Poland*, 20.1.2009, no. 44369/02.

50 The applicant, Ernst Rehbock, is a German national who was arrested by the Slovenian police and accused of dealing with narcotics and smuggling. He complained to the Court about the treatment he received at the time of his arrest, which resulted in a double fracture of the jaw and facial contusions, injuries that were diagnosed by a doctor the day following his arrest. He also complained about the lack of adequate medical care during his detention, about the length of the proceedings to determine the lawfulness of his detention, about the breach of his right to compensation in this respect and about the monitoring of his correspondence with the ECtHR. During the proceedings before the Court it became obvious that the applicant had refused to undergo the recommended surgery for his injury and that the detention by the Slovenian officials was legal since the applicant was convicted of the criminal charges against him and it was alleged that the applicant's injuries resulted from his own violent resistance at the time of his arrest. Nevertheless, in the view of the Court the government failed to satisfy the burden of proof that the use of force was not excessive and thus force was justified.

It is worth mentioning that the original claim was € 30,000. In the decision, there is no explanation for such a considerable reduction, which is rather peculiar given the fact that the Court had thoroughly highlighted the merits of the claim.[51]

2. *Sabin Popescu c. Roumanie*[52]

In the case of *Popescu* the evaluation of the Court's decision in 'equity'[53] was ambivalent: on the one hand, it openly refused to compensate the applicant for the fact that he had not received the original plots of land. On the other, it granted compensation for the loss of earnings (lucrum cessans) due to non-production, rejecting the government's argument that this loss was a result of the applicant's own conduct in not cultivating the land.[54] **15/22**

With respect to this decision, it must be stressed that contributory conduct is not limited only to cases where the victim contributed to the creation of the damage, but also extends to cases where the damage is aggravated through the victim's conduct after its occurrence.[55] Therefore a certain reduction – even to the extent of complete exclusion – of damages might have been indicated, since the applicant clearly contributed to the harm to a very large extent and obviously took no precaution to minimize the loss at hand. **15/23**

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51 ECtHR *Wenerski v. Poland*, 20.1.2009, no. 44269/02, § 84.

52 ECtHR 2.3.2004, no. 48102/99.The applicant, Sabin Popescu, is a Romanian national who complained about the non-execution of a definitive court ruling. On 20 March 1992, the first instance court of Craiova had granted the applicant the right to be given a certain plot of land. At the applicant's request, on 11 June 1992, the court rectified a few mistakes, specifying the size and the precise location of the two plots of land to be given to the applicant. When he requested the enforcement of the judgment, the local commission did not give him the two plots of land mentioned in the judgment but instead offered him a single plot of land of the same total dimensions located 70 meters from the 2 plots claimed. The applicant refused to take possession of this on the ground that it was not what the judgment specified. Nevertheless, a valid property title was sent, which the applicant returned. Seeking the execution of the original judgment, the applicant 1) filed an administrative litigation action, 2) filed a penal complaint for non-execution of a court ruling and 3) filed various other complaints with various authorities. The respondent State submitted that the applicant was not given the plots he claimed due to some changes in the land register and that the plot given was of the same size and same soil quality as the plots originally awarded. Moreover, the respondent State argued that the applicant would not have suffered any loss if he had accepted the new plot and cultivated it.

53 For further discussion concerning the notion of 'equity', see no 15/8 ff above.

54 Which was criticized by Judge Mularoni in the very same judgment.

55 See *Magnus/Martín-Casals* (fn 47) no 9 with extensive further reference.

15/24 Admittedly, another argument may be brought forward in favour of the applicant. As shown above,[56] the rule of law seems to be one of the absolute standards upheld by the Court and in this case no Romanian judgment was delivered stating that the replacement of the original plots of land was authorized and legal. Any failure to minimize a loss incurred can lead either to the exclusion of compensation for any loss deriving from the lack of mitigation,[57] or to an apportionment of the aggravated part of damage.[58] In this case the Court chose the second consequence. But even considering this, one has to admit that the different items of the applicant's loss might have been mistaken since the actual injury was the non-delivery of the original plot of land and *not* the lack of use of the substitute plot. Hence, if the applicant had to be compensated at all, it should have been for the replacement of and loss of the income from the original plots of land.

3. *Musiał v. Poland* [GC][59]

15/25 In *Musiał v. Poland* [GC] – in which the applicant initially refused a psychological examination to be released from detention – the Court considered that one year eight months and eight days is not compatible with the notion of speedy judicial review and no exceptional grounds (like

56 See no 15/13 above.

57 Such an approach was obviously rejected by the Court, but is accepted as a principle in Austria, Switzerland, and Turkey. In Austrian law, see *M Hinteregger*, Contributory Negligence under Austrian Law, in: Magnus/Martín-Casals (fn 47) no 13 ff; in Swiss law, see *Werro* (fn 21) no 827; in Turkish law, see *E Büyüksagis*, Die Haftung aus unerlaubter Handlung im Entwurf eines neuen türkischen Obligationenrechts, Haftung und Versicherung/Responsabilité et Assurances (HAVE/REAS) 2006, 338. For further explanations, particularly in English law, see *WVH Rogers*, Contributory Negligence under English Law, in: Magnus/Martín-Casals (fn 47) no 9.

58 See *Magnus/Martín-Casals* (fn 47) no 9.

59 ECtHR 25.3.1999, no. 24557/94. The applicant, Zbigniew Musiał, is a Polish national who had been found not criminally responsible during the criminal proceedings for his wife's manslaughter. As he was considered a threat to public order, he was detained in a psychiatric hospital. He filed several requests to be discharged, which were all refused. On 16 March 1993, the applicant's lawyer filed another request for his client to be discharged and insisted that Musiał should be examined, not by experts from the hospital where he was in detention, but by psychiatrists from the University of Cracow. These psychiatrists received Musiał's file in September 1993 and examined him from 31 January 1994 to 4 February 1994. Their report of 30 November 1994 stated that the reasons for which the claimant had been committed to a psychiatric institution were still evident and that, as a result, his condition required his further detention. On the basis of this medical opinion, the Katowice Regional Court decided on 9 January 1995 that the applicant could not be released from psychiatric detention. The applicant complained to the Court that the proceedings to review his psychiatric detention were unreasonably long and that his right to a speedy judicial decision about the lawfulness of his detention had been breached.

the initial refusal of the applicant) justify it. The Court added that national authorities could not be absolved from their obligations by the complexity of a medical case.[60] The applicant claimed a total of $ 1,500,000 for pecuniary and non-pecuniary loss, but his claim for pecuniary loss was severely reduced: the Court accepted he suffered non-pecuniary loss as a result of the length of the proceedings and thus awarded Polish zlotys 15,000 (approx $ 5,200) on an equitable basis, taking into account the circumstances of the case.

Compared to the original claim, one has to assume that a reduction was initially based on the fact that the applicant could not have suffered severe pecuniary loss since he was to stay in custody in any case – and his request for non-pecuniary loss appeared excessive on the very same ground. Furthermore, he contributed to his injuries by refusing the psychological examination.

Nevertheless, a possible reduction based on contributory negligence in this case seems problematic: at first glance, a reference to contributory conduct may be seen as a double standard in cases of victims who, according to the general rules, could not be liable due to their lack of tortious capacity.[61] However, the concept of tortious capacity must not be confused with the principles of contributory conduct: the commonly used term contributory 'negligence' is therefore misleading in this context since the conduct of the victim cannot properly be qualified as 'fault' or 'negligence' in a strictly technical sense.[62] Hence, in most countries,[63] rules provide that mentally incapacitated persons may be held liable when this is required by fairness[64] or at the discretion of the courts.[65] **15/26**

60 In addition, the Court considered the fact that the decision of 9 January 1995 was based on the examination which took place from 30 January to 4 February 1994, ie that it did not necessarily reflect the applicant's current condition and thus did not respect the principle of the protection of individuals against arbitrariness with regard to any measure depriving them of their liberty.

61 Such a rule is also consistent with the idea of an economic analysis of law that the reduction of damages on the grounds of contributory conduct involves an incentive for the victim to take care, a goal which cannot be reached if the victim lacks any understanding of what harming others means, see *Martín-Casals* (fn 46) no 11; *M Faure*, Economic Analysis of Contributory Negligence, in: Magnus/Martín-Casals (fn 47) no 68 ff; *HB Schäfer/A Schönenberger*, Strict Liability versus Negligence: an Economic Analysis, in: F Werro/VV Palmer (eds), The Boundaries of Strict Liability in European Tort Law (2004) 40.

62 Since no one is under a legal duty not to cause damage to his own sphere and last but not least because the incapacity of the victim belongs to his own sphere and is therefore not attributed to the tortfeasor. See *Martín-Casals* (fn 46) nos 5, 8.

63 Austria § 1310 Allgemeines Bürgerliches Gesetzbuch (ABGB); Germany § 829 Bürgerliches Gesetzbuch (BGB); Switzerland art 54 SwCo; Turkey art 65 TBK.

64 See *Magnus/Martín-Casals* (fn 47) no 81.

65 Eg in Belgium, see art 1386 Code civil (CC).

These rules are applied by analogy and the contributory negligence of mentally incapacitated persons is exceptionally taken into account. Hence, a reduction of damages on the basis of contributory conduct is also accepted with respect to persons who at first glance could not be held contributorily 'negligent' due to their lack of capacity.[66]

15/27 This line of argumentation is supported by the specific preconditions for liability under the Convention. As shown above and further detailed by Steininger/Wallner-Friedl,[67] instead of subjective fault, the mere violation of the Convention rights by the respondent State suffices in most cases for the establishment of liability. At first glance this line of argumentation may be ascribed to an assessment of the victim's situation since tortfeasor and victim may be seen as equal parties in the dispute. Hence, for questions of contributory conduct, wrongfulness on the side of the victim must be seen as decisive.[68] In principle, this wrongfulness is not tied to the tortious capacity of the tortfeasor or – in cases of contributory conduct – of the victim[69] and could accordingly be used as a reductive criterion in the assessment of damages. In particular when the victim has been convicted of serious criminal behaviour, his act of grave wrongfulness, ultimately leading to the infringement of his own human rights, could be considered in the assessment of damages.

15/28 These arguments, alongside the comparative observations, may seem dogmatically sound, but it should nevertheless be borne in mind that the guarantee of a fair and just trial is one of the absolute fundamental principles of justice and one of the founding ideas of the ECtHR, which it is therefore obliged to secure notwithstanding the applicant's own wrongful conduct. Hence, it is actionable to deprive someone who has been subjected to an unduly long review of his rights under art 6 (1) ECHR on the ground that he himself started the causal chain leading to the infringement of his human rights.[70]

Accordingly, a criminal offence could not amount to contributory conduct since the damage the applicant suffered due to the infringement of procedural rights under the Convention is not a loss that the relevant criminal statute was designed to prevent. On the contrary, the purpose of the Convention rights is not the sanctioning of a criminal offence, but the

66 See *Magnus/Martín-Casals* (fn 47) no 81.
67 See *Steininger/Wallner-Friedl* (fn 33) no 8/12 ff.
68 See *Bydlinski* (fn 25) no 2/196.
69 Eg acts of self-defence against mentally ill persons or children are justified.
70 *Dannemann* (fn 1) 244 ff.

protection of the afore-mentioned rights.[71] Hence, if any reduction resulting from the gravity of the applicant's wrongfulness had to be accepted at all, such a reduction must be absolutely exceptional.

D. Prohibition on Speculation

In *Chevrol v. France*[72] the Court found a violation of art 6 ECHR in its judgment since the Conseil d'Etat allegedly deemed itself to be bound to the negative opinion of a non-judicial organ (the Ministry of Foreign Affairs). The applicant sought an award of approximately € 3,000,000 for lost income for the time that elapsed during the legal actions. She also claimed € 100,000 in respect of the non-pecuniary damage resulting from the dispute and the destruction of her career. **15/29**

The Court referred in its decision to the fact that it was not allowed to speculate on what the outcome would have been if the Conseil d'Etat had not based its decision solely on the Ministry's opinion (non-speculation-formula), reduced the damages for pecuniary damage to nothing and awarded the severely reduced amount of € 17,000 for non-pecuniary damage.

This non-speculation-formula ultimately results in a situation where the applicant has to prove that if all procedural rights had been respected, the case would have been decided otherwise and the applicant would have suffered no loss. Obviously, such a proof is purely hypothetical and there- **15/30**

71 Such an approach would be similar to the one recently taken by the ECtHR in *Maslov v. Austria*. The Court stated that the residence prohibition had a basis in domestic law and that it 'pursued the legitimate aim' of preventing disorder and crime. Nevertheless, given the nature of the offences which were non-violent and a result of juvenile delinquency, given the plaintiff's good conduct following his release from prison the second time and given his lack of ties with his country of origin, the Court found that a ten-year residence prohibition appeared disproportionate to that 'legitimate aim'. The Court concluded that there had been a violation of art 8 ECHR. For a complete understanding of the process, see ECtHR 22.3.2007, no. 1638/03. See also the dissenting opinions of Judges Loucaides, Vajić and Steiner.

72 ECtHR 13.2.2003, no. 49636/99. The applicant, who had qualified as a doctor in Algeria, applied in France for membership of the local Medical Association in order to be approved for practising as a doctor in France. The authority in charge refused her application on the ground that, although she was a French national, her qualifications did not match the French medical qualification. The applicant subsequently filed 11 further applications, which were all rejected. The applicant appealed against those decisions, failed again and finally filed her complaint with the French Conseil d'Etat. In its judgment the latter Court refused the application again, basing its decision on a non-binding statement by the Ministry of Foreign Affairs. However, due to a change of French laws the applicant was finally admitted to practise as a doctor in 1999.

fore the applicant will not be able to provide such evidence in most cases. Thus, this rule must be clearly seen as a reductive approach in cases where the applicant's injury is a result of the infringement of the Convention and subsequent failure by the respondent State.[73]

15/31 One might add that the non-speculation approach is in itself contradictory: it suggests that the non-observance of human rights would have no implications for the outcome of the respective national proceedings.[74] But procedural rights specifically guarantee a fair and just trial and, of course, the opportunity for the claimants to put forward their positions and objections. Hence, the non-observance of human rights should lead to the opposite inference, namely a prima facie assumption that the outcome was affected, so that the respondent State is obliged to provide sufficient evidence that the infringement of human rights did not impact the outcome. On the basis of this evidence the Court may then decide whether the damage alleged by the applicant results from the infringement or not. Therefore, the ban on speculation could be replaced by a detailed analysis of causation[75] instead of a reduction on the basis of the non-speculation formula.[76]

III. Conclusions

15/32 This paper represents the authors' attempt to analyse the reduction of damages in the case law of the ECtHR: the authors first constructed some general paradigms and structures of possible reductions and sought subsequently to identify these within the case law of the Court. To proceed vice versa would have left the authors with a more delicate set of results –

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73 See *Bydlinski* (fn 25) no 2/109 ff, *M Kellner/IC Durant*, Causation (contained in this volume) no 7/65 ff.

74 See *Dannemann* (fn 1) 117.

75 For a similar approach, see *Büyüksagis* (fn 2) no 904.

76 One should, however, note that the Court used the causation test in a recent case, in which the relatives of the deceased claimed a loss of their son's earnings, and rejected the argument of the Turkish government according to which the method of calculation on which the applicants' claims were based was not compatible with the Court's practice and the amounts sought were highly speculative and imaginary. However, the Court did not grant damages to the applicants on the basis that there is no clear causal connection between the damage claimed by the applicants and the violation of the Convention. The Court stated that '... in the present case it is not established that the applicants were, in any way, dependent on Solomou's future earnings. Therefore, the Court does not find it appropriate in the circumstances of this case to make any award to the applicants under this head'. See ECtHR *Solomou and Others v. Turkey*, 24.6.2008, no. 36832/97, § 100.

or (given the sheer mass of cases) in danger of failing to indicate any means which possibly lead to a reduction of damages.

15/33 As demonstrated initially, European legal systems have developed techniques to keep liability within reasonable and sustainable limits. Compared to the case law of the ECtHR it becomes evident that the Court also endeavours to apply such a limitation of liability; in the analysis above the authors tried to match the potentially significant techniques and reasoning of the Court with those in the European legal systems. This comparison is however confronted with some challenges since the rationales given by the Court as to when damages should be awarded and how they are measured or accordingly reduced are extremely concise and it is therefore difficult to draw definite conclusions, at least to the extent initially hoped for.

15/34 The cases presented are only a starting point, the tip of the iceberg for further discussion and only first impressions can be drawn: the general desire to reduce damages was clearly observable within the Court's case law. The Court employs several techniques to this end although one has to admit that these techniques have not always been employed consistently. Hence, the authors made an effort to each provide a different perspective on the interpretation of the cases; nevertheless, the mechanisms used to achieve a reduction of damages could have been considered more precisely if the Court tackled in greater detail the way in which it calculated the damages to begin with and then clearly set out the reasons why it reduced them. More precise substantiation of the relevant rationales would not only be particularly helpful to the subjects to the Convention but also to secure the uniformity of the Court's case law.