



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

**CASE OF ASSANIDZE v. GEORGIA**

*(Application no. 71503/01)*

JUDGMENT

STRASBOURG

8 April 2004



**In the case of Assanidze v. Georgia,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,  
Mr C.L. ROZAKIS,  
Mr J.-P. COSTA,  
Mr G. RESS,  
Sir Nicolas BRATZA,  
Mr L. CAFLISCH,  
Mr L. LOUCAIDES,  
Mr I. CABRAL BARRETO,  
Mrs V. STRÁŽNICKÁ,  
Mr K. JUNGWIERT,  
Mr J. CASADEVALL,  
Mr B. ZUPANČIČ,  
Mrs W. THOMASSEN,  
Mrs S. BOTOUCHAROVA,  
Mr M. UGREKHELIDZE,  
Mr V. ZAGREBELSKY,  
Mrs A. MULARONI, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 19 November 2003 and 10 and 24 March 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case originated in an application (no. 71503/01) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Tengiz Assanidze (“the applicant”), on 2 July 2001.

2. The applicant, who was granted legal aid, was represented by Ms L. Mukhashavria, a lawyer from a Tbilisi-based association, “Article 42 of the Constitution”, and Mr Z. Khatiashvili, a lawyer and member of the Union of Independent Lawyers of Georgia. The Georgian Government (“the Government”) were represented by Mr L. Chelidze, the General Representative of Georgia at the Court, and Mr L. Hincker, of the Strasbourg Bar.

3. The applicant alleged, in particular, a violation of his right to liberty and security, arguing that the fact that he had remained in the custody of the

authorities of the Ajarian Autonomous Republic, despite having received a presidential pardon in 1999 for a first offence and been acquitted of a second by the Supreme Court of Georgia in 2001 following his conviction by the Ajarian courts, constituted a violation of his rights guaranteed by Article 5 §§ 1, 3 and 4, Article 6 § 1, Article 10 § 1 and Article 13 of the Convention, and Article 2 of Protocol No. 4.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 26 February 2002 it was communicated to the respondent Government (Rule 54 § 2 (b)). In their observations submitted to the Court on 18 April 2002, the Government confined themselves to the facts, making no legal submissions on the admissibility or merits of the application. On 30 May 2002 the applicant lodged his comments on the Government's observations.

5. On 12 November 2002 the application was declared partly admissible by a Chamber from the Second Section composed of Mr J.-P. Costa, President, Mr A.B. Baka, Mr Gaukur Jörundsson, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen, Mr M. Ugrekhelidze, judges, and Mrs S. Dollé, Section Registrar.

6. Attempts were made between December 2002 and February 2003 to reach a friendly settlement of the case (Article 38 § 1 (b) of the Convention and Rule 62). On 10 February 2003 the Government informed the Court that the central State authorities' negotiations with the local Ajarian authorities had been unsuccessful, so that they were unable to submit proposals for a friendly settlement to the Court.

7. On 18 March 2003 a differently composed Chamber (with Mr L. Loucaides replacing Mr Gaukur Jörundsson, who was unable to take any further part in the case), relinquished jurisdiction in favour of the Grand Chamber, none of the parties being opposed thereto (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined in accordance with Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. As the Government had not lodged any legal submissions on the merits when the case came before the Section Chamber, on 11 July 2003 the President of the Grand Chamber invited the parties to submit written comments on the merits of the complaints that had been declared admissible (Rule 59 § 1 and Rule 71 §§ 1 and 2). Both the applicant and the Government then filed observations on the merits of the application.

10. On 18 July 2002, 17 February and 15 September 2003 Mr Hincker, a member of the Strasbourg Bar, applied for leave for the Union of the Victims of the Crimes committed by Tamaz and Tengiz Assanidze and their Criminal Gang, for Mr V. Khakhutaishvili, Vice-President of the High Court of the Ajarian Autonomous Republic, and for the local Ajarian authorities represented by Mr Avtandil Abashidze, President of the High

Court of the Ajarian Autonomous Republic, to join the proceedings as third parties (Article 36 § 2 of the Convention).

11. On 9 October 2003 the Government asked the Court to grant the Ajarian authorities leave to join the proceedings as a third party.

12. On 30 October 2003, after consulting the judges of the Grand Chamber, the President refused the applications for leave to join the proceedings as third parties. As regards the request made on behalf of the authorities of the Ajarian Autonomous Republic, he pointed out that, in proceedings before the Court, authorities of the respondent State, including the regional authorities (even ones enjoying autonomous status), were, in principle, required to be represented by the central government and, consequently, could not be joined as third parties to the proceedings.

13. However, in the light of their request of 9 October 2003, the President reminded the Government that they were entitled to include representatives of the regional authorities in the delegation that would attend the hearing on 19 November 2003 with authority to appear before the Court.

14. On 8 November 2003 the Government informed the Court that their delegation would include the representatives of the Ajarian authorities.

15. On 17 November 2003 Mr Hincker, Mr Avtandil Abashidze and Mr V. Khakhutaishvili, with the support of Mr L. Chelidze, the General Representative of Georgia at the Court, applied to the Court for an adjournment of the hearing, as the local Ajarian authorities had not had sufficient time to prepare for it since the central government's decision to include them as members of their delegation. On 18 November 2003 the President dismissed that application.

16. A hearing on the merits therefore took place in the Human Rights Building, Strasbourg, on 19 November 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr L. CHELIDZE, General Representative of Georgia at the Court,

Mr A. ABASHIDZE, President of the High Court of  
the Ajarian Autonomous Republic,

Mr V. KHAKHUTAISHVILI, Vice-President of the High  
Court of the Ajarian Autonomous Republic,

Mr L. HINCKER,

Mr G. NUSS,

*Counsel,  
Adviser;*

(b) *for the applicant*

Ms L. MUKHASHAVRIA,

Mr Z. KHATIASHVILI,

Ms V. VANDOVA,

*Counsel,*

Ms M. GIOSHVILI,  
Mr D. ASSANIDZE, the applicant's son.

*Advisers,*

The Court heard addresses by Mrs Mukhashavria, Mr Chelidze and Mr Hincker and their replies to questions asked by some of the judges.

17. In the light of the events in Georgia in November 2003 that had led in particular to the resignation of the Georgian President, Mr Edward Shevardnadze, the President of the Grand Chamber asked the parties on 28 November 2003 to advise him of any effect which those changes might have on the observations that had already been submitted to the Court.

18. On 15 December 2003 the parties submitted their observations after being granted an extension of time.

19. On 15 January 2004 the Government submitted their comments on the applicant's claim for just satisfaction, in accordance with Rule 60 § 3.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

20. The applicant was born in Georgia in 1944. He is currently in custody in Batumi, the capital of the Ajarian Autonomous Republic in Georgia.

#### **A. The applicant's first conviction and the presidential pardon**

21. The applicant was formerly the mayor of Batumi, the capital of the Ajarian Autonomous Republic, and a member of the Ajarian Supreme Council. He was arrested on 4 October 1993 on suspicion of illegal financial dealings in the Batumi Tobacco Manufacturing Company, a private company, and the unlawful possession and handling of firearms. He was convicted on 28 November 1994 and given an immediate custodial sentence of eight years; orders were made for the confiscation of his assets and requiring him to make good the pecuniary losses sustained by the company. On 27 April 1995 the Supreme Court of Georgia, in a judgment on an appeal on points of law, upheld the applicant's conviction of 28 November 1994 for illegal financial dealings but quashed his other convictions. Instead of being transferred to prison to serve his sentence, the applicant remained in custody in the short-term remand prison of the Ministry of Security of the Ajarian Autonomous Republic.

22. By Decree no. 1200 of 1 October 1999, the Georgian President granted the applicant a pardon suspending the remaining two years of his sentence.

The relevant provisions of the decree read as follows:

“... that [the following] shall be granted a pardon:

1. Tengiz David Assanidze, born in 1944, who was tried for offences under Articles 238 § 2, 96.1 and 45 of the Criminal Code and sentenced on 28 November 1994 to eight years' imprisonment by the High Court of the Ajarian Autonomous Republic; the remaining two years of his prison sentence shall be suspended and replaced by release on licence for the same period ...

2. N.V.G., born in 1983 ...

3. M.A.M., born in 1953 ...”

23. Despite the presidential pardon, the applicant remained in custody in the short-term remand prison of the Ajarian Ministry of Security.

24. The Batumi Tobacco Manufacturing Company immediately challenged Presidential Decree no. 1200 of 1 October 1999 in the High Court of the Ajarian Autonomous Republic (“the Ajarian High Court”) on the ground that it had been granted unlawfully. Execution of the pardon was therefore stayed in accordance with Article 29 of the Code of Administrative Procedure.

25. On 11 November 1999 the Ajarian High Court declared the pardon null and void on the ground that the statutory procedure that should have been followed before the President of Georgia could exercise his right of pardon had not been complied with.

26. That judgment was quashed on 28 December 1999 by the Supreme Court of Georgia, which, in accordance with Article 360 of the Civil Code which was then in force, remitted the case to the Administrative and Tax Affairs Panel of the Tbilisi Court of Appeal.

In its submissions to that court, the Batumi Tobacco Manufacturing Company again contended that the pardon contravened the Presidential Decree of 13 May 1998 establishing the rules governing the exercise by the President of Georgia of his right of pardon, added to which the applicant had yet to make good the pecuniary damage the company had suffered.

27. In the meantime, the applicant was charged with further criminal offences on 11 December 1999 (see paragraphs 33 et seq. below).

28. In a decision of 24 March 2000, the Tbilisi Court of Appeal dismissed the Batumi Tobacco Manufacturing Company's complaints as unfounded. It ruled that the procedural defects pleaded (the failure to obtain the opinion of the Pardons Board and the applicant's lack of remorse) did not render the President's order unlawful, as the right of pardon was an absolute constitutional right vested in the President of Georgia. It said that, since the pardon granted to the applicant did not extend to the ancillary

award of compensation for pecuniary damage, the company could bring further legal proceedings to enforce that award; as to the remaining points, the company had no grounds for contesting the appropriateness of the pardon or the legality of the President's order. The Court of Appeal also noted that the company was not entitled in law to call for the reopening of the criminal proceedings against the applicant. It stated that it considered the applicant's detention to be in violation of Article 5 § 1 of the European Convention on Human Rights.

29. On 11 July 2000 the Supreme Court of Georgia dismissed an appeal on points of law by the Batumi Tobacco Manufacturing Company as unfounded. It noted that the impugned decision to pardon the applicant had left intact both the applicant's main sentence and the obligation to make good the pecuniary damage caused to the company. This was because the remaining two years of the sentence had been unconditionally suspended, the sentence being commuted to one of release on licence for the same period. The Supreme Court of Georgia said that the sole effect of the presidential pardon had accordingly been to secure the applicant's immediate release, while leaving intact the main and ancillary sentences. As to the President of Georgia's failure to follow the Rules on the Exercise of the Right of Pardon, the Supreme Court found that the decree of 13 May 1998 contained the working rules and regulations of the Office of the President of the Republic and that failure to observe them could under no circumstances prevent the Georgian President exercising his constitutional right of pardon.

30. Even after 11 July 2000 the local authorities in the Ajarian Autonomous Republic continued to hold the applicant in the short-term remand prison of the Ajarian Ministry of Security in Batumi.

31. The question of the legality of the applicant's pardon was referred by the Bureau of the Parliament on 24 June 2002 to the investigation committee of the Georgian Parliament responsible for supervising the lawfulness of civil servants' activities, which delivered its report on 26 September 2002 (see paragraphs 72 et seq. below).

32. On 4 October 2002 the President of Georgia issued a decree amending the presidential decree of 13 May 1998 establishing the Rules on the Exercise of the Right of Pardon. A new Article 10.1 of the decree vested the President of Georgia with the power to pardon convicted persons, as defined by Article 73 § 1, sub-paragraph 14, of the Constitution, without complying with the additional requirements set out in the decree beforehand.

## **B. The applicant's second conviction and subsequent acquittal**

33. On 12 November 1999 Mr David Assanidze, a close relative of the applicant who had been sentenced to twenty years' imprisonment by the



Supreme Court of Georgia on 20 September 1996, gave an interview on a television channel broadcasting in the Ajarian Autonomous Republic in which he affirmed that the applicant had been one of his accomplices.

34. Following that interview the applicant, who had remained in custody after being pardoned by the President on 1 October 1999, was charged on 11 December 1999 with being a member of a criminal association in 1993 and with the attempted kidnapping of V.G., the head of the regional department of the Ministry of the Interior for Khelvachauri (Ajarian Autonomous Republic).

35. On 28 December 1999 the Batumi Court of First Instance remanded the applicant in custody pending the investigation of the new charges. According to the applicant, the pre-trial investigation into the case ended on 29 December 1999 and a five-volume case file was compiled.

36. In a decision of 2 March 2000, the Georgian General Prosecutor's Office decided to take no further action, finding that the applicant's prosecution was not based on an arguable case and that all the circumstances and evidence relating to V.G.'s murder had been examined by the Supreme Court of Georgia in its unfettered discretion at Mr David Assanidze's criminal trial in 1996. The General Prosecutor's Office took the view that, since the exhaustive examination of the file relating to V.G.'s kidnapping and murder had not thrown up any evidence whatsoever that the applicant had been a member of the criminal association led by Mr David Assanidze, there were no grounds for charging him in connection with the same case six years after the event.

37. On 20 March 2000 that decision was set aside by the Batumi Court of First Instance on an appeal by the civil party. Consequently, on 28 April 2000 the Prosecutor's Office of the Ajarian Autonomous Republic ordered the criminal proceedings against the applicant to be reopened. It brought the pre-trial investigation to an end by an order dated 29 April 2000.

38. The applicant was committed to stand trial in the Ajarian High Court, where he denied all guilt. He maintained that this second prosecution was the result of a conspiracy to frame him. He denied ever having had any links with Mr David Assanidze or his associates, who prior to their arrest had been living as outlaws in the Ajarian forests. The applicant also said that he had at no stage hired them to kidnap V.G., who had been killed by Mr David Assanidze's gang, and, contrary to what had been affirmed by the three prosecution witnesses, kidnapping a State official would not have helped the applicant to consolidate his power as mayor of Batumi. He asked the judges to find him innocent.

39. The Ajarian High Court found that, even though the applicant had denied helping to organise the kidnapping that had resulted in the victim's murder, his guilt was established by the depositions of three prosecution witnesses: Mr David Assanidze, the leader of the criminal gang, and two gang members, Mr Mamuka Mosiava and Mr Tamaz Jincharadze. On

20 September 1996 all three had been convicted with Mr Tamaz Assanidze, the applicant's brother, of, *inter alia*, V.G.'s murder.

40. At the applicant's trial, a confrontation was arranged between Mr David Assanidze and the applicant, at which the former affirmed that the applicant had supplied him with funds and two machine guns to carry out the kidnapping.

41. Mr Mamuka Mosiava said that he did not know the applicant and had never met him. He explained that he had merely caught a glimpse of the applicant when accompanying Mr David Assanidze to a meeting with him and had heard him instruct Mr David Assanidze to kidnap V.G.

42. It appears from the judgment that Mr Tamaz Jincharadze, the third witness, was unable to appear in court owing to illness and was heard by the judges in the office of the governor of the short-term remand prison of the Ajarian Ministry of Security. He stated that he did not know the applicant and had only seen him on television. It was through Mr David Assanidze that he had learnt that the applicant's brother, Mr Tamaz Assanidze, had instructed their group to kill V.G. Mr David Assanidze did not want to be involved in murder and had been to see the applicant, whom he was convinced was behind the plot. It was at that meeting that the applicant had told Mr David Assanidze that there was no need to eliminate V.G., only to kidnap him. On 2 October 1993 the three members of the group had waylaid the victim in a street in Batumi and, on attempting to abduct him in accordance with the applicant's instructions, had killed him by accident.

43. The Ajarian High Court said that it was not just the three witnesses' depositions which confirmed the applicant's guilt, but also the fact that they had been convicted by the Supreme Court of Georgia on 20 September 1996. Without elaborating further on that point, the Ajarian High Court said in conclusion that, even if there was a close relation between the applicant's case and that of Mr David Assanidze and his co-defendants, it constituted an independent criminal act involving participation in the activities of the criminal gang led by Mr David Assanidze and the organisation of V.G.'s kidnapping. In its view, the applicant was directly accountable under the criminal law for his part in those events.

44. Consequently, on 2 October 2000 the applicant was convicted and sentenced to twelve years' imprisonment to be served in a strict-regime prison.

45. The Ajarian High Court noted that since his arrest on 4 October 1993 the applicant had remained in custody at all times and had not been released after being granted a presidential pardon on 1 October 1999. Accordingly, he was deemed to have begun his sentence on 4 October 1993.

46. The applicant appealed on points of law to the Supreme Court of Georgia. The central authorities made various attempts to secure his transfer from Batumi to Tbilisi for the day of the hearing. The Georgian Minister of Justice requested the Ajarian authorities through the intermediary of the

Georgian Minister of State Security and the Public Defender (Ombudsperson) to arrange for the applicant's transfer to the capital, but in vain.

47. On 29 January 2001 the Criminal Affairs Chamber of the Supreme Court of Georgia heard the appeal in the applicant's absence; it quashed the judgment of 2 October 2000 and acquitted the applicant.

48. It said, *inter alia*:

“The preliminary investigation and judicial investigation in the present case were conducted in flagrant breach of the statutory rules. The criminal file does not contain incontrovertible evidence capable of supporting a guilty verdict; the judgment is, moreover, self-contradictory and based on inconsistent conjecture and depositions from persons interested in the outcome of the proceedings that were obtained in breach of the procedural rules.

The convicted person, Tengiz Assanidze, did not admit the offences of which he was accused either during the preliminary investigation or at trial. He said that he had been charged as a result of a conspiracy against him by persons with an interest in his obtaining an unfavourable outcome to the proceedings.

The Supreme Court notes that there is no evidence in the file to refute his arguments. It has been established that Mr David Assanidze and Mr Tamaz Assanidze [the applicant's brother] were convicted on 20 September 1996 and that Mr David Assanidze, who repeatedly said that his accomplice was Mr Tamaz Assanidze, had at no stage implicated Mr Tengiz Assanidze at the material time. It was only on 12 November 1999 – six years and one month after the events – that, in an interview given to Ajarian television, Mr David Assanidze accused Mr Tengiz Assanidze of having been his accomplice. In that interview, Mr David Assanidze also expressed indignation and outrage at Mr Tengiz Assanidze's receipt of a presidential pardon and sought to denounce the authorities' attempts to portray him as an 'innocent lamb'.”

49. The Supreme Court found that the investigating bodies and the court that tried the case at first instance had not sought to establish why Mr David Assanidze had waited for so long before implicating the applicant and had not done so at his own trial. Instead, they had merely affirmed: “Relations between Mr David Assanidze and Mr Tengiz Assanidze were healthy and it is inconceivable that Mr David Assanidze's belated allegations were made out of self-interest.” In the Supreme Court's view, however, the evidence in the case file suggested the contrary and “preclude[d] finding that Mr David Assanidze [had] no interest in making his allegations against the applicant or that they [were] founded and true”. It noted that the applicant had said that relations between him and Mr David Assanidze had become strained as a result of a dispute over the sharing of a family tomb where their fathers were buried. Mr David Assanidze had not denied the existence of that dispute at a hearing on 20 September 1999. The Supreme Court accordingly found that Mr David Assanidze's assertion that there was no ill-feeling between them in private did not reflect the truth.

50. It held that the applicant could not be found guilty on the sole basis of affirmations made by Mr David Assanidze six years after the events in issue.

51. The Supreme Court went on to note that, in addition to Mr David Assanidze, Mr Mosiava and Mr Jincharadze had also belatedly accused the applicant of participating in the activities of the criminal gang led by Mr David Assanidze. They too had only implicated the applicant several years after their trials. However, both men had said that they did not know the applicant and had only learnt of his involvement in the kidnapping through Mr David Assanidze himself. The Supreme Court ruled that in such circumstances Mr Mosiava's and Mr Jincharadze's statements could not constitute true and incontrovertible evidence.

52. It was also noted that their assertions that the applicant had provided the gang with money and two machine guns to kidnap V.G. were not corroborated.

53. After examining other evidence relied on by the court of first instance in the applicant's case and comparing it with Mr David Assanidze's depositions at his trial in 1996, the Supreme Court found:

“Both [the applicant's] indictment and conviction rely solely on the depositions of persons who have a direct interest in the outcome of the proceedings against him and there is no other evidence of his guilt in the case file. The Court must therefore find that Mr Tengiz Assanidze has not committed an offence under the criminal law.”

54. In addition, the Supreme Court found serious procedural defects in the criminal proceedings against the applicant. Among other matters, it noted that on 6 March 2000 the investigating officer in charge of the case had rejected a request by the applicant for a confrontation with Mr David Assanidze regarding the kidnapping charge on the ground that it was unconnected with Mr David Assanidze's case and intended only to delay the proceedings unnecessarily. In the Supreme Court's view, the investigating bodies had failed to carry out a thorough investigation into the allegation that the applicant was implicated in the case.

55. The Supreme Court noted: “According to the impugned judgment, despite its connection with the case of Mr David Assanidze and his co-defendants, the present case concerned an independent criminal act. However, it is stated elsewhere in the same judgment that, in addition to other evidence against him, Mr Tengiz Assanidze's guilt was confirmed by the convictions of Mr David Assanidze and his co-defendants, which have become final.” The Supreme Court added that, in making that affirmation, the trial court “[had] not provide[d] any explanation as to how Mr David Assanidze's and his co-defendants' convictions confirmed Mr Tengiz Assanidze's guilt, since they [had been] convicted of the murder of an official, whereas Mr Tengiz Assanidze was accused of having organised his kidnapping”. Thus, in the Supreme Court's view, the trial court had not in

fact decided whether the applicant's case should be treated as part of Mr David Assanidze's case or as an independent criminal act.

The Supreme Court therefore found the applicant's conviction unlawful on other grounds, pertaining to the classification in law of the acts concerned.

56. Consequently, it held:

“Mr Tengiz Assanidze's conviction on 2 October 2000 by the High Court of the Ajarian Autonomous Republic is quashed and the criminal proceedings against him discontinued, as his acts do not disclose any evidence of an offence.

Mr Tengiz Assanidze shall be immediately released.

This judgment is final and no appeal shall lie against it.

Mr Assanidze shall be informed that he has the right to bring proceedings for compensation for the damage caused by the illegal and unjustified acts of the bodies involved in his criminal case.”

57. On 29 January 2001 the President of the Chamber of the Supreme Court forwarded the short version of the judgment acquitting the applicant to the Minister of Justice, the director of the department responsible for the execution of sentences at the Ministry of Justice and the governor of the short-term remand prison of the Ajarian Ministry of Security for execution. He informed them that they would receive the reasoned version of the judgment subsequently.

58. On 5 February 2001 the President of the Chamber sent them the reasoned version of the judgment acquitting the applicant for execution.

59. That judgment was never executed and the applicant remains in custody in the short-term remand prison of the Ajarian Ministry of Security.

60. The applicant's unlawful detention was denounced on a number of occasions by the General Prosecutor's Office of Georgia, the Public Defender, the Georgian Ministry of Justice and the Legal Affairs Committee of the Georgian Parliament. They contacted the local authorities concerned in the Ajarian Autonomous Republic, seeking his immediate release.

61. In letters of 20 April and 22 May 2001, the General Public Prosecutor's Office of Georgia informed the applicant's wife as follows:

“... [I]n response to your letter, I wish to inform you that the General Public Prosecutor's Office of Georgia is making every effort to secure compliance with the judgment of the Supreme Court of Georgia dated 29 January 2001 and to bring Mr Tengiz Assanidze's unlawful detention to an end.”

62. In a letter of 20 April 2001, the Vice-President of the Supreme Court of Georgia informed the applicant's wife that the operative provisions of the judgment of 29 January 2001 acquitting her husband had been sent by facsimile transmission that day for execution to the Georgian Minister of Justice, the director of the department responsible for the execution of sentences at the Ministry of Justice, the governor of the short-term remand

prison of the Ajarian Ministry of Security and the governor of the long-term remand prison of the Ajarian Ministry of Security. He added that the reasoned judgment had been sent to them under cover of a letter of 5 February 2001. The Vice-President also said in his letter that on 9 February 2001 the Supreme Court of Georgia had received an acknowledgment of receipt slip signed by the governor of the short-term remand prison of the Ajarian Ministry of Security.

63. On 18 May 2001 the Public Defender wrote directly to Mr Aslan Abashidze, the Head of the Ajarian Autonomous Republic:

“... Your authorities have not yet responded to my recommendation of 31 January 2001, even though Mr Tengiz Assanidze remains in the Ajarian Ministry of Security prison in flagrant breach of the law. ... Under the Public Defender Act, it is both an administrative and a criminal offence not to comply with the Public Defender's recommendations if the Public Defender is thereby obstructed in the course of his or her duties. ... I would therefore ask you to comply with my lawful demands as Public Defender and to hold both the governor of the short-term remand prison of the Ajarian Ministry of Security and the Minister himself accountable.”

64. On 10 May 2001 the President of the Legal Affairs Committee of the Georgian Parliament wrote to the General Public Prosecutor's Office of Georgia in the following terms:

“... In a decision of 29 January 2001, the Supreme Court of Georgia acquitted Mr Tengiz Assanidze. However, he continues to serve his sentence in a cell at the short-term remand prison of the Ministry of Security of the Ajarian Autonomous Republic. ... This constitutes a serious violation of ... Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms. ... I would therefore ask you to take the necessary measures to prosecute those responsible for failing to comply with the aforementioned judicial decision.”

65. In a letter of 7 June 2001, the director of the department responsible for the execution of sentences at the Georgian Ministry of Justice advised the applicant's wife that her husband was fully entitled to lodge an application against the Georgian State with the European Court of Human Rights. He stated in his letter: “We consider that the authorities of the Ajarian Autonomous Republic are acting in flagrant breach of the law and of human rights.”

66. The central authority's efforts to secure the applicant's release were unsuccessful.

67. According to the Government, on 3 September 2001 the Georgian courts martial prosecuting authority ordered certain officials from the Ajarian Ministry of Security suspected of failing to execute the judgment of 29 January 2001 acquitting the applicant to be charged with offences, in accordance with the Criminal Code. The police are trying to trace those concerned.

68. In a letter of 8 January 2002, the applicant's son informed the Court that his father's health had deteriorated. According to a medical certificate dated 4 December 2001, the applicant was suffering from gastritis, cardiac

insufficiency and gastro-oesophageal reflux. As this was causing him severe dietary problems, he required appropriate medical attention as a matter of urgency.

69. On 28 May 2003 the Government produced to the Court a letter of 4 March 2003 from Mr E. Shevardnadze to Mr Aslan Abashidze, Head of the Ajarian Autonomous Republic, in which he stated:

“You are a man with the State's interests at heart and I believe that I can count on your understanding in this situation. ... As you are aware, the Court [in Strasbourg] is very shortly due to decide whether to hold a hearing on the merits in the *Assanidze* case. The family is seeking three million euros in compensation. It is almost self-evident that Georgia will lose this case and that our State will be heavily condemned. There is a solution to this problem. Were Mr Assanidze to be released, his family would agree to withdraw the application.

I am sure that you will play a part in taking the only decision that is just, that which is in Georgia's interests.”

70. On 3 April 2003 the President of the Ajarian High Court sent a reply to the Georgian President. He began by accusing the Head of State of harbouring persons of Ajarian extraction who had fled Batumi to take refuge in Tbilisi after attempting to organise terrorist attacks on the Head of the Ajarian Autonomous Republic. He then drew the President's attention to the parliamentary committee's report (see paragraphs 72 et seq. below), which highlighted numerous irregularities in the proceedings that had led to the applicant's pardon and acquittal. Relying on the parliamentary committee's findings and Article 2 of Protocol No. 7 to the European Convention on Human Rights, the President of the Ajarian High Court suggested to the President of Georgia that the applicant's trial should be reopened so that his case could be reconsidered in the light of the matters set out in the report.

71. He also said in his letter that the applicant's application to the European Court of Human Rights constituted an abuse of his right of application within the meaning of Article 35 § 3 of the Convention and that he had been aided in that task by the General Public Prosecutor's Office of Georgia, the Public Defender, the Supreme Court of Georgia and the National Security Council. He added that, as the parliamentary committee was a national authority within the meaning of Article 13 of the Convention, the applicant could not be regarded as having exhausted domestic remedies before 26 September 2002, the date of the committee's report. Drawing the Georgian President's attention to this point, he said that the Georgian Ministry of Justice had misled the European Court of Human Rights in its observations.

**C. The parliamentary committee's report of 26 September 2002 and the President of the Supreme Court of Georgia's observations in reply**

*1. The parliamentary committee's report*

72. In a letter of 30 July 2002, the Government informed the Court that on 24 June 2002 the investigation committee of the Georgian Parliament responsible for supervising the lawfulness of civil servants' activities had been requested by the Bureau of the Parliament to launch an inquiry into the circumstances in which a presidential pardon had been granted in the Assanidze case. The committee, which was composed of members of parliament assisted by university lecturers and practising lawyers, produced its report on 26 September 2002.

73. Although its terms of reference were confined to issues relating to the presidential pardon, the committee also decided to examine the circumstances in which the applicant had been prosecuted and acquitted in the second set of proceedings. In the introduction to its report, the committee explained its reasons for so extending its terms of reference. In particular, it stated: "[T]he presidential pardon did not constitute an isolated act or separate procedure; in the present case, there was a close relation between all the proceedings and, in order to provide an overall view of the issues, it was considered appropriate to examine the chronology of the various sets of criminal proceedings brought against the applicant, the conduct of those proceedings and the merits of the decisions that were taken." There were thus two separate parts to the report: one on the legality of the presidential pardon and the other on the decisions of the domestic courts in the criminal proceedings against the applicant.

**(a) The presidential pardon**

*(i) Legality of the presidential pardon*

74. On 12 October 1998 the National Security Council examined the question of measures that needed implementing in the prison system. On a proposal by the Georgian President, it was decided that he would exercise his right of pardon. The prison authorities were asked to study the cases of convicted prisoners in their custody and to submit to the President any requests for a pardon, together with the files and assessments of the prisoners concerned. Requests for a pardon had to be made in these terms:

"Dear President, I repent of the crime I have committed and ask you to remit the remainder of my sentence."

Requests made in the prescribed terms were examined and the President exercised his right of pardon in a number of cases.



75. The parliamentary committee established that on 15 January 1999 the applicant had sent a letter to the Georgian President asking for the remainder of his sentence to be remitted. Since he had not made his request in the terms referred to above, the committee considered that his pardon did not satisfy the regulatory requirements in force and was therefore invalid. It also noted a number of other failings: “the [applicant's] file” had not been submitted to the Pardons Board appointed by the Georgian President, the applicant's name was not on the combined list of convicted persons seeking a pardon that was submitted to the President by the Ajarian authorities concerned and no appraisal of the applicant had been furnished by the Ajarian prison authorities in support of his request.

76. The committee established that, in breach of the rules in force, the Vice-President of the National Security Council, one of the Georgian President's aides, had prepared and submitted to the President a recommendation for the applicant to be pardoned solely on the strength of the applicant's letter of 15 January 1999. The committee said that that request should have been referred to a court under the rules of criminal procedure and not to the President of Georgia as a request for a pardon.

77. According to the committee, even assuming that the Georgian President had been entitled to grant the applicant a pardon without first complying with the statutory rule requiring requests for pardons to be examined by the competent board in the first instance, the decision had been taken shortly before the general election of October 1999 and was manifestly influenced by political considerations.

*(ii) Judicial review of the presidential pardon*

78. The committee considered that the reasons given by the Tbilisi Court of Appeal and the Supreme Court of Georgia in their judgments of 24 March and 11 July 2000 respectively did not comply with Articles 60 and 61 of the Administrative Code, which provide an exhaustive list of the grounds on which administrative acts may be declared null and void. Indeed, their effect was to render Article 42 of the Constitution, which guaranteed everyone the right to apply to a court to protect his or her rights, meaningless.

79. It noted that under domestic law a presidential pardon was an administrative act for which judicial review lay in the administrative courts. As the applicant's presidential pardon had been challenged in the courts, it had not become enforceable until 11 July 2000, the date of the Supreme Court's decision.

80. The committee criticised the reason advanced by the Tbilisi Court of Appeal on 24 March 2000 for dismissing the Batumi Tobacco Manufacturing Company's application for judicial review. In particular, it considered that the Tbilisi Court of Appeal had ruled on matters beyond the scope of the application, as the company had not sought an order reopening

the criminal proceedings against the applicant. The Court of Appeal should not, therefore, have ruled on the lawfulness of the applicant's continued detention. Since those two issues were within the jurisdiction of the criminal courts, not the administrative courts, the committee considered that the Tbilisi Court of Appeal should have restricted its review to the legality of the contested presidential act.

81. The committee further noted that the presidential pardon concerned only the prison sentence and not the applicant's duty to pay the Batumi Tobacco Manufacturing Company compensation for the pecuniary damage caused. The Tbilisi Court of Appeal should, therefore, also have examined the effects of the presidential pardon on that ancillary punishment.

**(b) The applicant's acquittal**

82. According to the committee, the second set of proceedings in which the applicant was acquitted was, like the first, tainted by various procedural defects at both the investigation and trial stages. In addition, the trial courts had failed to resolve contradictions in the various statements taken in the course of the investigation or to perform a thorough examination of the special circumstances of the case. In the committee's view, those circumstances should have been "treated as evidence by the courts and examined with a view to establishing the truth".

83. In order to illustrate this point, the committee conducted a detailed examination of various items of evidence and statements obtained in the criminal proceedings against Mr David Assanidze, Mr Tamaz Assanidze, Mr Nodar Shotadze and fourteen co-defendants, who had been convicted, *inter alia*, of the murder of the Ministry of the Interior official concerned (see paragraphs 33 et seq. above).

84. The committee thus established that at the trial in the Supreme Court of Georgia in 1996 Mr David Assanidze and Mr Shotadze had "sought to identify" the applicant as one of the organisers of the attack on Mr Aslan Abashidze, the Head of the Ajarian Autonomous Republic. In its view, instead of "ignoring Mr David Assanidze's and Mr Nodar Shotadze's attempts to implicate the applicant in serious offences", the judges of the Supreme Court of Georgia who heard the applicant's appeal on points of law should have brought "new criminal proceedings against [the applicant] in accordance with Article 257 of the Code of Criminal Procedure in force at the material time", that is to say, in 1993.

85. The committee considered that, in order to clarify certain details vital to the truth, the Supreme Court of Georgia should have heard evidence not only from the witnesses who were called, but also from Mr David Assanidze, who should have been questioned about his informal meeting with the judge who heard his case in 1996, and the judge himself. It should have sought to establish by whom and in what circumstances that meeting – at which Mr David Assanidze had accused the applicant off the record of

taking part in his group's activities – had been recorded, and why the judge concerned had not mentioned it in his judgment of 20 September 1996.

86. The committee criticised the Supreme Court for not hearing evidence from two other people who had also been implicated by Mr David Assanidze, and the applicant's son. It considered that the Supreme Court judges who heard the applicant's case should have ordered expert evidence to be obtained to establish when, by whom and how the weapons, the military munitions and technical equipment seized in Mr David Assanidze's case in 1996 had been purchased. Nor had they sought to ascertain why the prosecutor in the applicant's case had declined to make an order joining his case with Mr David Assanidze's.

87. The committee found, lastly, that the Supreme Court of Georgia had “failed to remit the applicant's case to the investigating bodies for further investigation” and should not have taken “a decision to acquit that was illegal, unfair and based on insufficiently investigated facts”.

88. In the committee's view, “the new circumstances revealed in its examination of the case for the purposes of the parliamentary report warranted investigation and analysis”. That proved that “the statutory remedies designed to elicit the truth [had] not yet been exhausted”. Referring to Articles 593 § 2 (g) and 539 of the Code of Criminal Procedure, it suggested that the applicant's trial should be reopened.

89. On 25 March 2003 the General Prosecutor's Office of Georgia refused a request by the civil party for the applicant's case to be reopened and re-examined in the light of the parliamentary committee's findings. It found, *inter alia*, that the findings did not constitute new circumstances that could warrant a reopening of the applicant's case. In the absence of new circumstances, a judgment of the Supreme Court, which was final and could not be appealed against, could not be challenged under Georgian law.

## *2. The observations of the President of the Supreme Court of Georgia*

90. On 8 November 2002 the President of the Supreme Court of Georgia submitted to the Georgian President his observations on the findings in the parliamentary committee's report of 26 September 2002.

91. He described the report as “tendentious”, “biased”, “unconstitutional” and “erroneous”. He noted, firstly, that the parliamentary committee had acted far outside the scope of its terms of reference and, instead of examining the circumstances in which the applicant had received a presidential pardon, had decided to review a judgment of the highest court of the land. In so doing, the committee had, in his view, contravened the fundamental constitutional rule requiring the separation of powers. The report undermined the notions of democracy and the rule of law. The President of the Supreme Court said that under the Constitution no one had the right to demand an explanation from a judge about a case. Criticism by a parliamentary committee of a final judicial decision against which no appeal

lay served only to hinder execution of the decision and to discredit the judiciary.

**(a) The presidential pardon**

92. As regards the committee's findings on the subject of the presidential pardon, the President of the Supreme Court of Georgia noted, firstly, that the right conferred by the Constitution on the Georgian President to grant a pardon was absolute and unconditional and could be exercised independently of the regulations laying down the principles on which requests for a pardon were to be examined by the Presidential Office. He further noted that in many countries there was no right of appeal against a pardon, which constituted the ultimate act of humanity. The fact that the applicant's request for a pardon had not been examined beforehand by the Presidential Pardons Board could not render the pardon illegal, especially as, in the applicant's case, obtaining his file and details from the Ajarian prison authorities had been no easy task. The President of the Supreme Court of Georgia also pointed out that, in the instant case, the grant of a pardon also represented an attempt at restoring justice to a convicted prisoner who had been held for years in an unlawful place of detention.

93. He added that the section of the report on the Ajarian High Court's judgment of 11 November 1999 declaring the presidential pardon null and void for procedural defects was entirely erroneous. He pointed out that on 11 November 1999 the New Code of Administrative Procedure had yet to come into force and that, in accordance with Article 360 of the Code of Civil Procedure – the statutory provision applicable to contested administrative cases at the time – the Tbilisi Court of Appeal had exclusive territorial jurisdiction to hear applications for judicial review of presidential acts. The President of the Supreme Court of Georgia said that it was regrettable that the committee had omitted to mention that the Ajarian High Court had on 11 November 1999, in breach of the law then in force, assumed jurisdiction to hear an application for judicial review of a pardon granted by the President of Georgia.

**(b) The applicant's acquittal**

94. In his observations, the President of the Supreme Court of Georgia noted that, in describing the judgment acquitting the applicant as biased, incomplete and illegal, the parliamentary committee had at no point mentioned the question of the applicant's interests or his unlawful detention. The President of the Supreme Court considered that the committee was thereby seeking to justify the applicant's continued detention despite his acquittal.

95. The committee had chosen to review the judgment acquitting the applicant on its own initiative, but had not put forward a single plausible argument that pointed to the applicant's guilt. Nor had it shown that the

Supreme Court could have returned a guilty verdict on the evidence before it. On the contrary, the committee saw no difficulty in an acquitted defendant being held in custody until such time as the issue of his guilt or innocence had been re-examined in the light of new circumstances. That, said the President of the Supreme Court in conclusion, was “totally unlawful”.

96. The President of the Supreme Court considered it unfortunate that the committee had failed to mention that the applicant had been held since his conviction in the Ajarian Ministry of Security prison, in breach of the law. He noted that Mr David Assanidze, whose televised remarks ought, in the committee's eyes, to have prompted the Supreme Court of Georgia to convict the applicant, was serving his twenty-year prison sentence in the same prison.

97. The passage in the report in which the committee found that the applicant would not have exhausted the statutory remedies until such time as his trial was reopened in the light of the new circumstances revealed by the parliamentary committee was described by the President of the Supreme Court as a “masterpiece of legal invention”. He recommended that the report be translated into various foreign languages so that international human rights organisations would also have access to it.

98. The President of the Supreme Court regretted that the parliamentary committee had yielded to political pressure from certain groups, instead of helping justice to prevail, in accordance with the wish expressed at the end of its report.

99. In conclusion, the President of the Supreme Court of Georgia said that he would leave the issue of the applicant's continued detention following his acquittal to the discretion of the Court in Strasbourg.

## II. RELEVANT INTERNATIONAL AGREEMENTS AND DOMESTIC LAW

### **A. Evolution of the status of Ajaria (“Batumi district”) and the Georgian Constitution of 1921**

100. In the 1080s Ajaria, part of the Bagratid Kingdom known as the “Kingdom of the Georgians”, was laid to waste by Seljuk invaders from the South. In the 1570s it was invaded by the Ottoman Empire. The *sanjaks* (districts) of Upper Ajaria and Lower Ajaria were formed there and the region was annexed to the *vilayet* (province) of Childir (Akhalsikhe). Subsequently, at various times, the Ottomans and the adjoining Georgian principalities fought over the region. Under the terms of Article IV of the Treaty of Adrianople signed on 2 September 1829 between tsarist Russia and the Ottoman Empire, Ajaria was assigned to the latter.

101. Article LVIII of the Treaty of Berlin signed on 13 July 1878 between the Russian and Ottoman Empires provided:

“The Sublime Porte cedes to the Russian Empire in Asia the territories of Ardahan, Kars, and Batum together with the port of the latter.”

102. Articles XI and XV of the Armistice Treaty signed on 30 October 1918 at Mudros between Great Britain and her allies, and Turkey provided:

“XI. ... Part of Trans-Caucasia has already been ordered to be evacuated by Turkish troops, the remainder to be evacuated if required by the Allies after they have studied the situation there.”

“XV. ... This clause to include Allied occupation of Batoum ...”

103. The Armistice Treaty signed at Brest-Litovsk on 3 March 1918 between Germany, Austria-Hungary, Bulgaria and Turkey, and Russia provided:

“IV. ... The districts of Erdehan, Kars, and Batum will likewise and without delay be cleared of the Russian troops. Russia will not interfere in the reorganisation of the national and international relations of these districts, but leave it to the population of these districts to carry out this reorganisation in agreement with the neighbouring States, especially with Turkey.”

104. Article 107 of the Constitution of the Democratic Republic of Georgia, which was adopted on 21 February 1921, provided:

“The inseparable parts of the Republic of Georgia, namely the district of Abkhazia-Sokhoumi, Muslim Georgia (district of Batumi) and the district of Zakatala, shall have the right of self-government for local affairs.”

105. Article 2 of the Moscow Accords dated 16 March 1921 and signed by Russia and Turkey provided:

“Turkey agrees to cede to Georgia suzerainty of the port of Batumi, together with the territory to the north of the border referred to in Article 1 of this Treaty that forms part of the district of Batumi ... on condition that: (a) the populations of these territories enjoy a large degree of local administrative autonomy guaranteeing each community its cultural and religious rights and are permitted to introduce in the aforementioned places an agrarian regime in accordance with their wishes. ...”

106. On 16 July 1921 Ajaria was granted the status of an autonomous Soviet socialist republic forming part of the Soviet Socialist Republic (SSR) of Georgia.

107. Article 6 of the Kars Treaty signed on 13 October 1921 between the government of Turkey and the governments of the Soviet Socialist Republics of Azerbaijan, Armenia and Georgia provided:

“Turkey agrees to cede to Georgia suzerainty of the town and port of Batumi, together with the territory to the north of the border referred to in Article 4 of this Treaty that was formerly part of the district of Batumi ... on condition that:

(i) The populations of the places specified in this Article enjoy a large degree of local administrative autonomy guaranteeing each community its cultural and

religious rights and are permitted to introduce in the aforementioned places an agrarian regime in accordance with their wishes.

(ii) Turkey is guaranteed free transit of goods and all materials to or from Turkey through the port of Batumi, free of customs, without hindrance, free of all duties and imposts and with the right for Turkey to use the port of Batumi without special costs. In order to implement this provision, a Committee of Representatives of Interested Parties shall be set up immediately after the signature of this Treaty.”

## **B. Status of Ajaria under the 1995 Constitution, as currently worded**

108. On 24 August 1995, four years after the dissolution of the USSR, the Georgian Parliament adopted a new Constitution, Article 2 § 3 of which provides:

“The internal territorial arrangement of Georgia shall be determined by constitutional law on the basis of the principle of division of power after the full restoration of the jurisdiction of Georgia over all its territory.”

109. On 20 April 2000 the Constitution was amended by a constitutional law which replaced the term “Ajaria” with “Ajarian Autonomous Republic” and added a third paragraph to Article 3 of the Constitution, which reads:

“The status of the Ajarian Autonomous Republic shall be determined by a constitutional law on the status of the Ajarian Autonomous Republic.”

On 10 October 2002 the Georgian Parliament enacted a constitutional law containing similar amendments and additions with respect to Abkhazia. It has not passed any similar legislation with respect to the Tskhinvali region (formerly, the “Autonomous District of South Ossetia”).

110. The proposed constitutional law determining the status of the Ajarian Autonomous Republic (see Article 3 of the Constitution) has not yet been passed.

## **C. Presidential pardons**

### *1. The Constitution*

111. Article 73 § 1, sub-paragraph 14, of the Constitution reads as follows:

“The President of Georgia: ... has the right to grant convicted persons a pardon; ...”

### *2. Presidential Decree no. 319 on the exercise of the right of pardon*

112. The relevant provisions of Article 1 of Decree no. 319 of 13 May 1998 on the exercise of the right of pardon provide:

**Article 1**

“The President of Georgia may grant convicted persons a pardon in accordance with Article 73 § 1, sub-paragraph 14, of the Constitution. In order to exercise this right, the President shall examine beforehand requests by convicted persons for a pardon that have been submitted by the Georgian courts, ..., petitions for a pardon lodged by members of parliament, private individuals, groups of private individuals, organisations or public bodies, and requests for convicted persons to be released from an obligation to pay compensation for pecuniary damage under an order of the Georgian courts made in favour of a public undertaking, institution or organisation.

A pardon may be granted at the request of a convicted person if he or she admits his or her guilt and repents.”

**Article 2 § 1**

“Requests and petitions for a pardon shall be examined by the Pardons Board before being submitted to the President. The board ... shall be set up to carry out a prior examination of requests and petitions made to the President for a pardon and to make recommendations in that regard. The board's recommendations shall be examined by the President, who shall take the final decision.”

**Article 7**

“If granted a pardon, the convicted person shall be entitled to:

- (a) remission of all the main or any ancillary sentence, with or without deletion of his or her name from the criminal records;
- (b) remission of part of the main or any ancillary sentence, in other words, to a reduction in the length of his or her sentence;
- (c) have the remainder of his or her sentence commuted to a lesser sentence;
- (d) remission of all or part of an order of the trial court to pay compensation for pecuniary damage.”

**Article 9**

“A pardon may not be granted to convicted persons:

- (a) who have been tried for a serious crime and sentenced to a term of imprisonment of more than five years and have not yet served at least half of their sentence;
- (b) who have been sentenced for the first time to a term of imprisonment of less than five years and have not yet served at least a third of their sentence;

...



(f) who are of bad character according to the institution in which they are being held and have a reputation for unacceptable violations of the applicable prison regulations.

Requests by convicted persons falling within the provisions of this Article shall not be examined by the Pardons Board unless special circumstances so warrant.”

#### **Article 10**

“Prior to its examination by the Pardons Board the request for a pardon shall be sent with the file documents produced by the penal institution concerned for opinion to the Supreme Court of Georgia, the General Prosecutor's Office and the Ministry of the Interior.

Prior to being examined by the Pardons Board the request for remission of an obligation to pay compensation for pecuniary damage shall be sent with the file documents to the Supreme Court of Georgia, the territorial administrative authorities and self-governing authorities and any legal entity that is a civil party to the proceedings.

The aforementioned authorities' opinions and legal entity's observations shall be submitted to the Pardons Board within two weeks.”

113. By Presidential Decree no. 426 of 4 October 2002, an Article 10.1 was added to the aforementioned Decree no. 319. It provides:

“The President of Georgia shall have the right to grant a pardon to a convicted person in accordance with Article 73 § 1, sub-paragraph 14, of the Constitution even if the additional conditions set out in this decree are not satisfied.”

#### **3. Relevant provisions of other Codes**

114. Article 360 of Chapter XIX of the Code of Civil Procedure, which contained the rules of procedure in administrative-law disputes before the Code of Administrative Procedure came into force on 1 January 2000 provided:

“The application must be lodged with the court of appeal with territorial jurisdiction for the area in which the body from which the contested act emanated is situated.”

115. The relevant provisions of the Code of Administrative Procedure provide:

#### **Article 6 § 1 (a)**

“The courts of appeal shall hear as courts of first instance applications concerning:  
(a) the legality of administrative acts of the President of Georgia; ...”

#### **Article 29**

“An application for judicial review of an administrative act shall stay execution of that act.”

#### **D. The parliamentary report**

116. The relevant provisions of the Constitution are as follows:

##### **Article 56 §§ 1 and 2**

“Parliament shall set up committees for the duration of its term to conduct preliminary studies of legislative issues, to implement decisions, and to supervise the activities of the Government and the bodies accountable to Parliament for their work.

In the circumstances set out in the Constitution and the Rules of Parliament, or at the request of at least a quarter of the members of parliament, committees of inquiry and other temporary committees shall be set up. The representation of the parliamentary majority on such committees shall not exceed one-half of the total number of the committee members.”

##### **Article 42 § 1**

“Everyone shall be entitled to seek judicial protection of his or her rights and freedoms.”

117. Article 60 of the Administrative Code, as amended on 2 March 2001, reads as follows:

“1. An administrative decision shall be declared null and void

(a) if it emanates from an unauthorised body or person;

(b) if its execution could entail the commission of an offence;

(c) if its execution is impossible for objective factual reasons;

(d) if it is contrary to the law or if there has been a material breach of the statutory rules governing its preparation or adoption.

2. A breach of the law that results in a different decision from that which would have been taken had the law been complied with shall constitute a material breach of the statutory rules on the preparation and adoption of administrative decisions.

3. An administrative decision shall be declared null and void by either the body from which it originated or a higher administrative body on an internal appeal or an administrative court on an application for judicial review.”

118. Article 257 of the former Code of Criminal Procedure, which was in force until 15 May 1999, provided:

“If, during the course of the judicial examination of a case, circumstances come to light that indicate that the offence was committed by a person who has not been charged, the court shall make an order for criminal proceedings to be brought against that person and forward the decision to the inquiry and investigative bodies for execution.”

119. The relevant provisions of the New Code of Criminal Procedure, which came into force on 15 May 1999, are as follows:

**Article 539**

“A judgment or other judicial decision shall be ill-founded if: (a) a guilty verdict is returned that is not based on the evidence in the case; (b) there are unresolved conflicts of evidence that call into question the validity of the court's finding; (c) the court failed to take material evidence into account when reaching its decision; (d) the court reached its findings on the basis of evidence that was inadmissible or irrelevant; (e) the court rejected certain evidence in favour of other conflicting evidence without explaining its reasons for so doing; (f) the court did not afford the convicted person the benefit of the doubt.”

**Article 593**

“1. The judgment ... may be quashed in whole or in part if new factual or legal circumstances come to light.

2. New factual circumstances shall entail a review of any court decision that is illegal or does not contain reasons. There shall be a review in particular when:

(a) it is judicially established that the evidence of a witness or expert witness or of any other kind that constituted the basis for the impugned court decision was false; (b) it is judicially established that the trial judge, the public prosecutor, the investigating officers or prosecuting authority contravened the law when dealing with the case; (c) fresh evidence has come to light ... that may prove the innocence of a convicted person or the guilt of an acquitted person ...; (d) fresh evidence has come to light that shows that ... the evidence on which the decision was based was inadmissible.”

**E. Procedure in the Supreme Court of Georgia and on acquittal**

120. Article 9 of the Institutional Law on the Supreme Court of Georgia of 12 May 1999 sets out the jurisdiction of the various chambers of the Supreme Court, including the Criminal Affairs Chamber:

“The chambers ... of the Supreme Court of Georgia are courts of cassation which ... hear appeals on points of law against the decisions of the regional courts of appeal, the High Courts of the Autonomous Republics of Abkhazia and Ajaria and the Criminal Affairs Panel of the Supreme Court.”

121. The relevant provisions of the New Code of Criminal Procedure are as follows:

**Article 28 (a)**

“Criminal proceedings may not be brought and pending criminal proceedings shall be discontinued if the act or omission concerned is not an offence under the Criminal Code.”

**Article 602 § 2**

“Judgments must be prepared for execution at the latest within seven days after the date on which they become enforceable.”

**Article 604**

“1. It is for the court which delivered the decision to send the judgment or order for execution. The order relating to execution of the judgment and a copy of the judgment shall be sent by the judge or the president of the court to the body responsible for its enforcement. ... 2. The body responsible for its enforcement shall immediately inform the court which delivered the judgment of its execution. ...”

**F. The place of detention**

122. Section 6(1) and (3) of the Detention Act of 22 July 1999 provides:

“Sentences of imprisonment judicially imposed in a judgment shall be served in prison institutions supervised by the Ministry of Justice of Georgia.

In the territory of Georgia, these prison institutions shall be as follows:

- (a) ordinary-regime prisons;
- (b) strict-regime prisons;
- (c) isolation prisons.”

**THE LAW****I. PRELIMINARY OBJECTION OF FAILURE TO EXHAUST DOMESTIC REMEDIES***1. The parties' submissions*

123. Counsel for the Government invited the Court to declare the application inadmissible for breach of the obligation under Article 35 of the Convention to exhaust domestic remedies. Noting that the machinery of protection established by the Convention was subsidiary to the national systems safeguarding human rights (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48), he submitted that the Court's decision declaring the present application admissible had infringed the subsidiarity principle embodied in international law. He

pointed out that the Government had not communicated to the Court the parliamentary committee's report of 26 September 2002 before the Court examined the issue of the admissibility of the applicant's complaints. In his submission, that omission had prevented the Court from taking an informed decision on the issue of admissibility.

124. Counsel for the Government noted that the investigation committee of the Georgian Parliament had found a number of irregularities in the proceedings in which the applicant had been acquitted (see paragraphs 82 et seq. above). However, the respondent State had not yet had an opportunity to remedy the situation in the light of the committee's findings using the means available within its own legal system (see *Retimag SA v. the Federal Republic of Germany*, no. 712/60, Commission decision of 16 December 1961, Yearbook 8, pp. 29-42). In his submission, "when a national parliament decides to examine a particularly sensitive domestic case in order to verify whether the decisions of the judicial authorities were lawful, the case cannot reasonably be regarded as having been finally decided in the country concerned".

Counsel for the Government provided a detailed summary of the parliamentary committee's report and asked the Court not to underestimate its relevance to the proceedings before it. He noted that the parliamentary committee had suggested that the applicant's trial should be reopened on account of the irregularities it had found and said that statutory remedies would not have been exhausted until that had been done (see paragraph 88 above). In his submission, that finding by the committee confirmed that the applicant had failed to comply with his obligation to exhaust domestic remedies within the meaning of Article 35 of the Convention, with the result that his complaints were inadmissible.

125. The applicant replied that the parliamentary committee's report had no legal effect in the domestic system. On a separate point, he drew the Court's attention to the fact that the report had only been signed by the president of the committee whereas, under the parliamentary rules of procedure, the signatures of the other members were also necessary to validate the document. The applicant also pointed out that the president of the committee was a member of parliament who had been elected as a candidate from the political party of Mr Aslan Abashidze, the Head of the Ajarian Autonomous Republic.

## 2. The Court's assessment

126. Even though the Government are late in making this plea of inadmissibility (Rule 55 of the Rules of Court), the Court considers that it must examine it, in view of the special circumstances of the case.

127. It notes that the investigation committee of the Georgian Parliament was instructed by the Bureau of the Parliament to examine the circumstances in which the applicant had come to be granted a presidential

pardon, even though he had taken no steps to request one. On its own initiative, the committee also proceeded to examine the second set of criminal proceedings, in which the applicant was acquitted and, in its report of 26 September 2002, suggested the reopening of the case so that it could be remitted to the investigating bodies for further investigation (see paragraphs 72-88 above).

The Court reiterates that the rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 67, and *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997, *Reports* 1997-VI, pp. 2094-95, § 159).

Thus, extraordinary procedural remedies that do not satisfy the requirements of “accessibility” and “effectiveness” are not remedies requiring exhaustion for the purposes of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Kiiskinen v. Finland* (dec.), no. 26323/95, ECHR 1999-V, and *Moyá Alvarez v. Spain* (dec.), no. 44677/98, ECHR 1999-VIII).

128. The Court notes that under the Georgian legal system the report of a parliamentary investigation committee on a court decision does not entail that decision being set aside or reviewed. At most, the prosecuting authorities may judge it necessary to set the criminal process in motion in respect of matters that have thereby been brought to their attention. In the instant case, on 25 March 2003, following a request for the reopening of the proceedings by the civil party, the General Prosecutor's Office of Georgia found that the parliamentary committee's findings in its report of 26 September 2002 did not constitute new factual or legal circumstances that could warrant reopening the applicant's case (see paragraph 89 above).

Since the parliamentary committee's report did not result in a review of the proceedings in which the applicant was acquitted (see paragraph 47 above), the Government cannot validly maintain that those criminal proceedings are still pending in the domestic courts or that the applicant's application to the Court was premature.

In these circumstances, the Court considers it unnecessary to examine whether the report was validly approved by all the members of the investigation committee.

129. In any event, the Court notes that the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature with the administration of justice

designed to influence the judicial determination of the dispute (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 82, § 49). Consequently, the Court would be extremely concerned if the legislation or practice of a Contracting Party were to empower a non-judicial authority, no matter how legitimate, to interfere in court proceedings or to call judicial findings into question (see, *mutatis mutandis*, *Cooper v. the United Kingdom* [GC], no. 48843/99, § 130, ECHR 2003-XII).

130. The judgment acquitting the applicant was final. Accordingly, without prejudice to the provisions of Article 4 § 2 of Protocol No. 7, the principle of legal certainty – one of the fundamental aspects of the rule of law – precluded any attempt by a non-judicial authority to call that judgment into question or to prevent its execution (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, §§ 61-62, ECHR 1999-VII, and *Ryabykh v. Russia*, no. 52854/99, §§ 51-52, ECHR 2003-IX).

131. In the light of the foregoing, the Court dismisses the objection of failure to exhaust domestic remedies.

## II. THE RESPONDENT STATE'S JURISDICTION AND RESPONSIBILITY UNDER ARTICLE 1 OF THE CONVENTION

132. Article 1 of the Convention provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

### 1. *The Government's submissions*

133. The Government accepted that the Ajarian Autonomous Republic was an integral part of Georgia and that the matters complained of were within the jurisdiction of the Georgian State. However, they did not touch upon the difficulties encountered by the central State authorities in exercising their jurisdiction in the Ajarian Autonomous Republic.

134. As a preliminary point, counsel for the Government drew the Court's attention to the fact that the Georgian central government had not informed the Ajarian authorities of the proceedings before the Court in the present case. Consequently, although directly implicated by the application, the Ajarian authorities had had no opportunity to explain to the Court why the applicant remained in custody.

Noting that the Ajarian Autonomous Republic was subject to Georgian law, counsel for the Government stressed that the Georgian Supreme Court had the power to overturn decisions of the Ajarian High Court on an appeal on points of law. He said that Georgian law was duly applied in the Republic and that, apart from the present case, with its strong political

overtones, there was no problem of judicial cooperation between the central authorities and the local Ajarian authorities.

Counsel for the Government added that, unlike the other two autonomous entities (the Autonomous Republic of Abkhazia and the Tskhinvali region), the Ajarian Autonomous Republic had never had separatist aspirations and that any suggestion that it would refuse to cooperate with the central judicial authorities was unfounded. He also said that the Ajarian Autonomous Republic was not a source of conflict between different States and that the central State authorities exercised full jurisdiction over it.

## *2. The applicant's submissions*

135. Like the Government, the applicant stated that there was no doubt that the Ajarian Autonomous Republic was part of Georgia, both under domestic and international law. He noted that the Ajarian Autonomous Republic was not a separatist region, that the Georgian State exercised its jurisdiction there and was answerable to the international courts for matters arising in all parts of Georgia, including Ajaria. He added that the central authority had no difficulty in exercising its jurisdiction in the Ajarian Autonomous Republic. In his view, the Supreme Court of Georgia was generally successful in supervising the functioning of the Ajarian courts, the instant case proving the sole exception to that rule.

136. The applicant considered that his inability to secure compliance with the judgment acquitting him was attributable domestically to the local Ajarian authorities, but also to the central authorities, whose actions had not been sufficiently effective, and to the President of Georgia, who had not played his role as guarantor of the State. In his submission, his application did not concern questions of jurisdiction or responsibility, but only the respondent State's failure to secure, by all available means, execution of a judicial decision.

## *3. The Court's assessment*

### **(a) The question of “jurisdiction”**

137. Article 1 of the Convention requires the States Parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”. It follows from this provision that the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their “jurisdiction” – or competence – at the time of the violation.

In certain exceptional cases, jurisdiction is assumed on the basis of non-territorial factors, such as: acts of public authority performed abroad by diplomatic and consular representatives of the State; the criminal activities of individuals overseas against the interests of the State or its nationals; acts



performed on board vessels flying the State flag or on aircraft or spacecraft registered there; and particularly serious international crimes (universal jurisdiction).

However, as a general rule, the notion of “jurisdiction” within the meaning of Article 1 of the Convention must be considered as reflecting the position under public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, 14 May 2002, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII). That notion is “primarily” or “essentially” territorial (see *Banković and Others*, *ibid.*).

138. In addition to the State territory proper, territorial jurisdiction extends to any area which, at the time of the alleged violation, is under the “overall control” of the State concerned (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310), notably occupied territories (see *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV), to the exclusion of areas outside such control (see *Banković and Others*, cited above).

139. The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption.

140. In that connection, the Court notes, firstly, that Georgia has ratified the Convention for the whole of its territory. Furthermore, it is common ground that the Ajarian Autonomous Republic has no separatist aspirations and that no other State exercises effective overall control there (see, by converse implication, *Ilașcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001, and *Loizidou*, cited above). On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory. Such a reservation would in any event have been ineffective, as the case-law precludes territorial exclusions (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 29, ECHR 1999-I) other than in the instance referred to in Article 56 § 1 of the Convention (dependent territories).

141. Unlike the American Convention on Human Rights of 22 November 1969 (Article 28), the European Convention does not contain a “federal clause” limiting the obligations of the federal State for events occurring on the territory of the states forming part of the federation. Moreover, since Georgia is not a federal State, the Ajarian Autonomous Republic is not part of a federation. It forms an entity which, like others (the Autonomous Republic of Abkhazia and, before 1991, the Autonomous District of South Ossetia), must have an autonomous status (see paragraphs 108-10 above), which is a different matter. Besides, even if an implied federal clause similar in content to that of Article 28 of the

American Convention were found to exist in the European Convention (which is impossible in practice), it could not be construed as releasing the federal State from all responsibility, since it requires the federal State to “immediately take suitable measures, in accordance with its constitution ..., to the end that the [states forming part of the federation] may adopt appropriate provisions for the fulfillment of [the] Convention”.

142. Thus, the presumption referred to in paragraph 139 above is seen to be correct. Indeed, for reasons of legal policy – the need to maintain equality between the States Parties and to ensure the effectiveness of the Convention – it could not be otherwise. But for the presumption, the applicability of the Convention could be selectively restricted to only parts of the territory of certain States Parties, thus rendering the notion of effective human rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the States Parties, that is to say between those which accepted the application of the Convention over the whole of their territory and those which did not.

143. The Court therefore finds that the actual facts out of which the allegations of violations arose were within the “jurisdiction” of the Georgian State (see *Bertrand Russell Peace Foundation Ltd v. the United Kingdom*, no. 7597/76, Commission decision of 2 May 1978, Decisions and Reports (DR) 14, pp. 117 and 124) within the meaning of Article 1 of the Convention.

**(b) Issues of imputability and responsibility**

144. The present application is distinguishable from the cases which the Court has been called upon to examine under Article 1 of the Convention. In those cases, the notions of imputability and responsibility were considered as going together, the State only engaging its responsibility under the Convention if the alleged violation could be imputed to it (see *Loizidou*, cited above, pp. 20-22, §§ 52-56, and *Cyprus v. Turkey*, cited above, pp. 260-62, §§ 75-81).

In the aforementioned cases, the Court held, in particular, that the alleged violations of the Convention committed on part of the territory of the Contracting Party to the Convention could not engage that State's responsibility when the zone concerned was under the effective control of another State (see *Loizidou*, pp. 23-24, § 62). The position in the present case is quite different: no State apart from Georgia exercised control – and therefore had jurisdiction – over the Ajarian Autonomous Republic and indeed it has not been suggested otherwise before the Court, quite the opposite (see paragraphs 132-36 above). The present application also differs from that in *Banković and Others*, which was distinguishable from the two preceding cases, in that the respondent States – which were parties to the Convention and members of NATO – did not exercise “overall control” over the territory concerned. In addition, the State which did have such

control, the Federal Republic of Yugoslavia, was not a party to the Convention.

145. The applicant in the instant case is a person who, despite being acquitted by the Supreme Court of Georgia (see paragraph 47 above), nonetheless remains in the custody of the local Ajarian authorities (see paragraph 59 above). While attributing his continued detention to arbitrariness on the part of the local authorities, the applicant also complains that the measures taken by the central authority to secure his release have been ineffective.

As the case file shows, the central authorities have taken all the procedural steps possible under domestic law to secure compliance with the judgment acquitting the applicant, have sought to resolve the dispute by various political means and have repeatedly urged the Ajarian authorities to release him. However, no response has been received to any of their requests (see paragraphs 60-69 above).

Thus, the Court is led to the conclusion that, under the domestic system, the matters complained of by the applicant were directly imputable to the local Ajarian authorities.

146. However, it must be reiterated that, for the purposes of the Convention, the sole issue of relevance is the State's international responsibility, irrespective of the national authority to which the breach of the Convention in the domestic system is imputable (see, *mutatis mutandis*, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 21, § 63; *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 13, § 32; and *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, § 46).

Even though it is not inconceivable that States will encounter difficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory, each State Party to the Convention nonetheless remains responsible for events occurring anywhere within its national territory.

Further, the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, § 239). The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected (*ibid.*, p. 64, § 159).

147. Despite the malfunctioning of parts of the State machinery in Georgia and the existence of territories with special status, the Ajarian Autonomous Republic is in law subject to the control of the Georgian State. The relationship existing between the local Ajarian authorities and the

central government is such that only a failing on the part of the latter could make the continued breach of the provisions of the Convention at the local level possible. The general duty imposed on the State by Article 1 of the Convention entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the State for everyone. That is confirmed by the fact that, firstly, Article 1 does not exclude any part of the member States' "jurisdiction" from the scope of the Convention and, secondly, it is with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that member States are called on to show compliance with the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp. 17-18, § 29).

148. The authorities of a territorial entity of the State are public-law institutions which perform the functions assigned to them by the Constitution and the law. In that connection, the Court reiterates that in international law the expression "governmental organisation" cannot be held to refer only to the government or the central organs of the State. Where powers are distributed along decentralised lines, it refers to any national authority exercising public functions. Consequently, such authorities have no standing to make an application to the Court under Article 34 of the Convention (see *Municipal Section of Antilly v. France* (dec.), no. 45129/98, ECHR 1999-VIII, and *Ayuntamiento de Mula v. Spain* (dec.), no. 55346/00, ECHR 2001-I).

These principles show that, in the present case, the Ajarian regional authorities cannot be described as a non-governmental organisation or group of individuals with a common interest, for the purposes of Article 34 of the Convention. Accordingly, they have no right to make an application to the Court or to lodge a complaint with it against the central authorities of the Georgian State.

149. The Court thus emphasises that the higher authorities of the Georgian State are strictly liable under the Convention for the conduct of their subordinates (see *Ireland v. the United Kingdom*, cited above, p. 64, § 159). It is only the responsibility of the Georgian State itself – not that of a domestic authority or organ – that is in issue before the Court. It is not the Court's role to deal with a multiplicity of national authorities or courts or to examine disputes between institutions or over internal politics.

150. The Court therefore finds that the actual facts out of which the allegations of violations arose were within the "jurisdiction" of Georgia within the meaning of Article 1 of the Convention and that, even though within the domestic system those matters are directly imputable to the local authorities of the Ajarian Autonomous Republic, it is solely the responsibility of the Georgian State that is engaged under the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

151. The applicant complained that he had been the victim of a violation of Article 5 § 1 of the Convention following his pardon by the President on 1 October 1999, and submitted that his detention since his acquittal on 29 January 2001 was arbitrary.

The relevant provisions of Article 5 § 1 of the Convention read as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...”

#### **A. Period of detention following the presidential pardon of 1 October 1999**

##### *1. The Government's submissions*

152. In their observations filed after the admissibility decision (see paragraphs 4 and 9 above), the Government noted that the presidential pardon had been challenged in the administrative courts and its execution stayed in accordance with Article 29 of the Code of Administrative Procedure. The proceedings in the administrative courts had ended on 11 July 2000, when at last instance the Supreme Court of Georgia dismissed an appeal on points of law in which the Batumi Tobacco Manufacturing Company had argued that the presidential decree of pardon was illegal. That judgment was the final domestic decision within the meaning of Article 35 § 1 of the Convention and the applicant's complaint that he had been unlawfully detained between 1 October and 11 December 1999 was out of time.

153. As to the merits of the complaint, the Government maintained that the applicant's detention between 1 October and 11 December 1999 fully complied with the requirements of Article 5 § 1 (a) of the Convention. Having been sentenced on 28 November 1994 to eight years' imprisonment

by the Ajarian High Court, the applicant was granted a pardon by the Georgian President on 1 October 1999 (see paragraphs 21 and 22 above). That presidential decree was immediately challenged by the Batumi Tobacco Manufacturing Company in the Ajarian High Court (see paragraph 24 above). That challenge itself operated to stay execution of the pardon in accordance with Article 29 of the Code of Administrative Procedure (see paragraph 115 above) and the judgment of 28 November 1994 continued to serve as the basis for the applicant's detention. Since the proceedings in the administrative courts only ended with the Supreme Court of Georgia's judgment of 11 July 2000 dismissing the Batumi Tobacco Manufacturing Company's appeal on points of law at last instance (see paragraph 29 above), the basis for the applicant's detention from 1 October to 11 December 1999 was the judgment of 28 November 1994 and the detention therefore complied both with domestic law and the requirements of Article 5 § 1 (a) of the Convention.

154. Counsel for the Government said that, in his view, the applicant had been pardoned for purely political reasons. He concurred with the Government's representative in considering that the basis for the applicant's detention during that period was the Ajarian High Court's judgment of 28 November 1994.

## *2. The applicant's submissions*

155. The applicant submitted, firstly, that his detention from 1 October 1999 to date constituted a single period and that he had been unlawfully detained throughout. In that connection, he pointed out that there had been no visible change in his status between his detention in the first set of criminal proceedings and his detention following his conviction in the second set of proceedings and that the entire period he had spent in custody since receiving his pardon had served the same political purpose of the Ajarian authorities. The applicant therefore asked the Court to examine his detention from 1 October 1999 to date as a whole.

156. He added that for the period from 1 October to 11 December 1999 there had been no basis or lawful order for his continued detention. He stressed that, in contrast to himself, the other two convicted prisoners who had been granted pardons by the President of Georgia in the same decree (see paragraph 22 above) had both been released immediately.

157. Both in his observations filed with the Court after the admissibility decision and at the hearing on 19 November 2003, the applicant complained for the first time about his prosecution in December 1999 and ensuing detention in the second set of criminal proceedings. He said, in particular, that there had been "no reasonable ground to suspect" him of being implicated in the activities of the criminal gang led by Mr David Assanidze. His acquittal on 29 January 2001 demonstrated that the charges in the second set of proceedings were a complete fabrication and that his detention

in connection with those proceedings also contravened the requirements of Article 5 § 1 of the Convention.

### *3. The Court's assessment*

158. The Court notes at the outset that under Georgian law a substantive decision of the Georgian President constitutes an administrative act amenable to judicial review in the administrative courts (Article 60 of the Administrative Code and Article 6 § 1 (a) of the Code of Administrative Procedure – see paragraphs 117 and 115 above). Since the decree of pardon issued on 1 October 1999 was immediately challenged in the domestic courts by the Batumi Tobacco Manufacturing Company, its execution was stayed in accordance with Article 29 of the Code of Administrative Procedure and it only became enforceable on 11 July 2000, when the Supreme Court of Georgia dismissed at last instance an appeal by that company (see paragraph 29 above). In the meantime, on 11 December 1999, the applicant had already been charged in the second set of criminal proceedings and had been unable to secure his release (see paragraphs 27, 34 and 35 above).

159. Unlike the applicant, the Court considers that the period of detention after the presidential pardon of 1 October 1999 cannot be regarded as forming a whole with his continued detention since 29 January 2001, the date of his acquittal (see paragraph 47 above). Even though there was no gap between these periods of detention (as the applicant was not released), they were preceded by distinct periods of detention imposed on the applicant in two separate sets of proceedings and on different statutory bases.

The Court must therefore determine the extent to which it will examine each of these periods (from 1 October to 11 December 1999 and from 29 January 2001 to date) in the light of the rules governing admissibility and, in particular, the rule that applications must be made to the Court “within a period of six months from the date on which the final decision was taken”, that is to say, the decision ending the process of “exhaustion of domestic remedies” within the meaning of Article 35 (see *Kadikis v. Latvia* (no. 2) (dec.), no. 62393/00, 25 September 2003).

160. On 12 November 2002 the Chamber to which the case was originally assigned declared the whole of the applicant's complaint under Article 5 § 1 of the Convention admissible.

However, by virtue of Article 35 § 4 of the Convention, the Court may declare a complaint inadmissible “at any stage of the proceedings” and the six-month rule is a mandatory one which the Court has jurisdiction to apply of its own motion (see, among other authorities, *Kadikis* (no. 2), cited above). In the light of the Government's observations and the special circumstances of the case, the Court considers that in the instant case it is

necessary to take this rule into account when examining the various periods for which the applicant was detained.

161. As regards the first period (from 1 October to 11 December 1999), the Court finds it unnecessary to examine whether the six-month period started to run from 1 October 1999, when the presidential pardon was granted, or, as the Government have submitted, from 11 July 2000, when the Supreme Court of Georgia dismissed the Batumi Tobacco Manufacturing Company's appeal at last instance (see paragraph 152 above). Whichever date is taken, the Court notes with regard to the first period of detention that the complaint under Article 5 § 1 was made outside the six-month time-limit, since the applicant lodged his application with the Court on 2 July 2001. It follows that this part of the application must be declared inadmissible as being out of time.

162. As to the complaint concerning the applicant's prosecution on 11 December 1999 in the second set of criminal proceedings and his detention between that date and his acquittal, the Court notes that the first occasion it was raised before it was on 23 September and 19 November 2003 (see paragraph 157 above). Consequently, it was not dealt with in the admissibility decision of 12 November 2002, which defines the scope of the Court's examination (see, among other authorities, *Peltier v. France*, no. 32872/96, § 20, 21 May 2002; *Craxi v. Italy (no. 1)*, no. 34896/97, § 55, 5 December 2002; and *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V). It follows that this complaint falls outside the scope of the case referred to the Grand Chamber for examination.

163. The Court will therefore only examine the applicant's complaints concerning the period of detention that began on 29 January 2001.

## **B. Period of detention from 29 January 2001 to date**

### *1. The Government's submissions*

164. Despite requests from the Court, the Government have at no stage of the proceedings made any legal submissions on the applicant's detention since his acquittal on 29 January 2001. In exclusively factual observations that were submitted on 18 April 2002, they said that they were obliged to confine themselves to the facts of the instant case (see paragraph 4 above).

Subsequently, the Government also declined to reply to a question concerning the merits of this complaint. However, their counsel has stated that the applicant's continued detention – despite his acquittal on 29 January 2001 – was entirely legitimate, since there was no basis for the acquittal in law. In so arguing, he relied primarily on the findings of the parliamentary committee's report of 26 September 2002. In his submission, since the judgment of 29 January 2001 was invalid, the basis for the applicant's detention since then had been his conviction and sentence on 2 October



2000 (see paragraph 44 above), that being the only judgment which remained effective. The detention consequently fell within Article 5 § 1 (a) of the Convention and complied fully with that provision. He added that, even if that were not the case, the applicant's detention was in any event justified under Article 5 § 1 (c) of the Convention by his dangerous links with mafia and terrorist groups.

Counsel for the Government further submitted that the findings in the parliamentary committee's report constituted new circumstances that were capable of forming a basis for reopening the second set of criminal proceedings against the applicant.

165. As to the relevance of the place where the applicant was held to the lawfulness of his detention under the Convention, the Government referred to the Court's judgment in *Bizzotto v. Greece* (judgment of 15 November 1996, *Reports* 1996-V) and submitted that, even if it contravened domestic law, the place of detention did not of itself render the detention contrary to Article 5 § 1 of the Convention.

## *2. The applicant's submissions*

166. The applicant complained that he had been kept in custody despite his acquittal in 2001 and described that deprivation of liberty as arbitrary. It was his belief that he was being held because it suited the local Ajarian authorities, who wanted him out of the way, the motive being political revenge.

167. Both in his observations filed with the Court on 23 September 2003 and at the hearing on 19 November 2003, the applicant complained for the first time that the place of his detention – a prison-style cell in the Ajarian Ministry of Security measuring some six square metres – was illegal under domestic law. Since his arrest in 1993, the applicant had been held in total isolation in that cramped cell and had never left it.

The applicant pointed out that under domestic law such cells were intended to hold remand prisoners during the preliminary investigation and that, even without the presidential pardon and his acquittal, he should have been transferred to a strict-regime prison immediately after his convictions on 28 November 1994 and 2 October 2000. He submitted that that aspect of his detention amounted to a violation of his rights under Article 5 § 1 of the Convention.

168. In his observations of 23 September and oral submissions of 19 November 2003, the applicant also asked the Court for the first time to examine the issue of his place of detention under Article 3 of the Convention and to hold that he had been subjected to degrading treatment.

### 3. *The Court's assessment*

#### (a) **Whether the detention was lawful**

169. The Court observes, firstly, that Article 5 of the Convention guarantees the fundamental right to liberty and security. That right is of primary importance in a “democratic society” within the meaning of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, § 65, and *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37).

170. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 22, § 40), save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV, and *Quinn v. France*, judgment of 22 March 1995, Series A no. 311, p. 17, § 42) and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, p. 25, § 58, and *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, p. 848, § 42).

171. However, the fact that the deprivation of liberty comes within one of the categories permitted under Article 5 § 1 does not suffice. A person who is arrested or detained must benefit from the various safeguards set out in paragraphs 2 to 5 of Article 5 to the extent that they are applicable (see *Weeks*, cited above, p. 22, § 40).

Thus, the provisions of Article 5 require the detention to be “in accordance with a procedure prescribed by law” and any decision taken by the domestic courts within the sphere of Article 5 to conform to the procedural and substantive requirements laid down by a pre-existing law (see *Agee v. the United Kingdom*, Commission decision of 17 December 1976, DR 7, p. 165). The Convention here refers essentially to national law, but it also requires that any deprivation of liberty be in conformity with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Quinn*, cited above, pp. 18-19, § 47, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118). Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see *Scott v. Spain*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2396, § 57; *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 753,

§ 41; and *Giulia Manzoni v. Italy*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1190, § 21).

172. In the instant case, the applicant was detained by the Ajarian authorities for the purposes set out in Article 5 § 1 (c) from 11 December 1999 onwards, that being the date he was charged in a fresh set of proceedings (see paragraph 34 above). However, that situation ended with his acquittal on 29 January 2001 by the Supreme Court of Georgia, which at the same time ordered his immediate release (see paragraphs 47 and 56 above). Since then, despite the fact that his case has not been reopened and no further order has been made for his detention, the applicant has remained in custody. Thus, there has been no statutory or judicial basis for the applicant's deprivation of liberty since 29 January 2001. It cannot, therefore, be justified under any sub-paragraph of Article 5 § 1 of the Convention.

173. As to the conformity of the applicant's detention with the aim of Article 5 to protect against arbitrariness, the Court observes that it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release.

174. As the documents in the case file show, the central State authorities themselves pointed out on a number of occasions that there was no basis for the applicant's detention. The central judicial and administrative authorities were forthright in telling the Ajarian authorities that the applicant's deprivation was arbitrary for the purposes of domestic law and Article 5 of the Convention. However, their numerous reminders and calls for the applicant's release went unanswered (see paragraphs 60-69 above).

175. The Court considers that to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty (see, *mutatis mutandis*, *Jėčius v. Lithuania*, no. 34578/97, § 62, ECHR 2000-IX) and arbitrary, and runs counter to the fundamental aspects of the rule of law.

176. The Court accordingly finds that since 29 January 2001 the applicant has been arbitrarily detained, in breach of the provisions of Article 5 § 1 of the Convention.

#### **(b) The place of detention**

177. The applicant has complained of various aspects of his detention in the instant case: firstly, the place of the detention itself, which he alleged was illegal under domestic law, and, secondly, the fact that he was held in total isolation.

178. As it has found that the applicant's continued detention since his acquittal is arbitrary, the Court considers that his separate complaint regarding the legality of the place of detention under domestic law adds nothing to the violation that has already been found. It accordingly

considers it unnecessary to examine this issue separately under Article 5 § 1 of the Convention.

As to the applicant's complaint that the fact that he had been held in total isolation in a cell at the Ajarian Ministry of Security prison constituted a breach of Article 3 of the Convention, the Court notes that it was raised for the first time on 23 September 2003 (see paragraph 167 above) and, consequently, was not referred to in the admissibility decision of 12 November 2002 which determined the scope of the proceedings to be examined by the Court (see, among other authorities, *Peltier*, cited above, § 20; *Craxi (no. 1)*, cited above, § 55; and *Göç*, cited above, § 36). It follows that this complaint is outside the scope of the case that was referred to the Grand Chamber for examination.

#### IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

179. The applicant submitted that the failure to comply with the judgment acquitting him had infringed Article 6 § 1 of the Convention, which provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...”

##### *1. The parties' submissions*

180. The Government did not make any submissions on this complaint. Referring to the Court's judgment in *Hornsby v. Greece* (judgment of 19 March 1997, *Reports* 1997-II), the applicant requested the Court to find a violation of his rights under Article 6 § 1 of the Convention.

##### *2. The Court's assessment*

181. The Court reiterates that the execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6 (see, *mutatis mutandis*, *Hornsby*, cited above, pp. 510-11, § 40; *Burdov v. Russia*, no. 59498/00, §§ 34-35, ECHR 2002-III; and *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003).

182. The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. It would be inconceivable that paragraph 1 of Article 6, taken together with paragraph 3, should require a Contracting State to take positive measures with regard to anyone accused of a criminal offence (see, among other authorities, *Barberà, Messegue and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, pp. 33-34, § 78) and describe in detail procedural guarantees afforded to litigants –

proceedings that are fair, public and expeditious – without at the same time protecting the implementation of a decision to acquit delivered at the end of those proceedings. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit (see, *mutatis mutandis*, *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 570, § 37).

183. Applying those principles to the instant case, the Court emphasises that it was impossible for the applicant to secure execution of the judgment of a court that had determined criminal charges against him, within the meaning of Article 6 § 1 of the Convention. It does not consider it necessary to establish which domestic authority or administration was responsible for the failure to execute the judgment, which was delivered more than three years ago. It merely observes that the administrative authorities taken as a whole form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice (see *Hornsby*, cited above, p. 511, § 41). If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees the defendant previously enjoyed during the judicial phase of the proceedings would become partly illusory.

184. Consequently, the fact that the judgment of 29 January 2001, which is a final and enforceable judicial decision, has still not been complied with more than three years later has deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

## V. ALLEGED VIOLATIONS OF ARTICLES 5 § 4 AND 13 OF THE CONVENTION

185. The applicant submitted that the failure to comply with the operative provision of the judgment of 29 January 2001 ordering his immediate release constituted a violation of his rights under Article 5 § 4 and Article 13 of the Convention, which read as follows:

### **Article 5 § 4**

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

### **Article 13**

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

186. The Government did not make any submissions on this point. Counsel for the Government said that the applicant had at all times been able to challenge the lawfulness and merits of his detention in accordance with the requirements of Article 5 § 4 and Article 13 of the Convention, as witnessed by his many applications for release.

187. The Court notes that the complaints under Article 5 § 4 and Article 13 of the Convention are based on the failure to comply with the second operative provision of the judgment ordering the applicant's immediate release (see paragraph 56 above). They therefore raise essentially the same legal issue on the basis of the same facts as that examined by the Court under Article 6 § 1 of the Convention. Consequently, no separate examination of these complaints is necessary.

## VI. ALLEGED VIOLATION OF OTHER PROVISIONS OF THE CONVENTION

### *1. Alleged violation of Article 5 § 3 of the Convention*

188. Without elaborating on his arguments in support of this complaint, the applicant said that his continued unlawful detention automatically entailed a violation of Article 5 § 3.

Article 5 § 3 of the Convention reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

189. The Government have not submitted observations on this complaint at any stage of the proceedings.

190. The Court notes that the period of detention for which the applicant was entitled to benefit from the guarantees set out in Article 5 § 3 ended on 2 October 2000 with his conviction at first instance by the Ajarian High Court (see paragraph 44 above), that is to say, outside the six-month time-limit laid down by Article 35 § 1 of the Convention (see paragraphs 160-61 above). It follows that this complaint must be dismissed as being out of time.

### *2. Alleged violation of Article 10 § 1 of the Convention*

191. The applicant submitted that there had been a violation of his rights under Article 10 § 1 of the Convention, which provides:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

The applicant has not at any stage of the proceedings advanced any argument in support of this complaint, other than to say that the violation of Article 10 § 1 was “closely linked to that of Article 5 § 1 of the Convention”.

The Government have not submitted any observations in reply.

192. In these circumstances, the Court finds that the applicant's complaint under Article 10 § 1 of the Convention is unsubstantiated.

### *3. Alleged violation of Article 2 of Protocol No. 4*

193. The applicant submitted that his continued detention infringed his rights under Article 2 of Protocol No. 4, which provides:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

...”

The Government argued that there had been no violation of that provision in the instant case, as at no stage had the applicant been subject to a measure restricting his liberty of movement within the country or preventing him from leaving it. While it was accepted that the applicant's detention made it impossible for him to exercise his right afforded by that provision, the restrictions on his movement resulted from his continued detention, not any violation of his rights under Article 2 of Protocol No. 4.

194. The Court considers that the present case is concerned not with a mere restriction on freedom of movement within the meaning of Article 2 of Protocol No 4, but, as it has found above, with arbitrary detention falling under Article 5 of the Convention. It is not therefore necessary to consider the complaint under Article 2 of Protocol No. 4.

## VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

195. Under Article 41 of the Convention,

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### **A. Damage**

196. The applicant made the following claims: as reparation for pecuniary damage (loss of monthly income since 1 October 1999), 12,000 euros (EUR); for non-pecuniary damage, EUR 3,000,000.

197. The Government argued that the sum of EUR 3,000,000 claimed by the applicant was “grossly exaggerated”. In their submission, the applicant had not advanced any valid legal or factual argument relating to the violation of the Convention that would justify making such a large award. Noting that a judgment of the Court finding a violation imposed an obligation on the State to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*), the Government asked the Court not to grant the applicant's request for just satisfaction, but to dismiss it as ill-founded.

Were the Court minded not to dismiss the claim, the Government asked it to take into account the severe socio-economic crisis in Georgia and the State's financial situation, which the Government said precluded it from paying out large sums to the applicant over any length of time. The Government therefore asked the Court, in the event of its finding a violation of the Convention provisions, to restrict any award for non-pecuniary damage to the applicant to a reasonable level.

The Government did not comment on the sum claimed by the applicant for pecuniary damage.

198. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Menteş and Others v. Turkey* (Article 50), judgment of 24 July 1998, *Reports* 1998-IV, p. 1695, § 24; and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal



system that might prevent the applicant's situation from being adequately redressed (see *Maestri*, cited above, § 47).

199. In the instant case, as regards the non-pecuniary damage already sustained, the Court finds that the violation of the Convention has indisputably caused the applicant substantial damage. Held arbitrarily in breach of the founding principles of the rule of law, the applicant is in a frustrating position that he is powerless to rectify. He has had to contend with both the Ajarian authorities' refusal to comply with the judgment acquitting him handed down some three years ago and the failure of the central government's attempts to compel those authorities to comply.

200. As to pecuniary damage, in view of the lack of evidence of the applicant's monthly income prior to his arrest, the Court has been unable to make a precise calculation. However, it considers that the applicant must necessarily have sustained such a loss as a result of being held without cause when, from 29 January 2001 onwards, he should have been in a position to find employment and resume his activities.

201. Consequently, ruling on an equitable basis and in accordance with the criteria set out in its case-law, the Court awards the applicant EUR 150,000 in respect of the period of detention from 29 January 2001 to the date of this judgment for all heads of damage combined, together with any amount which may be due by way of value-added tax (VAT).

202. As regards the measures which the Georgian State must take (see paragraph 198 above), subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta*, cited above, § 249; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, *Reports* 1998-II, pp. 723-24, § 47; and *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

However, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.

203. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention (see paragraphs 176 and 184 above), the

Court considers that the respondent State must secure the applicant's release at the earliest possible date.

## **B. Costs and expenses**

204. The applicant claimed the sum of EUR 37,000 for costs and expenses, broken down as follows: EUR 2,000 for secretarial costs and costs of interpretation incurred in the proceedings before the Court; EUR 1,800 for his lawyer's travel expenses between Tbilisi and Batumi in connection with the preparation of his defence before the domestic courts; and 42,000 United States dollars (USD) (approximately EUR 33,200) for the fees of Mr Khatiashvili, his lawyer in the domestic proceedings and before the Court.

Apart from an agreement entered into between the applicant's son and Mr Khatiashvili on 30 November 2000, the applicant has not furnished any documentary evidence in support of his claims, as he is required to do by Rule 60 § 2 of the Rules of Court. The agreement provides: "If Mr Tengiz Assanidze is successful in his case before the Supreme Court of Georgia, and once Mr T. Assanidze has been released, his son undertakes to pay Mr Khatiashvili the sum of USD 42,000."

205. The Government did not comment on this point.

206. The Court notes that this case has given rise to two series of written observations and an adversarial hearing (see paragraphs 4, 9 and 16 above). Nevertheless, having examined the applicant's claims and taking into account the fact that a number of vouchers are missing, the Court is not satisfied that all the costs and expenses claimed were incurred solely for the purposes of putting an end to the violation. Under the Court's case-law, the Court may only order the reimbursement of costs to the extent that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, p. 83, § 77, and *Malama v. Greece* (just satisfaction), no. 43622/98, § 17, 18 April 2002). The Court is also mindful of the great differences at present in rates of fees from one Contracting State to another, and does not consider it appropriate to adopt a uniform approach to the assessment of fees under Article 41 of the Convention. It reiterates too that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see, *inter alia*, *M.M. v. the Netherlands*, no. 39339/98, § 51, 8 April 2003).

207. Ruling on an equitable basis and taking into account the sums already paid to the applicant by the Council of Europe in legal aid, the Court awards him EUR 5,000, together with any VAT that may be payable.

### C. Default interest

208. The Court considers it appropriate to base the default interest on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the preliminary objection of failure to exhaust domestic remedies (paragraph 131);
2. *Holds* unanimously that the matters complained of are within the “jurisdiction” of Georgia within the meaning of Article 1 of the Convention and that only the responsibility of the Georgian State is engaged under the Convention (paragraph 150);
3. *Holds* unanimously that the complaint under Article 5 § 1 of the Convention regarding the applicant's detention from 1 October to 11 December 1999 is out of time (paragraph 161);
4. *Holds* unanimously that the complaint under Article 5 § 1 of the Convention regarding the applicant's detention from 11 December 1999 to 29 January 2001 falls outside the scope of the matters referred to it for examination (paragraph 162);
5. *Holds* unanimously that since 29 January 2001 the applicant has been held arbitrarily in breach of the provisions of Article 5 § 1 of the Convention (paragraph 176);
6. *Holds* unanimously that no separate examination of the issue of the applicant's place of detention is necessary under Article 5 § 1 of the Convention (paragraph 178);
7. *Holds* unanimously that the complaint under Article 3 of the Convention falls outside the scope of its examination (paragraph 178);
8. *Holds* by fourteen votes to three that there has been a violation of Article 6 § 1 of the Convention on account of the failure to comply with the judgment of 29 January 2001 (paragraph 184);

9. *Holds* by fourteen votes to three that no separate examination of the complaint concerning the failure to comply with the judgment of 29 January 2001 is necessary under Article 5 § 4 of the Convention (paragraph 187);
10. *Holds* unanimously that no separate examination of the complaint concerning the failure to comply with the judgment of 29 January 2001 is necessary under Article 13 of the Convention (paragraph 187);
11. *Holds* unanimously that the complaint under Article 5 § 3 of the Convention is out of time (paragraph 190);
12. *Holds* unanimously that there has been no violation of Article 10 § 1 of the Convention (paragraph 192);
13. *Holds* unanimously that it is unnecessary to consider the complaint under Article 2 of Protocol No. 4 (paragraph 194);
14. *Holds* unanimously
  - (a) that the respondent State must secure the applicant's release at the earliest possible date (paragraphs 202 and 203);
  - (b) that, in respect of all the damage sustained, the respondent State is to pay the applicant, within three months, EUR 150,000 (one hundred and fifty thousand euros) for the period of detention from 29 January 2001 to the date of this judgment, plus any amount payable by way of value-added tax, to be converted into Georgian laris at the rate applicable at the date of settlement (paragraph 201);
  - (c) that the respondent State is to pay the applicant, within three months, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any amount payable by way of value-added tax, to be converted into Georgian laris at the rate applicable at the date of settlement (paragraph 207);
  - (d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
15. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 April 2004.

Luzius WILDHABER  
President

Paul MAHONEY  
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Loucaides;
- (b) partly concurring opinion of Mr Costa;
- (c) joint partly dissenting opinion of Mr Costa, Sir Nicolas Bratza and Mrs Thomassen.

L.W.  
P.J.M.

## CONCURRING OPINION OF JUDGE LOUCAIDES

While agreeing with the approach of the majority in this case I would like to say a few words about the notion of “jurisdiction” within the meaning of Article 1 of the Convention. This issue is dealt with in paragraphs 137 and 138 of the judgment.

To my mind “jurisdiction” means actual authority, that is to say the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Party or outside that territory. Therefore, a High Contracting Party is accountable under the Convention to everyone directly affected by any exercise of authority by such Party in any part of the world. Such authority may take different forms and may be legal or illegal. The usual form is governmental authority within a High Contracting Party's own territory, but it may extend to authority in the form of overall control of another territory even though that control is illegal (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310), notably occupied territories (see *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV). It may also extend to authority in the form of the exercise of domination or effective influence through political, financial, military or other substantial support of a government of another State. And it may, in my opinion, take the form of any kind of military or other State action on the part of the High Contracting Party concerned in any part of the world (see, by way of contrast, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, cited in the judgment).

The test should always be whether the person who claims to be within the “jurisdiction” of a High Contracting Party to the Convention, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned. Any other interpretation excluding responsibility of a High Contracting Party for acts resulting from the exercise of its State authority would lead to the absurd proposition that the Convention lays down obligations to respect human rights only within the territory under the lawful or unlawful physical control of such Party and that outside that context, leaving aside certain exceptional circumstances (the existence of which would be decided on a case-by-case basis), the State Party concerned may act with impunity contrary to the standards of behaviour set out in the Convention. I believe that a reasonable interpretation of the provisions of the Convention in the light of its object must lead to the conclusion that the Convention provides a code of behaviour for all High Contracting Parties whenever they act in the exercise of their State authority with consequences for individuals.

## PARTLY CONCURRING OPINION OF JUDGE COSTA

(Translation)

1. I have decided to concur with my fellow judges' view that the operative provisions of the judgment should contain an indication to the Government of the respondent State that the applicant's release must be secured at the earliest possible date.

2. I would like briefly to explain the reservations I have had on this subject.

3. The Court's case-law in this sphere is well known. Since its judgment in *Marckx*<sup>1</sup>, the Court has regarded its decisions as being essentially *declaratory*, so that when it finds that there has been a violation of the Convention, it leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligations under Article 46<sup>2</sup>, which contains an undertaking by the States to abide by judgments of the Court.

4. The distinction between the choice of means and the obligation to achieve a specific result thus seeks to reconcile the principle of subsidiarity with the collective guarantee of the rights and freedoms protected by the Convention. Normally, it is for the Committee of Ministers of the Council of Europe, not the Court, to ensure compliance with the Court's judgments by supervising the general and individual measures taken by the respondent State to remedy the violation of the Convention. This, too, follows from Article 46.

5. There have already been cases in which the Court has limited the State's choice of means. In cases involving deprivation of property, it has stated in the operative provisions that the State *must* return the property to the applicant<sup>3</sup>. It is true that it has not viewed that obligation as being totally mandatory, as it stipulates in the judgments that "failing such restitution ..." the State must pay certain sums to the applicant. In other words, *restitutio in integrum* is only compulsory in cases of this type to the extent that it is feasible (such a proviso being necessary, *inter alia*, to protect the rights of third parties acting in good faith).

6. In any event, while an order by the Court requiring a State to achieve a specific result offers the advantage of simplifying the Committee of Ministers' task, it also complicates it in some ways. Under the system that operated before Protocol No. 11 came into force, in cases in which, instead

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1. *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58.

2. Former Article 53 of the Convention.

3. See *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, ECHR 2001-I.

of being responsible for supervising the execution of a Court judgment<sup>1</sup>, the Committee of Ministers had itself decided that there had been a violation of the Convention<sup>2</sup>, the States undertook to treat any decision of the Committee of Ministers as *binding*<sup>3</sup>. Under the current system, that State obligation to the Committee of Ministers has, at least on the face of it, disappeared, although that does not prevent the Committee of Ministers, when supervising the execution of a judgment in accordance with Article 46 § 2 as now worded, from relying on paragraph 1 of that Article, which provides: “The [States] undertake to abide by the final judgment of the Court in any case to which they are parties.”

7. The more specific the wording of the judgment, the easier the Committee of Ministers' task of supervising the execution of measures imposed on the States becomes from the legal perspective. However, that is not necessarily true of the political aspects, since, if it has no choice as to the measures to be implemented, the respondent State will be left with only one alternative: either to comply with the Court's order (in which case all will be well), or to run the risk of blocking the situation.

8. The present case thus gave considerable pause for thought. The continued detention, without any legal basis, of a person acquitted in a final judgment nearly three years ago, constitutes a flagrant denial of justice to which the Court had to respond with exemplary firmness, but, equally, the practical difficulties of enforcing the judgment called for caution. Although the authorities of the Autonomous Republic of Ajaria have yet to release the applicant, this has not been for want of action on the part of the central government authorities<sup>4</sup>, who have repeatedly called for and sought to obtain his release from prison. Paragraphs 59 to 71 of the judgment are sufficiently clear on this point. The question that arises, therefore, is whether the Court should have waited for a more suitable opportunity to take this step forward in its case-law. Similarly, is there not a risk that the Committee of Ministers will find itself faced with a situation which, albeit straightforward legally, is highly complex in practice?

9. I have pondered each of these objections. Two series of considerations have been instrumental in my rejecting them. As regards principle, which is the most important factor, it would have been illogical and even immoral to leave Georgia with a choice of (legal) means, when the sole method of bringing arbitrary detention to an end is to release the prisoner. From the factual standpoint, at a time when relations between the respondent State and its decentralised entity have changed considerably and

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1. Under former Article 54 of the Convention.

2. As it had power to do under former Article 32.

3. In accordance with paragraph 4 of that provision.

4. Who are rightly held solely responsible for the breach of the Convention in the present judgment (see paragraph 150).



are still evolving, the wording adopted by the Court in its judgment ought to help put a stop to what is a glaring injustice that has gone on for far too long, especially as Georgia will remain responsible for a continuing violation of Article 5 § 1 of the Convention until such time as Mr Assanidze is released.

10. In any event, it is my hope that this judgment will be followed by the applicant's release as soon as possible. I would also note that the Court has taken what to my mind represents a welcome and logical step forward from the aforementioned restitution of property cases, as, rather than deciding that Georgia must pay the applicant compensation if it fails to secure his release, it has ruled that the payment obligation is additional to and does not in any way lessen the obligation to secure his release.

JOINT PARTLY DISSENTING OPINION  
OF JUDGES COSTA, Sir Nicolas BRATZA  
AND THOMASSEN

We are in complete agreement with the conclusion and reasoning of the majority of the Court save as to the finding that the failure to comply with the judgment acquitting the applicant infringed Article 6 § 1 of the Convention and that, in consequence, no separate examination of the complaint under Article 5 § 4 was called for. In our view, the conclusion should have been reversed and a violation of Article 5 § 4 found, without the necessity of examining the case separately under Article 6.

The essence of the applicant's claim under the Convention is that, notwithstanding his acquittal on all the charges against him by a final judgment of the Supreme Court of Georgia, he has continued to be detained in violation of domestic law and without any lawful basis since 29 January 2001. This has quite correctly resulted in the Court's finding that the applicant has been arbitrarily detained since that date, in breach of the provisions of Article 5 § 1.

In holding that the refusal to comply with the judgment of the Supreme Court acquitting the applicant additionally violated Article 6 of the Convention, the majority of the Court have adapted and applied the principle first expounded in *Hornsby v. Greece* (judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II) to the effect that the "right to a court" of which the right of access constitutes one aspect, would be illusory if a State's domestic legal system allowed a final, binding decision to remain inoperative to the detriment of one party. As the Court went on to observe in its judgment in that case, it would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions.

However, *Hornsby*, and subsequent decisions of the Court applying the principles there stated, involved civil rather than criminal proceedings. We are not persuaded that the reasoning of the Court – with its references to access to a court, to the execution of judgments and to the necessary measures to comply with a final, enforceable judgment (see paragraphs 40-45 of *Hornsby*) – can be easily transposed to the case of a defendant in criminal proceedings. This is the more so where, as in the present case, a defendant is acquitted by a final judgment of a court, where in general there is nothing for the national authorities to execute and where no measures are necessary to comply with the judgment. Further, the Court's reliance in *Hornsby* on the fact that the procedural guarantees under Article 6 would otherwise be illusory has much less force in the case of the acquittal of a defendant, having regard to the well-established case-law of the Convention

organs that an applicant who is acquitted cannot in any event claim to be a victim of a violation of such procedural guarantees.

Moreover, since the failure of the national authorities to comply with the judgment of the Supreme Court is at the heart of the Court's finding of a breach of Article 5 – to which as the *lex specialis* in the sphere of liberty and security of person the case more naturally belongs – we see no necessity in any event for a separate and additional finding under Article 6 directed specifically to the failure of compliance itself.

On the other hand, we consider that there is a separate and distinct problem under Article 5 § 4, which confers on a person deprived of his liberty the right to take proceedings by which the lawfulness of his detention shall be decided speedily and his release ordered if the detention is not lawful. It is an inherent requirement of this provision that the national authorities should promptly comply with any such order for release. The Government argue that the applicant has at all times been able to challenge the lawfulness and merits of his detention before the domestic courts. While this may be formally the case, the submission wholly ignores the reality that such an application would have been fruitless. In the present case, the Supreme Court did not confine itself to quashing the applicant's conviction and dismissing the criminal proceedings against him. It went further by ordering his immediate release. While the order for release was made at the end of the criminal proceedings against the applicant and not in a separate challenge to the lawfulness of his continued detention, the fact that for a period of over three years the authorities have consistently refused to respect or give effect to the order of the Supreme Court of Georgia is the clearest evidence of the ineffectiveness of the remedy in the case of the present applicant and of a violation of the State's obligations under Article 5 § 4 of the Convention.