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ACCORDING TO THE ECHR REGIME: PUTATIVE  
ASBESTOS CASE**

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REGIME: PUTATIVE ASBESTOS CASE**

Law Students at Università Bocconi

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*1. Introduction.*

Article 2 of the ECHR protects the right to life. This is a non-derogable right, which implicates several provisions, obligations, tests and procedures to actualize the aim of the article. The right to life article is enshrined in the ECHR with the objective of making its implementation practical and achievable, with corresponding duties that are incumbent on the State, clearly delineated. This paper proceeds by establishing the facts of the case and issues instantiated via the proceedings. The focus pivots on showing that it is the Court's overarching view that procedural obstacles circumventing the realization of the aims of Article 2, are to be mitigated where possible. While this inquiry explores historical cases in the investigation of the interactions of the implicated rules underscoring the operation and application of the ECHR, the facts of this hypothetical case are fictitious.

*2. Facts.*

B worked at a privately-owned rubber factory from the mid-1960s until 2001 and during this time, he was exposed to asbestos. B subsequently died of asbestos related cancer on November 30, 2005. A criminal case was filed by the Turin Prosecutor's Office. In the filing, several directors and executives were charged with manslaughter.

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The first instance trial acquitted the defendants. The Turin Court of Appeals voided the first instance trial. However, it declared that the crime was extinguished due to a statute of limitations, which ran concurrently with the proceedings. The Italian Supreme Court of Cassation declared the appeal was ill-grounded and therefore, inadmissible given that statutes of limitations are treated as substantive matters in criminal law.

### 3. *Issues Raised.*

The central issues arising from these facts concern potential violations of the following Articles of the European Convention on Human Rights (ECHR):

- Article 2 (right to life)
  - Substantive positive obligation.
  - Procedural positive obligation.
- Article 6 (right to fair trial).
- Article 7 (no punishment without law).
- Article 13 (right to an effective remedy).

### 4. *Preliminary matters.*

#### 4.1 *Admissibility*

Victim status: Once the actual victim is deceased Article 34 ECHR (Individual applications) requires that the applicant be a victim of the violation of rights enshrined in the ECHR by one of the High Contracting Parties. Furthermore, Article 34 establishes that States must not impede the filing of an application or its submission.

#### 4.2 *Exhaustion of local remedies.*

In this case, since a decision given by The Italian Supreme Court of Cassation cannot be appealed, the requirement is fulfilled, given there has been an exhaustion of local remedies through domestic courts of national jurisdiction.

#### 4.3 *Ratione criteria.*

- *Ratione Personae*: the complaint is being brought against Italy. Italy is a Contracting State bound by the ECHR.
- *Ratione Materiae*: the claim arguably falls within the scope of the ECHR (Art. 1, 2, 6, 7, 13).
- *Ratione Temporis*: the circumstances giving rise to the complaint occurred after Italy became a member of the Council of Europe.
- *Ratione Loci*: the events giving rise to the complaint occurred in Italy.

### 5. *Potential violation of Article 2.*

Article 2 of the ECHR upholds the right to life. The text of the Article reads:

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1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purposes of quelling a riot or insurrection.

5.1. *Negative and positive ECHR obligations.*

The ECHR imposes a range of negative and positive obligations upon its Contracting States. Negative obligations require Contracting States to refrain from interfering with rights guaranteed by the ECHR.<sup>1</sup> Consequently, a negative obligation will be violated when a Contracting State prevents or limits the exercise of a guaranteed right through a positive action. In contrast, positive obligations require proactive intervention from Contracting States in order to secure ECHR rights. Violations in the context of positive obligations therefore, arise from the omissions or inadequate actions of a Contracting State.<sup>2</sup>

The potential for positive obligations to arise from the ECHR in addition to negative obligations first occurred in *X and Y v Netherlands* (1985) in the context of Article 8:<sup>3</sup>

[Although] the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

Subsequent case law has since recognised positive obligations arising from numerous other Articles in the ECHR. Increased recognition of positive obligations has been based on the proposition that to the extent a Contracting State has the power and ability to regulate all activities within its jurisdiction, its indirect responsibility can potentially be sought in all human rights violations.<sup>4</sup>

5.2. *Positive obligations in respect of Article 2.*

<sup>1</sup> Jean-Francois Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, 2007 at 11.

<sup>2</sup> *Ibid.*

<sup>3</sup> *X and Y v Netherlands*, no. 8978/80, § 23, ECHR 1985

<sup>4</sup> Dimitris Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry" (2007) Vol. 80 No. 03 Ger. Law J. 231 at 231.

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*L.C.B v UK* (1988) and *Osman v UK* (1988) were the first cases to recognise positive obligations arising from Article 2. In the particular context of unintentional killings arising from industrial activities, the ECtHR has recognised two forms of positive obligations.<sup>5</sup> The first is a substantive positive obligation on Contracting States to take appropriate steps to safeguard the lives of individuals involved in dangerous activities within their jurisdiction.<sup>6</sup> The second is a procedural positive obligation on Contracting States to ensure that an adequate response occurs when lives are lost in circumstances potentially engaging the Contracting State's responsibility.<sup>7</sup>

5.3 *Article 2's substantive positive obligation in the context of industry.*

5.3.1 *Subsidiary issues.*

Article 2 imposes a substantive positive obligation on Contracting States to prevent infringements of the right to life arising from dangerous activities. To determine whether a Contracting State has violated a substantive positive obligation under Article 2, Courts should determine the following:

- Whether Article 2 imposed a substantive positive obligation on the Contracting State in relation to the particular activity at the time of the alleged violation?
- If Article 2 imposed a substantive positive obligation, whether the Contracting State complied with its duty to take all necessary steps to safeguard the lives of those involved in the dangerous activity?

5.3.2 *Imposition of a substantive positive obligation?*

- Relevant law

Article 2's substantive positive obligation applies in "the context of any activity, whether public or [private], in which the right to life may be at stake".<sup>8</sup> This obligation indisputably applies in the context of dangerous activities.<sup>9</sup> Consequently, this obligation regularly arises in the context of industrial activities as they are inherently dangerous. Examples of industrial activities already recognised by the ECtHR as being dangerous include the operation of waste-collection sites,<sup>10</sup> deep sea saturation diving operations,<sup>11</sup> and working in environments which entail exposure to asbestos<sup>12</sup>.

<sup>5</sup> *Budayeva and Others v Russia*, nos. 15339/03, 11673/02, 15343/02, 20058/02, 21166/02, § 129, ECHR 2007.

<sup>6</sup> *Oneryildiz v Turkey*, no. 48939/99, § 71, ECHR 2004.

<sup>7</sup> *Oneryildiz v Turkey*, no. 48939/99, § 91, ECHR 2004.

<sup>8</sup> *Oneryildiz v Turkey*, no. 48939/99, § 71, ECHR 2004.

<sup>9</sup> *Oneryildiz v Turkey*, no. 48939/99, § 90, ECHR 2004.

<sup>10</sup> *Oneryildiz v Turkey*, no. 48939/99, ECHR 2004.

<sup>11</sup> *Vilnes and Others v Norway*, nos. 52806/09, 22703/10, ECHR 2014.

<sup>12</sup> *Brincat and Others v Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, ECHR 2014.

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The assertion of a breach to the right to life is not restricted by the source of the dangerous activity complained of.<sup>13</sup> For example, in *L.C.B v UK*, the state-sponsorship of the industrial activity complained of (nuclear testing), did not impact the Court's reasoning. Instead, the Courts have concluded that the focus is on the failure of States to regulate operational and safety standards for a given industry (be it public or private) and supervise and enforce their implementation.<sup>14</sup> Consequently, States can be held liable for this failure even when a non-state actor was directly factually responsible for the activity resulting in death or an immediate danger of death.

Whether Article 2 imposed an obligation on the Contracting State at the time of the alleged violation will depend on whether the Contracting State knew or ought to have known of the danger involved in the activity.<sup>15</sup>

- Application

Based on the circumstances of the present case, it is likely that the Court would conclude that Article 2 imposed a substantive positive obligation on the Italian State, sometime between 1965 and 2001, in relation to prolonged workplace asbestos exposure. This conclusion is based on the fact prolonged exposure to asbestos during work is a dangerous activity, and the Italian State either knew or should have known of the dangers arising from asbestos exposure sometime during this period.

In *Brincat*, prolonged exposure to asbestos during work at a government run shipyard was considered a sufficiently dangerous activity in which the right to life could be at stake.<sup>16</sup> Similar reasoning would suggest prolonged exposure to asbestos at a rubber factory (either publicly or privately owned to account for the assignment's factual variation) would also constitute a sufficiently dangerous activity.

*Brincat* can also be relied upon to support the conclusion that the Italian State either knew or should have known of the dangers arising from prolonged asbestos exposure. In *Brincat*, it was concluded based on objective scientific research published from the 1930s onwards (which became increasingly prevalent), that the Maltese government knew or ought to have known of the dangers arising from asbestos by at least the early 1970s.<sup>17</sup> Italian research of asbestos health risks dates back as early as 1910, and became prominent from the 1940s onwards.<sup>18</sup> Consequently, it is highly likely that the ECtHR would conclude that the Italian State was aware of asbestos related dangers around the time Mr B was working at the rubber factory. Even if the Italian State was given the benefit of the doubt and concluded to have known around the early 1970s, this would still cover the majority of the time Mr B was working.

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<sup>13</sup> Dimitris Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry" (2007) Vol. 80 No. 03 Ger. Law J. 231 at 237.

<sup>14</sup> Dimitris Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry" (2007) Vol. 80 No. 03 Ger. Law J. 231 at 237.

<sup>15</sup> *Brincat and Others v Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, § 105, ECHR 2014.

<sup>16</sup> *Brincat and Others v Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, § 81, ECHR 2014.

<sup>17</sup> *Brincat and Others v Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, § 106, ECHR 2014.

<sup>18</sup> Daniela Marsili and others, "Asbestos Ban in Italy: A Major Milestone, Not the Final Cut" (2017) Vol. 14, 1379 Int. J. Environ. Res. Public Health at 2.

### 5.3.3 Compliance with the substantive positive obligation.

- Relevant law

In this context, the primary substantive positive obligation on the Contracting State is an obligation to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.<sup>19</sup> With dangerous activities, special emphasis must be placed on regulations geared towards the special features of the activity and the potential risk to human life involved. In contrast to the approach taken in *Osman*, the protection of life in the context of industry operates within a non-emergency framework where positive measures are required well before the risk becomes “immediate”.<sup>20</sup>

A Contracting State’s non-emergency framework should comprise regulations which “govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the activity’s inherent risks”.<sup>21</sup> However, it is possible that in certain specific circumstances, substantive positive obligations may also be fulfilled in practice despite an absence of relevant legal provisions.<sup>22</sup>

In determining compliance and the extent of the Contracting State’s positive obligation, the ECtHR must consider the adequacy of the positive measures taken by the Contracting State rather than simply substitute its own view on what the best policy would have been without consideration of priorities and resources.<sup>23</sup> The measures taken by the Contracting State should be considered as a whole in order to determine whether they are adequate. Contracting States are provided a wide margin of appreciation as to the choice of positive measures.<sup>24</sup> This ensures that an impossible or disproportionate burden is not imposed upon them.

Potential practical and institutional measures include:

- Informing the local population, including providing workers with specific information about the risks to health and safety they are facing.
- Taking precautionary measures, such as requiring employers to periodically test work environments to ensure toxic fibres in the atmosphere are not present in quantities which could hinder health and endanger life in the long term.
- Taking emergency measures, such as closing the specific factory if the State became aware of an immediate risk to life.
- Application

<sup>19</sup> *Oneryildiz v Turkey*, no. 48939/99, § 89, ECHR 2004.

<sup>20</sup> Dimitris Xenos, “Asserting the Right to Life (Article 2, ECHR) in the Context of Industry” (2007) Vol. 80 No. 03 Ger. Law J. 231 at 241.

<sup>21</sup> *Oneryildiz v Turkey*, no. 48939/99, § 90, ECHR 2004.

<sup>22</sup> *Brincat and Others v Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, § 112, ECHR 2014

<sup>23</sup> *Oneryildiz v Turkey*, no. 48939/99, § 107, ECHR 2004.

<sup>24</sup> *Oneryildiz v Turkey*, no. 48939/99, § 107, ECHR 2004.

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Assuming a substantive positive obligation is imposed, it is unlikely that the ECtHR would conclude that the Italian State has complied with its duty to take all necessary steps to safeguard the lives of workers exposed to asbestos between 1970 and 2001 (the period of Mr B's employment). This conclusion is based on the fact that Italy's legislative and administrative framework with regard to asbestos was limited prior to changes made in 1992.

In compliance with European Union directives, Italy passed Law 257/92 in 1992 banning asbestos.<sup>25</sup> The law prohibited the extraction, import, export, marketing and production of asbestos or asbestos containing products. It includes:

- A consistent set of definitions and aims, criteria and methods for analytical controls;
- Guidelines for governmental activities;
- Procedures for managing waste containing asbestos;
- Plans for environmental clean-up; and
- Social security intervention to support former asbestos workers.
- A number of asbestos polices were also implemented following the ban including:
  - Public policies for asbestos substitutes.
  - The implementation of national surveillance systems relating to those exposed to asbestos.
  - On-going surveillance for those working to remove asbestos.

Consequently, it is likely that the Italian State has fulfilled its substantive positive obligation from 1992 onwards. However, measures taken prior to 1992 concerning asbestos exposure were limited. Given the Italian State's knowledge of the inherent dangers arising from prolonged exposure to asbestos from the early 1970s, it is likely they failed to meet their substantive positive obligation and therefore violated Article 2. This reasoning is largely the same regardless of the public-private distinction.

### *5.4 Article 2's procedural positive obligation in the context of industry.*

Having earlier considered the substantive element of the positive obligations of Article 2, we will now consider the procedural aspect of the horizontal obligations of the state, which considers the State's active role in ensuring that all that is necessary is done to protect life. However, once life is lost, the procedural element is triggered which involves the responsibility of the State to conduct a thorough investigation to uncover the causes of the failure of the State to protect life. Consistent with the non-derogability of the right to life is an absolute duty of the State to protect life through its actions. In *McCann and Others v. United Kingdom*, a thorough investigation revealed that the killing of suspected terrorists by a trained special forces unit of the British Army, Special Air Service (SAS), had not been 'absolutely necessary' and was done in error, based on false intelligence. Another inquest showed that the explosive device was of a ticking time-bomb type, and not of a type remotely controlled for detonation by the terrorist suspects who were killed.

<sup>25</sup> Daniela Marsili and others, "Asbestos Ban in Italy: A Major Milestone, Not the Final Cut" (2017) Vol. 14, 1379 Int. J. Environ. Res. Public Health at 3.

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While this example is not exactly analogous to our asbestos case, the significance of conducting a thorough investigation is aptly demonstrated in this example. Furthermore, following revelation of the State's culpability in its failure to protect life in the McCann case, the Court was able to also craft an appropriate remedy to compensate the plaintiffs, who were the family of the decedents. Having found an Article 2 violation had occurred in the State's failure to take operational preventive measures that would have protected the lives of the deceased, the Court held unanimously that the United Kingdom should pay the applicants, within three months, £38,700 for costs and expenses incurred in the Strasbourg proceedings, less 37,731 French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the judgment.

Thus, the procedural aspect invokes the need for proportionality in devising an appropriate penalty, considering the aims of criminal punishment are to serve as a deterrent; to rehabilitate the criminal; to reinforce societal values; and to neutralize the danger or harm done. But none of these aims of the criminal penalty to be meted out would directly benefit the victims of the crime (the decedent is gone and the families bringing a complaint are yet to be redressed for the loss). Therefore, it is pertinent to consider if an alternative civil or administrative process and remedy may be achieved instead of a costly and lengthy criminal process.

In a similar asbestos case, *Moor v. Switzerland*, in which a statute of limitations posed an obstacle to gaining redress for the victims' loss, the court awarded 12,000 euros as Article 41 just satisfaction, for what it deemed pain and suffering, experienced by the plaintiffs in the lengthy proceedings. The award by the Court for a psychological harm manifested in pain and suffering invokes the case of *Ebcin v. Turkey* where Article 8 was implicated via a harm to the physical and psychological integrity of the complainant. Consequently, this was subsumed under Article 3's invocation of freedom from inhuman and degrading treatment.

The *Ebcin* case involved a teacher who had suffered physical and psychological maladies from an acid attack by terrorists. Significantly, in the Court's award of 30,000 euros as just compensation for non-pecuniary damages and 2,500 euros for costs and expenses, the Court faulted the lengthy proceedings and sanctioned the lack of diligence in effective investigation of the Article 3 and Article 8 violation. Thus, the Court fashioned its monetary award in consideration of the shortcomings in the investigative process and proceedings.

The element to refrain from causing an individual physical and psychological harms inherent in Article 8, may be viewed as imposing a positive obligation as well as a negative obligation on the state in securing the welfare of the individual. In *Moor v. Switzerland*, the ECtHR awarded the plaintiff 12,000 euros for the pain and suffering endured because of the lengthy legal proceedings, to obtain redress as well as overcome the statute of limitations barring their ability to get a fair trial and speculating on their rights.

In *Oneriyildiz v. Turkey*, the Court opined that the status of the offending party as a non-state actor or not, did not mitigate the obligations of the state. Arguably, the independence and capacity of the state to regulate and supervise a harmful activity under the positive obligation to protect life should have been enhanced, where the potential offending party is a non-state actor, as it is in our asbestos case. Any potential

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for laxity or conflict of interest in the cause of supervising the dangerous activity or conducting an investigation following a failure to protect life, is removed. In *Oneryildiz*, it was found that public or not, the state's responsibility is not mitigated when there is a life at stake, and a fortiori in the case of industrial activities, which by their very nature are known to be dangerous.

The *Oneryildiz* case involved the methane explosion that occurred at a rubbish tip, where the plaintiffs' relatives lost their lives. In our case, it was already known that certain unprotected exposure to asbestos was a danger to life, given the extant legislation instigated by the massive industrial use of asbestos and its widespread victims. However, the state failed to do all that was necessary to protect the victim's life. An investigation is necessary to determine the level of the state's culpability, and what could have been done to prevent the loss of life. Furthermore, findings will serve as a deterrent for future dereliction. A proper investigation should keep the victim's family well-informed and updated and should maintain full disclosure underscored by the family's right to know the details surrounding the death of their loved one.

While national jurisdictions are competent to decide issues raised in this case and, considering the procedural hurdles such as the issue of statute of limitations instigated to the extent that it effectively precludes the victim's access to a court, and consequently an effective remedy in accordance to ECHR, the Court can opine on the matters of contention in this case. Although the Court has often exercised judicial self-restraint on controversial matters such as abortion and left such cases within the purview of national jurisdiction to decide, cases dealing with asbestos deaths arising from lapses in state obligations, are widespread and not controversial. In a similar asbestos death case, *Moor v. Switzerland*, the Court was able to rule decisively and provide direction as regards the effect of time-bars, which effectively defeat the purpose of Article 2.

In summary, several articles are implicated and filed in conjunction with the application to the Court raising a violation of ECHR. They include Article 1, which is euphemistically called the right to dignity article or obligation to respect human life within the jurisdiction under the control of the contracting parties. Referencing cases we have analysed, such as *Oneryildiz v. Turkey* and *Ebcin v. Turkey*, this article is not analysed by the Court separately but in conjunction with other substantive articles in consideration, such as Article 2 and 3. As discussed earlier Article 8 is implicated in consideration of the pain and suffering experienced in the inordinately lengthy proceedings, and the infringement on the psychological integrity of the applicants as a result. As noted, there was an award of 12,000 euros by the Court, for pain and suffering in the near analogous case of *Moor v. Switzerland*. Finally, Articles 6, 7 and 13, will be discussed shortly in this paper.

#### 6. *Potential violation of Article 6.*

Article 6 of the European Convention on Human Rights guarantees the right to a fair trial. The scope of its provision is two-fold: there is a civil and a criminal limb. Those notions are subject to an autonomous interpretation by the Court. The Court, over the years, has been constantly extending the scope of Article 6, with the clear purpose of extending as far as possible this scope to increase protection and the number

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safeguards in judicial proceedings.<sup>26</sup> However, some proceedings are still excluded from the scope of Article 6, such as tax and deportation proceedings.<sup>2</sup>

Article 6 lists several requirements that have to be met in order to ensure a right to a fair trial. However, it is important to emphasize that this list is not exhaustive: there are also implicit requirements under Article 6 that were developed by the case law. For example, even if it is not specifically mentioned in the article, it is recognized that anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself.<sup>27</sup>

Statute of limitations can be an obstacle to the exercise of enshrined rights in Article 6, as it leads to the extinguishment of the public action and thus makes any pursuit of redress or fair trial impossible. Modalities attached to it, such as suspension and interruption, can also have a big impact on the right to a fair trial.

6.1 *Statutes of limitations as an obstacle per se.*

Statutes of limitations have the direct effect of excluding the judicial resolution of certain grievances that may be completely justified in substance. But, Article 6 is not an absolute prohibition and lends itself to limitations, provided that such limitations do not restrict access to a person in such manner that his or her right to a court is impaired in its very substance. In addition, these limitations must pursue a legitimate aim and a reasonable relationship of proportionality between the means employed and the intended purpose.

Among these legitimate restrictions, we find in statutes of limitations, which also serve several important purposes such as ensuring legal certainty and finality, protecting potential defendants from old claims which might be difficult to counter, and preventing unfairness to the defendant and the injustice, which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence that may have become unreliable and incomplete because of the effluxion of time.

There is especially one situation in which statutes of limitations can be very problematic: when the applicant suffers from a disease that can only be diagnosed long after the fact. In those cases, the action is often extinguished by existing statutes of limitations, leaving the applicant with no remedy. The case law of the ECHR is very interesting in that context has evolved a lot during the years.

In *Stubbings e.a. v. United Kingdom*, the Court was very reluctant to intervene and recognized that member states enjoy a wide margin of appreciation in determining the rules on limitations, being content to observe that “the time-limit in question was not unduly short”<sup>28</sup>. Then, in two cases<sup>29</sup>, the Court takes a frank position, stating that

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<sup>26</sup> For example: disciplinary proceedings: offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months (*Engel and Others v. the Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, § 85, 8 June 1976).

<sup>27</sup> *Funke v. France*, no. 10828/84, §44, 25 February 1993.

<sup>28</sup> *Stubbings and Others v. The United Kingdom*, no. 22083/93; 22095/93, §35, 22 October 1996.

<sup>29</sup> *Sabri Günes v. Turkey*, no. 27396/06, 29 June 2012; *Esim v. Turkey*, no. 59601/09, 17 September 2013.

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everyone should have the opportunity to take legal action after they become aware of the damage they have suffered.

This finding was reiterated in the case of *Howald Moore v. Switzerland*<sup>30</sup>, which is very close to the situation of Mr. B. Indeed, both applicants died from a disease related to asbestos and both relatives filed an action that was rejected as being out of time, by reason of statute of limitations. However, we must note that the core of the problem was not the same in the two cases: in *Howald Moore*, the disease only emerged long after the exposure period and the action was already proscribed at the time when the disease was diagnosed, while in the case of Mr. B, the proscription was not yet in effect at the time of the introduction of the action. But the length of the proceedings and the fact that the Italian law doesn't provide for the suspension of statutes of limitations when there's an action under prosecution, precluded the relatives of Mr. B from any remedy. In other words, the problem in Mr. B. was not the strict application of the delay of proscription but rather the non-suspension of the delay during the trial.

6.2 *Non-suspension of statutes of limitations.*

The problem of Mr. B results from the combination of two elements: the length of proceedings of Italian courts and the fact that the Italian legislation doesn't provide that the statute of limitations be suspended or interrupted when there's an ongoing prosecution.

6.2.1 *Length of proceedings.*

The length of proceedings is an issue in Italy: It has the unenviable record of the highest number of violations of the "reasonable time" requirement enshrined in Article 6. A very large percentage of the cases coming to the Court from Italy have traditionally concerned complaints about judicial proceedings at the domestic level that took too long and for which no remedy existed<sup>31</sup>.

After numerous instances in which the Court found violations, Italy introduced in 2001 the so-called "Pinto law" whose essential aim is to decrease the number of requests to the Strasbourg's Court and therefore its workload. This law provides for the possibility for any party to a judicial, administrative and even fiscal proceeding to complain about the length of the process and to obtain pecuniary compensation via a national judge. The claim for compensation must be lodged either during the course of the proceedings, whose duration is contested or within 6 months from the date the decision becomes *res judicata*.

The Court considers the Pinto Act as being accessible and in principle effective to internally denounce, the slowness of justice<sup>32</sup>. Moreover the number of Italian

<sup>30</sup> *Howard Moor and Others v Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014.

<sup>31</sup> See for example: *Ceteroni v. Italy*, no. 22465 and 22461/93, 15 November 1996; *Bottazzi v. Italy*, no. 34884/97, 28 July 1999.

<sup>32</sup> *Brusco v. Italy*, no 69789/01, ECHR 2001-IX; *Pacifico v. Italy*, no 17995/08, § 67, November 2012.

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applications has fallen drastically since the implementation of the Pinto Act<sup>33</sup>. Nevertheless, the effectiveness of the new legislation has been challenged several times before the European Court of Human Rights (ECtHR). Particularly, in the Scordino<sup>34</sup> judgment and eight other judgments delivered on the same day<sup>35</sup>, the Court had to consider whether this domestic remedy might be held to provide appropriate and sufficient redress for the violation of the right to have a hearing within a reasonable time.

The Court held that the delay in receiving the compensation was excessive delay in the process and that the amounts awarded by the Italian authorities were too low. These two considerations made the remedy ineffective, inappropriate, and insufficient, resulting in a violation of Article 6§1. The Court held that it was “unacceptable” that the applicants had to wait for periods ranging between eleven months and over three years, and sometimes even bring execution proceedings before receiving the compensation awarded to them. The Court also adds that “*the length of proceedings in Italy continues to be excessive*”<sup>36</sup> and even if the Pinto Act saved the Court from having to rule in those proceedings, “*the task has simply been transferred to the courts of appeal, which were already overburdened themselves*”<sup>37</sup>.

In the case of Mr. B, the entire proceeding took thirteen years. Article 6 ensures that the proceedings take place within a reasonable time. It covers the whole proceedings, including appeal proceedings. However, Mr. B’s relatives couldn’t challenge the length of proceedings before the Court, because there’s a need to exhaust domestic remedies before applying to the Court<sup>38</sup>. They should first follow the Pinto procedure.

### 6.2.2 Suspension of statutes of limitations.

The Italian legislation doesn’t provide that statutes of limitations are suspended or interrupted when there’s a legal action being prosecuted. In 2017, Article 159 of the *Codice Penale* introduced two new hypotheses of suspension of the delay of extinguishment with the aim of avoiding extinction of criminal proceedings solely because of the time that passes through several degrees of jurisdiction. However, nothing changes in case of acquittal of the defendant as in the case for Mr. B: the time to obsolescence inherent in a statute of limitation continues to run during the appeal, without interruption or suspension. Consequently, the statute of limitations keeps running and because of the length of proceedings in Italy, most of the crimes will be time-barred by the time the process is over.

There’s nothing in the ECHR’s case law relating to this specificity of this problem. Only the ECJ has raised this issue in the *Taricco* case and ruled that a legislation as such is “liable to have an adverse effect on fulfilment of the Member States’ obligations

<sup>33</sup> [https://www.echr.coe.int/Documents/Pub\\_coe\\_Domestics\\_remedies\\_2006\\_ENG.pdf](https://www.echr.coe.int/Documents/Pub_coe_Domestics_remedies_2006_ENG.pdf)

<sup>34</sup> Scordino v. Italy no. 36813/97, 29 March 2006.

<sup>35</sup> Riccardi Pizzati c. Italy, Musci c. Italy, Giuseppe Mostacciuolo c. Italy (no1), Giuseppe Mostacciuolo c. Italy (no2), Cocchiarella c. Italy, Apicella c. Italy, Ernestina Zullo c. Italy and Giuseppina et Orestina Procaccini c. Italy, 29 March 2006.

<sup>36</sup> Scordino v. Italy no. 36813/97, §222, 29 March 2006

<sup>37</sup> *Ibid.*

<sup>38</sup> Saba v. Italy, no 36629/10, §100-103, 1 October 2014.

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under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases”<sup>39</sup>.

6.3 *Conclusions on Article 6*

The Court would probably conclude that the combined effect of the two elements leads to a violation of Article 6§1, relating to access to a court and fair trial.

7. *Potential violation of Article 7.*

The issue at stake spots a problem regarding the statute of limitation and the effectiveness of criminal law. In the case considered, a more severe law which doubles the statute of limitation period is approved subsequent to the commission of the crime, while the process is ongoing. To state whether the application of this law could constitute a breach of the rubber factory owners’ rights under ECHR, an analysis of the case in light of the principle of non-retroactivity of criminal law should be conducted, starting from an investigation of the normative grounds from which it derives.

7.1 *Normative grounds.*

The legality principle constitutes a pillar of all modern legal systems. The essence of non-retroactivity implies that a law’s effect does not extend to past affairs and cannot pass judgment on events which occurred prior to its implementation. Instead, a law only applies to events that occur after its implementation. Thus, the date of implementation is a decisive factor in determining a law’s applicability.

The ECHR clearly states in Article 7, paragraph 1, the *nullum crimen, nulla poena, sine lege* principle, saying that ‘*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed*’.<sup>40</sup> This principle is also enshrined in the European Charter of Fundamental Rights, which in its Article 49 states that no punishment can be imposed in absence of a law in force at the time of the commission of the crime.<sup>41</sup>

Shifting our attention to domestic provisions, it must be highlighted that the principle of legality has a long tradition in Italian legal system. The importance of the principle at stake has its roots in Cesare Beccaria’s work ‘*On Crimes and Punishments*’, a milestone of both Italian and European Enlightenment, which in one of its most peculiar parts, says that ‘*The laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents*

<sup>39</sup> Judgment of 8 September 2015, *Taricco*, C-105/14, §58.

<sup>40</sup> Art.7, para.1, ECHR

<sup>41</sup> Art. 49, para. 1, CFREU: ‘*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable.*’

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*the whole society united by the social compact. No magistrate then, (as he is one of the society) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws. But as a punishment, increased beyond the degree fixed by the law, is the just punishment with the addition of another, it follows that no magistrate, even under a pretense of zeal, or the public good, should increase the punishment already determined by the laws’.*

After World War II, this perspective has been widely supported by jurists and legal experts, being incorporated in the Italian Constitution itself, which in Article 25 states that ‘no punishment may be inflicted, except by virtue of a law in force at the time the offence was committed’.<sup>42</sup> Along the same lines as the Constitution, the principle was incorporated and stated in more detail inside the letter of Italian ordinary law, both procedural<sup>43</sup> and substantive<sup>44</sup>.

The ratio legis of the provisions analysed is to grant the respect of the ‘*nulla poena sine lege penali*’ and ‘*nulla poena sine lege certa*’ principles, to create a legal system where no penalty will be imposed without definite law. This provides that a penal statute must define the punishable conduct and the penalty with sufficient definiteness to allow citizens to foresee when a specific action would be punishable, and to conduct themselves accordingly. This is an expression of the general principle of legal certainty in matters of criminal law.

## 7.2 Scope of application.

Regarding the scope of application of the legality principle, it refers only to substantive law and not procedural law. The Court itself has specified that the rules on retroactivity established in Article 7 of the Convention only apply to the provisions defining the offences and the corresponding penalties. As it was found in the *Scoppola v. Italy* judgment of 2009 ‘the Court reiterates that the rules on retrospectiveness set out in Article 7 of the Convention apply only to provisions defining offences and the penalties for them; on the other hand, in other cases, the Court has held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws’.<sup>45</sup>

The question that should be answered to understand if the case could be decided according to the new law enacted several years after the commission of the crime, is whether the 2005 law extending the statute of limitations period can be classified under substantive or procedural law. The answer to this question differs according to the framework under which the issue is viewed, whether under a national or international one.

According to the facts, the appeal filed by Mr. B’s relatives before the Italian Supreme Court of Cassation, claims that the crime at issue cannot be considered

<sup>42</sup> Art. 25, para 2, Constitution of Italian Republic: ‘Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso’

<sup>43</sup> Art. 2, para 1, Italian Criminal Code: ‘Nessuno può essere punito per un fatto che, secondo la legge del tempo in cui fu commesso, non costituiva reato’

<sup>44</sup> Art. 11, para. 1, Preleggi : ‘La legge non dispone che per l’avvenire: essa non ha effetto retroattivo’

<sup>45</sup> *Scoppola v. Italy* (no. 2) [GC], § 110, no 10249/03, 17 September 2009

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extinguished because the law enacted in December 2005, provided for the doubling of the statute of limitations' term for certain crimes. This includes manslaughter arising from a violation of safety prescriptions in the workplace, which is declared inadmissible by the Supreme Court. The reason given by the Court is that the appeal is ill grounded, given that statute of limitations is considered under the purview of substantive criminal law as recognized in the Italian legal order.

While in the Italian tradition here is no doubt about how statutory limitation should be classified, the same could not be said in relation to the Court's perspective. To better understand this point, we will discuss two cases which were brought before the ECHR, *Coëme v. Belgium* and *Previti c. Italy*, where the Court held that Article 7 does not impede the immediate application to live proceedings of laws extending limitation periods. We will then analyse the critical points, particularly in view of the most recent jurisprudence of the CJEU on the matter.

### 7.2.1 *Coëme and Others v. Belgium*.

In *Coëme v. Belgium*, the facts involve criminal proceedings against Mr Javeauin in 1989, who was suspected of fraud and corruption between 1981 and 1989, when he ran the association "I", whose activities included carrying out market surveys and opinion polls. In 1994 the prosecution requested the Chamber of Representatives to lift Mr Coëme's parliamentary immunity, since he was implicated in some of that association's illegal activities while serving as minister. Pursuant to Article 103 of the Constitution on judicial proceedings against ministers, the Chamber of Representatives decided that Mr Coëme should be prosecuted before the Court of Cassation sitting as a full court, which under that article was the only court with jurisdiction to try a minister. The other applicants were dealt with under the same procedure, before the Court of Cassation, by virtue of the connected offences principle established in the Code of Criminal Investigation, although none of them was a minister. At the hearing before the Court of Cassation on 5 February 1996, it was announced that the procedure to be followed would be the ordinary criminal procedure. On 12 February 1996 via an interlocutory judgment, the Court of Cassation declared that the matter had been properly brought before it and that it had jurisdiction. In the same judgment the court stated that the rules governing ordinary criminal procedure would be applied only in so far as they were compatible with the provisions governing the procedure before the Court of Cassation sitting as a full court. The Court of Cassation also refused to request the Administrative Jurisdiction and Procedure Court to give a preliminary ruling on two questions submitted by two of the applicants, one concerning the connected offences principle taken from the Code of Criminal Investigation and applied to the instant proceedings and the other referring to the application to those proceedings of a new statute, the Law of 24 December 1993, which extended from three to five years the period after which prosecution for minor offences (*délits*) became time-barred. The Court of Cassation delivered its judgment on 5 April 1996, finding the applicants guilty and imposing various penalties.

In the present case the Court says that '*the extension of the limitation period brought about by the Law of 24 December 1993 and the immediate application of that statute by the Court of Cassation did, admittedly, prolong the period of time during*

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*which prosecutions could be brought in respect of the offences concerned, and they therefore detrimentally affected the applicants' situation, in particular by frustrating their expectations. However, this does not entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation'.<sup>46</sup>*

The applicants were convicted for acts in respect of which the prosecution never became time-barred. Those acts constituted offences when they were committed, and the penalties imposed were no heavier than those applicable at the material time. Nor had the applicants suffered, on account of the Law of 24 December 1993, greater harm than they would have faced at the time when the offences were committed.

7.2.2 *Previti v. Italy.*

In 1996 the public prosecutor of Milan brought proceedings against the applicant on a charge of bribery. Those proceedings were discontinued in 2000. The prosecution appealed. In 2005, Parliament enacted a law which, among other things, reduced the statutory limitation period for the offence of bribery from fifteen to eight years. As the date on which the offence in question was committed could be fixed at 1992, the charges would thus have become time-barred in 2000. However, under a transitional provision, the applicant was unable to benefit from the changes to the limitation period as his case was pending before the Court of Cassation at the time the new law entered into force. In 2007 the applicant was convicted on remittal of the case. His last appeal on points of law was dismissed.

In this case, the Court decides on the line of the above-mentioned decisions. As the Grand Chamber had confirmed in *Scoppola v. Italy (no. 2)*, it was reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws. In its *Coëme and Others v. Belgium* judgment, the Court had classified rules on limitation periods as procedural law, which did not define the offences or corresponding penalties and could be construed as merely laying down a prior condition for the examination of a case. Consequently, since the legislative amendment complained of by the applicant had concerned a procedural law, provided there was no arbitrariness, nothing in the Convention prevented the Italian legislature from regulating its application to proceedings that were pending at the time of its entry into force. The exception provided for by the transitional provision had been limited to pending appeal or cassation proceedings. The provision appeared neither unreasonable nor arbitrary. In those circumstances, no appearance of a violation of Article 7 of the Convention could be detected.<sup>47</sup>

7.2.3 *Critical points in light of the Taricco case.*

<sup>46</sup> *Coëme and others v. Belgium*, no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VII

<sup>47</sup> *Previti v. Italy (dec.)*, no. 1845/08, § 80-85, 12 February 2013

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Even if the position of the Court on the issue seems to be consistent in considering statute of limitations as a procedural matter, it must be mentioned that there are several conflicting concurring/dissenting opinions positing that “the principles of legal certainty, a fair trial and the resocialization of offenders sentenced to criminal penalties are not compatible with the prosecution and punishment of criminal offences without any limit of time. Thus, criminal offences should be prosecuted and punished within reasonable time-limits. (...) Hence, criminal penalties should be served within reasonable time-limits after a final sentence has been handed down. In both cases, time-limits must be commensurate with the seriousness of the offences in question”<sup>48</sup>The issue regarding the classification and definition of statute of limitation is a controversial one, in particular considering it in relation to the Italian perspective. Even if the European trend seems to consider statute of limitation as a procedural issue, in view of the recent dialogue between the CJEU and the Italian Constitutional Court, it must be highlighted that this classification is not universally accepted as true and cannot ignore the different views rooted in national traditions.

In the notorious ‘Taricco case’, Mr. Taricco and others had been charged with the offense of tax fraud for a conduct that took place from 2005 to 2009. When the criminal proceedings were still at the stage of the preliminary investigation, the referring judge had to determine whether there were sufficient grounds to bring the defendants to trial.

Under the Italian procedural law, the period for prosecuting carousel fraud is quite limited. According to the referring court, it was certain that all the offenses would be time-barred by 8 February 2018 at the latest, before a final judgment could be delivered. As a result, the defendants may enjoy *de facto* impunity.

In the view of the referring court, this scenario would be contrary to Italy’s obligations under EU law. According to the Court of Cuneo, this condition was created by Article 160 which “provides for the limitation period to be extended by only one quarter following interruption and, therefore, allows crimes to become time barred, resulting in impunity, even though criminal proceedings were brought in good time”. He therefore asked the CJEU to assess the compatibility of the provisions relating to the statute of limitation with Italy’s commitments under EU law, considering the obligation to protect the financial interest of the European Union.

The Court first found that in the light of ‘*the case-law of the European Court of Human Rights in relation to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which enshrines rights corresponding to those guaranteed by Article 49 of the Charter, support that conclusion. Thus, according to that case-law, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of that convention, since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation*’.<sup>49</sup>

The outcome by CJEU and the extremely hard and rigid position showed in the opinion rendered by the Advocate General Yves Bot suggested that the dialogue with

<sup>48</sup> Concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić in *Mocanu v. Romania* (2014)

<sup>49</sup> Judgment of 8 September 2015, *Taricco*, C-105/14, EU:C:2015:555, paragraph 54

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Italy would not have ended in a compromise, while Europe was oblivious to the threats of triggering the counter-limits doctrine by the Italian state. In the *Taricco II* Judgment, however, the Court actually recognized the nature of substantive law to statute of limitation within the Italian framework, ruling that *'Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.'*<sup>50</sup>

7.3 Conclusions on Article 7.

In view of the foregoing arguments, it may be debatable what the ECHR outcome would be in relation to the application of 2005 law to the case at stake. Depending on the approach it takes, the Court would find that applying the law affecting in peius the situation of the convicted subject is either not in breach of Article 7, considering the statute of limitation part of procedural law, or in violation of the principle of legality, considering it part of substantive law.

8. Potential violation of Article 13.

A further issue that emerges from Mr. B's case regards the alleged breach of Article 13, right to receive an effective remedy. This article of the Convention is deeply linked to Article 6, but as the Strasbourg Court specifies in the *Kudła v. Poland* judgment, it is important to consider it separately, since *'the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings.'*<sup>51</sup>

Given the convoluted effect caused in Italian legislation by the combined reaction of the running of statute of limitations concurrently with a pending trial and the unreasonable length of proceedings we find that *'the object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an*

<sup>50</sup> Judgment of 5 December 2017, *Taricco II*, C-42/17, EU:C:2017:936

<sup>51</sup> *Kudła v. Poland*, no. 30210/96, §152, 26 October 2000

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*individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority.*<sup>52</sup>

Particularly in a case where the right to life is threatened, it is even more fundamental that the State complies with its obligation to provide the existence of remedies which are effective in order to grant just satisfaction to the victim. In Mr. B's case, it goes without saying that this duty has not been respected by the Italian State, since ' *What is important is the impact which the State's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of State officials or bodies for acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation.*'<sup>53</sup>

9. Conclusion.

In summary, considering the issues we have analysed regarding the admissibility of our application for a hearing before the ECtHR, we believe that the Court will find that there has been a violation of our client's fundamental human rights especially underscored in articles 2, 6, 8, and 13. Therefore, the application will be deemed admissible by the Court.

**ABSTRACT:** The right to life article is enshrined in the ECHR with the objective of making its implementation practical and achievable, with corresponding duties that are incumbent on the State, clearly delineated. This paper proceeds by establishing the facts of the case and issues instantiated via the proceedings. The focus pivots on showing that it is the Court's overarching view that procedural obstacles circumventing the realization of the aims of Article 2, are to be mitigated where possible.

**KEYWORDS:** ECHR; Right to Life; Financial interests of the EU; Judicial dialogue; Statute of limitations; Taricco.

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<sup>52</sup> Ibidem

<sup>53</sup> *Öneryildiz v. Turkey*, no. 48939/99, § 148, 30 November 2004