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

GRAND CHAMBER

CASE OF JALLOH v. GERMANY

(Application no. 54810/00)

JUDGMENT

STRASBOURG

11 July 2006

In the case of Jalloh v. Germany,

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

Luzius Wildhaber, *President*,
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Georg Ress,
Giovanni Bonello,
Lucius Caflisch,
Ireneu Cabral Barreto,
Matti Pellonpää,
András Baka,
Rait Maruste,
Snejana Botoucharova,
Javier Borrego Borrego,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Khanlar Hajiyev,
Ján Šikuta, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 23 November 2005 and on 10 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 54810/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sierra Leonean national, Mr Abu Bakah Jalloh ("the applicant"), on 30 January 2000.

2. The applicant was represented by Mr U. Busch, a lawyer practising in Ratingen. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialdirigentin*.

3. The applicant alleged, in particular, that the forcible administration of emetics in order to obtain evidence of a drugs offence constituted inhuman and degrading treatment prohibited by Article 3 of the Convention. He further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 of the Convention.

4. The application was allocated to the Third Section of the Court. By a decision of 26 October 2004, it was declared partly admissible by a Chamber of that Section, composed of Ireneu Cabral Barreto, President, Georg Ress, Lucius Caflisch, Rıza Türmen, Boštjan M. Zupančič, Margarita Tsatsa-Nikolovska and Alvina Gyulumyan, judges, and Vincent Berger, Section Registrar.

5. On 1 February 2005 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Georg Ress, whose term of office expired on 31 October 2004, continued to sit in the case (Article 23 § 7 of the Convention and Rule 24 § 4). Jean-Paul Costa, Rıza Türmen and Margarita Tsatsa-Nikolovska, who were unable to take part in the hearing, were replaced by András Baka, Giovanni Bonello and Ján Šikuta (Rule 24 § 2 (a) and § 3). At the final deliberations, Snejana Botoucharova, substitute judge, replaced Ljiljana Mijović, who was unable to take part in the further consideration of the case (Rule 24 § 3).

7. The applicant and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs A. WITTLING-VOGEL, *Ministerialdirigentin*, *Agent*,
Mr H. BRÜCKNER, *Oberregierungsrat*,
Mrs C. KREIS, *Staatsanwältin*,
Mr J. KLAAS, *Oberstaatsanwalt*,
Mr K. PÜSCHEL, *Professor*
(Institut für Rechtsmedizin Hamburg),
Mr H. KÖRNER, *Oberstaatsanwalt*, *Advisers*;

(b) *for the applicant*
Mr U. BUSCH, *Rechtsanwalt*, *Counsel*,
Mr A. BUSCH, *Unternehmensberater*, *Adviser*.

The Court heard addresses by Mr A. Busch and Mrs Wittling-Vogel as well as their answers and the reply of Mr Püschel to questions put to them.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1965 and lives in Cologne (Germany).

10. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Investigation proceedings

11. On 29 October 1993 four plain-clothes policemen observed the applicant on at least two different occasions take a tiny plastic bag (a so-called "bubble") out of his mouth and hand it over to another person in exchange for money. Believing that these bags contained drugs, the police officers went to arrest the applicant, whereupon he swallowed another bubble he still had in his mouth.

12. The police officers did not find any drugs on the applicant. Since further delay might have frustrated the conduct of the investigation, the public prosecutor ordered that emetics (*Brechmittel*) be administered to the applicant by a doctor in order to provoke the regurgitation of the bag (*Exkorporation*).

13. The applicant was taken to a hospital in Wuppertal-Elberfeld. According to the Government, the doctor who was to administer the emetics questioned the applicant about his medical history (a procedure known as obtaining an anamnesis). This was disputed by the applicant, who claimed that he had not been questioned by a doctor. As the applicant refused to take the medication necessary to provoke vomiting, he was held down and immobilised by four police officers. The doctor then forcibly administered to him a salt solution and the emetic ipecacuanha syrup through a tube introduced into his stomach through the nose. In addition, the doctor injected him with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine. Approximately an hour and a half after being arrested and taken to the hospital, the applicant was examined by a doctor and declared fit for detention.

14. When visited by the police in his cell two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence.

15. Pursuant to an arrest warrant that had been issued by the Wuppertal District Court, the applicant was remanded in custody on 30 October 1993.

16. The applicant maintained that for three days following the treatment to which he was subjected he was only able to drink soup and that his nose repeatedly bled for two weeks because of wounds he had received when the

tube was inserted. This was disputed by the Government, who stressed that the applicant had failed to submit a medical report to prove his allegation.

17. Two and a half months after the administration of the emetics, the applicant underwent a gastroscopy in the prison hospital after complaining of continuous pain in the upper region of his stomach. He was diagnosed as suffering from irritation in the lower area of the oesophagus caused by the reflux of gastric acid. The medical report did not expressly associate this condition with the forced administration of the emetics.

18. The applicant was released from prison on 23 March 1994. He claimed that he had had to undergo further medical treatment for the stomach troubles he had suffered as a result of the forcible administration of the emetics. He did not submit any documents to confirm that he had received medical treatment. The Government, for their part, maintained that the applicant had not received any medical treatment.

B. Domestic court proceedings

19. In his submissions dated 20 December 1993 to the Wuppertal District Court, the applicant, who was represented by counsel throughout the proceedings, objected to the use at his trial of the evidence obtained through the administration of emetics, a method he considered to be illegal. By using force to provoke the regurgitation of the bubble of cocaine, the police officers and the doctor concerned were guilty of causing him bodily harm in the course of their duties (*Körperverletzung im Amt*). The administration of toxic substances was prohibited by Article 136a of the Code of Criminal Procedure (see paragraph 34 below). His bodily functions had been manipulated, since bodily activity had been provoked by suppressing the control reactions of the brain and the body. In any event, administering emetics was a disproportionate measure and therefore not authorised by Article 81a of the Code of Criminal Procedure (see paragraphs 33 and 35-40 below). It would have been possible to obtain evidence of the alleged offence by waiting for the bubble to pass through his system naturally. The applicant further argued that the only other method authorised by Article 81a of the Code of Criminal Procedure would have been irrigation of the stomach.

20. On 23 March 1994 the Wuppertal District Court convicted the applicant of drug trafficking and sentenced him to one year's imprisonment, suspended, and probation. It rejected the defence's argument that the administration of emetics under Article 81a of the Code of Criminal Procedure was a disproportionate means of recovering a bubble containing just 0.2 g of cocaine.

21. The applicant appealed against the judgment.

22. On 17 May 1995 the Wuppertal Regional Court upheld the applicant's conviction but reduced the length of the suspended prison

sentence to six months. It further ordered the forfeiture (*Verfall*) of 100 German marks that had been found on the applicant at the time of his arrest on the ground that it was the proceeds of sale of two drug bubbles.

23. The Regional Court found that the evidence obtained following the public prosecutor's order to provoke the regurgitation of the bubble of cocaine was admissible. The measure had been carried out because further delay might have frustrated the conduct of the investigation. Pursuant to Article 81a of the Code of Criminal Procedure, the administration of the substances in question, even if effected against the suspect's will, was legal. The procedure had been necessary to secure evidence of drug trafficking. It had been carried out by a doctor and in compliance with the rules of medical science. The defendant's health had not been put at risk and the principle of proportionality had been adhered to.

24. The applicant appealed against this judgment on points of law. He argued in particular that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics, as it did not permit the administration of life-threatening substances by dangerous methods. Furthermore, Article 81a prohibited measures such as the one in question that resulted in a suspect effectively being forced to contribute actively to his own conviction. He further submitted that the impugned measure had violated Articles 1 and 2 of the Basic Law (*Grundgesetz* – see paragraphs 31-32 below), and disregarded in particular the right to respect for human dignity.

25. On 19 September 1995 the Düsseldorf Court of Appeal dismissed the applicant's appeal. It found that the Regional Court's judgment did not contain any error of law that was detrimental to the accused.

26. The applicant lodged a complaint with the Federal Constitutional Court. He reiterated that the administration of emetics was a disproportionate measure under Article 81a of the Code of Criminal Procedure.

27. On 15 September 1999 the Federal Constitutional Court declared the applicant's constitutional complaint inadmissible under the principle of subsidiarity.

28. It considered that the administration of emetics, including apomorphine, a morphine derivative, raised serious constitutional issues with respect to the right to physical integrity (Article 2 § 2 of the Basic Law – see paragraph 32 below) and to the principle of proportionality which the criminal courts had not yet addressed.

29. The Federal Constitutional Court found that the applicant had not availed himself of all the remedies at his disposal (*alle prozessualen Möglichkeiten*) to contest the measure before the criminal courts in order to avoid any underestimation of the importance and scope of the fundamental right laid down in Article 2 § 2, first sentence, of the Basic Law (*um eine*

Verkennung von Bedeutung und Tragweite des Grundrechts des Art. 2 Abs. 2 Satz 1 GG zu verhindern).

30. It further stated that the administration of emetics did not give rise to any constitutional objections of principle either with respect to human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination guaranteed by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

II. RELEVANT DOMESTIC, COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

1. Domestic law and practice

(a) The Basic Law

31. Article 1 § 1 of the Basic Law reads as follows:

> "The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it."

32. Article 2, in so far as relevant, provides:

> "1. Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [*Sittengesetz*].
>
> 2. Every person shall have the right to life and physical integrity. ..."

(b) The Code of Criminal Procedure

33. Article 81a of the Code of Criminal Procedure, in so far as relevant, reads as follows:

> "1. A physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. To this end, blood samples may be taken and other bodily intrusions effected by a doctor in accordance with the rules of medical science for the purpose of examination without the accused's consent, provided that there is no risk of damage to his health.
>
> 2. Power to make such an order shall be vested in the judge and, in cases in which delay would jeopardise the success of the examination, in the public prosecutor's office and officials assisting it ..."

34. Article 136a of the Code of Criminal Procedure on prohibited methods of interrogation (*verbotene Vernehmungsmethoden*) provides:

> "1. The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.

2. Measures which impair the accused's memory or ability to understand and accept a given situation [*Einsichtsfähigkeit*] shall not be permitted.

3. The prohibition under sub-paragraphs 1 and 2 shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use."

35. German criminal courts and legal writers disagree as to whether Article 81a of the Code of Criminal Procedure authorises the administration of emetics to a suspected drug dealer who has swallowed drugs on arrest.

36. The view taken by the majority of the German courts of appeal (see, *inter alia*, the decision of the Bremen Court of Appeal of 19 January 2000, *NStZ-RR* 2000, p. 270, and the judgment of the Berlin Court of Appeal of 28 March 2000, *JR* 2001, pp. 162-64) is that Article 81a of the Code of Criminal Procedure can serve as a legal basis for the administration of emetics in such circumstances.

37. For example, in its judgment cited above, the Berlin Court of Appeal had to deal with the case of a suspected drug dealer who agreed to swallow ipecacuanha syrup after being threatened with its administration through a nasogastric tube if he refused. It found:

"Pursuant to Article 81a § 1, first sentence, of the Code of Criminal Procedure, a physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. ...

(a) Contrary to the view taken by the appellant, legal commentators are almost unanimous in agreeing that the administration of emetics in order to obtain quantities of drugs the accused has swallowed involves a bodily intrusion within the meaning of that provision (see *HK*-Lemke, *StPO*, 2nd edition, § 9; Dahs in Löwe-Rosenberg, *StPO*, 24th edition, § 16; *KK*-Senge, *StPO*, 4th edition, §§ 6, 14; see, with regard to Article 81a of the Code of Criminal Procedure, Rogall, *SK-StPO*, Article 81a, § 48 and *NStZ* 1998, pp. 66-67, and Schaefer, *NJW* 1997, pp. 2437 et seq.; contrast Frankfurt Court of Appeal, *NJW* 1997, p. 1647 with note by Weßlau, *StV* 1997, p. 341).

This intrusion also does not violate human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination contained in Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law. Pursuant to Article 2 § 2, third sentence, of the Basic Law, interferences with these basic rights are permitted if they have a statutory basis. The Federal Constitutional Court has already found on several occasions that, as a statutory provision enacted by Parliament, Article 81a of the Code of Criminal Procedure meets this requirement ... Furthermore, it has found more specifically that the administration of emetics in reliance on that provision did not give rise to any constitutional objections of principle either (see Federal Constitutional Court, *StV* 2000, p. 1 – *the decision in the present case*). It did not, therefore, find it necessary to discuss in detail the opinion expressed by the Frankfurt (Main) Court of Appeal (*NJW* 1997, pp. 1647-48) which is occasionally shared by legal writers (see Weßlau, *StV* 1997, pp. 341-42), ... that the administration of emetics forces the accused to contribute to his own conviction and to actively do something he does not want to, namely regurgitate. This Court does not share the [Frankfurt Court of Appeal's] view either, as the right of an accused to remain passive is not affected by his or her having to tolerate an intervention which merely provokes 'involuntary bodily reactions'. ...

(e) ... this Court does not have to decide whether the evidence obtained by the administration of emetics may be used if the accused has refused to comply with his duty to tolerate the measure and his resistance to the introduction of a tube though the nose has been overcome by physical force. That point is not in issue in the present case ... The Regional Court ... stated that [on the facts of] the case decided by the Frankfurt (Main) Court of Appeal it too would have excluded the use of the evidence obtained because of the clearly disproportionate nature of the measure. It did, however, expressly and convincingly demonstrate that the facts of the present case were different."

38. In its judgment of 11 October 1996, however, the Frankfurt (Main) Court of Appeal held that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics. The case concerned the administration of an overdose of ipecacuanha syrup to a suspected drug dealer by force through a nasogastric tube and his injection with apomorphine. The court found:

"The forced administration of emetics was not covered by the Code of Criminal Procedure. Even Article 81a does not justify the administration of an emetic by force. Firstly, the administration of an emetic constitutes neither a physical examination nor a bodily intrusion carried out by a doctor for examination purposes within the meaning of that provision. It is true that searching for foreign objects may be justified by Article 81a ... However, the emetic was used not to search for foreign objects, but to retrieve objects – whose presence was at least probable – in order to use them in evidence ... This aim was more akin to searching for or seizing an object within the meaning of Articles 102, 94 et seq. of the Code of Criminal Procedure than to a physical examination ... – although those provisions do not, on the face of it, include forcible interference with a person's physical integrity as a possible measure. ...

Secondly, an accused is not the object of criminal proceedings ... The forced administration of emetics violates the principle of passivity [*Grundsatz der Passivität*], since its purpose is to force the accused actively to do something that he is unwilling to do, namely regurgitate. This is neither permitted under Article 81a of the Code of Criminal Procedure nor compatible with the position of the accused in criminal proceedings. ...

Consequently, the conduct of the prosecuting authorities constitutes unlawful interference with the accused's physical integrity (Article 2 § 1, first sentence, of the Basic Law). ...

The forcible administration of emetics in the absence of any legal basis therefor also violates the duty to protect human dignity and the accused's general personality rights (Articles 1 § 1 and 2 § 1 of the Basic Law). ...

The prohibition on obtaining the evidence [in that manner] and the other circumstances of the case prevent this evidence from being used in court. ..."

39. According to many legal writers, Article 81a of the Code of Criminal Procedure authorises the administration of emetics to suspected drug dealers in order to obtain evidence (see also the authors cited above at paragraph 37). This view is taken, for example, by Rogall (*NStZ* 1998, pp. 66-68 and *Systematischer Kommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz*, München 2005, Article 81a *StPO*, § 48) and by Kleinknecht and Meyer-Goßner (*StPO*, 44th edition, Article 81a, § 22 –

administration of emetics permitted for the investigation of serious offences).

40. A considerable number of legal writers, however, take the view that the Code of Criminal Procedure, Article 81a in particular, does not permit the administration of emetics. This opinion is held, for example, by Dallmeyer (*StV* 1997, pp. 606-10, and *KritV* 2000, pp. 252-59), who considers that Article 81a does not authorise a search – as opposed to an examination – of the interior of a defendant's body. Vetter (*Problemschwerpunkte des § 81a StPO – Eine Untersuchung am Beispiel der Brechmittelvergabe im strafrechtlichen Ermittlungsverfahren*, Neuried 2000, pp. 72-82, 161) considers that the forcible administration of emetics through a nasogastric tube is irreconcilable with the rules of medical science, disproportionate and liable to damage the defendant's health.

(c) Medical expert opinions on the forced administration of emetics to suspected drug dealers

41. Medical experts disagree as to whether the forcible administration of emetics through the insertion of a nasogastric tube is advisable from a medical point of view. While some experts consider that emetics should be administered to a suspect in order to protect his health even if he resists such treatment, others take the view that such a measure entails serious health risks for the person concerned and should not therefore be carried out.

42. The medical experts who argue in favour of the forcible administration of emetics stress that even if this measure is not primarily carried out for medical reasons, it may nevertheless serve to prevent a possibly life-threatening intoxication. As the packaging of drugs swallowed on arrest is often unreliable, it is preferable from a medical standpoint for emetics to be administered. This measure poses very few risks, whereas there is a danger of death if the drugs are allowed to pass through the body naturally. Drugs can be extracted from the stomach up to one hour, in some cases two, after being swallowed. Administering emetics is a safe and fast method (the emetic usually takes effect within 15 to 30 minutes) of retrieving evidence of a drugs offence, as it is rare for them not to work. Even though the forcible introduction of a tube through the nose can cause pain, it does not pose any health risks as the act of swallowing can be induced by the mechanical stimulus of the tube in the throat (see, *inter alia*, Birkholz, Kropp, Bleich, Klatt and Ritter, "Exkorporation von Betäubungsmitteln – Erfahrungen im Lande Bremen", *Kriminalistik* 4/97, pp. 277-83).

43. The emetic ipecacuanha syrup has a high margin of safety. Side-effects to be expected merely take the form of drowsiness, diarrhoea and prolonged vomiting. Rare, more serious complications include Mallory-Weiss syndrome or aspiration pneumonia. These may occur if the person concerned has sustained previous damage to his or her stomach or if the

rules governing the administration of emetics, notably that the patient is fully alert and conscious, are not observed (see, for example, Birkholz, Kropp, Bleich, Klatt and Ritter, cited above, pp. 278-81, and American Academy of Clinical Toxicology/European Association of Poisons Centres and Clinical Toxicologists, "Position Paper: Ipecac Syrup", *Journal of Toxicology, Clinical Toxicology*, vol. 42, no. 2, 2004, pp. 133-43, in particular, p. 141).

44. Those medical experts who argue against the administration of emetics by force point out in particular that the forcible introduction of emetics through a nasogastric tube entails considerable health risks. Even though it is desirable for drugs to be eliminated from the suspect's body as quickly as possible, the use of a nasogastric tube or any other invasive method can be dangerous because of the risk of perforation of the drug packaging with potentially fatal consequences. Furthermore, if the tube is badly positioned liquid may enter the lungs and cause choking. Forced regurgitation also involves a danger of vomit being inhaled, which can lead to choking or a lung infection. The administration of emetics cannot therefore be medically justified without the consent of the person concerned, and, without this consent, this method of securing evidence will be incompatible with the ethics of the medical profession, as has been illustrated in particular by the death of a suspect following such treatment (see, *inter alia*, Odile Diamant-Berger, Michel Garnier and Bernard Marc, *Urgences Médico-Judiciaires*, 1995, pp. 24-33; Scientific Committee of the Federal Medical Council, report dated 28 March 1996 in response to the Federal Constitutional Court's request to assess the dangers involved in the forcible administration of emetics; and the resolution adopted by the 105th German Medical Conference, Activity Report of the Federal Medical Association, point 3).

(d) Practice concerning the administration of emetics by force in Germany

45. There is no uniform practice on the use of emetics to secure evidence of a drugs offence in the German *Länder*. Since 1993, five of the sixteen *Länder* (Berlin, Bremen, Hamburg, Hesse and Lower Saxony) have used this measure on a regular basis. Whereas some *Länder* discontinued its use following the death of a suspect, others are still resorting to it. In the vast majority of cases in which emetics have been used, the suspects chose to swallow the emetic themselves, after being informed that it would otherwise be administered forcibly. In other *Länder*, emetics are not forcibly administered, partly because, on the basis of medical advice, it is regarded as a disproportionate and dangerous measure, and partly because it is not considered a necessary means of combating drugs offences.

46. There have been two fatalities in Germany as a result of the forcible administration of ipecacuanha syrup to suspected drug dealers through a tube introduced through the nose into the stomach. In 2001 a Cameroonian

national died in Hamburg. According to the investigation, he had suffered a cardiac arrest as a result of stress caused by the forcible administration of emetics. He was found to have been suffering from an undetected heart condition. In 2005 a Sierra Leonean national died in Bremen. The investigation into the cause of his death has not yet been completed. The emergency doctor and a medical expert suggested that the applicant had drowned as a result of a shortage of oxygen when water permeated his lungs. Criminal investigations for homicide caused by negligence have been launched against the doctor who pumped the emetic and water into the suspect's stomach and against the emergency doctor called to attend to him.

47. As a consequence of the fatality in Bremen, the Head of the Bremen Chief Public Prosecutors (*Leitender Oberstaatsanwalt*) has ordered the forcible administration of emetics to be discontinued in Bremen for the time being. Pending the outcome of the investigation, a new procedure has been set up by the Senators for Justice and the Interior. Under this procedure, a person suspected of swallowing drugs must be informed by a doctor about the risks to his health if the drugs remain in his body. The suspect can choose to take emetics or a laxative if a medical examination discloses that it poses no risks to his health. Otherwise, he is detained in a specially equipped cell until the drug packages are passed naturally.

2. Public international law, comparative law and practice

(a) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

48. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as adopted by the United Nations General Assembly on 10 December 1984 (resolution 39/46), provides:

Article 1 § 1

"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Article 15

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Article 16 § 1

"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

(b) Case-law of United States courts

49. In *Rochin v. California* (342 US 165 (1952)), the United States Supreme Court reversed the petitioner's conviction for unlawful possession of drugs. On the basis of information that the petitioner was selling narcotics, three state officers entered his home and forced their way into his bedroom. They unsuccessfully attempted to extract by force drug capsules which the petitioner had been observed to put into his mouth. The officers then took him to a hospital, where an emetic was forced through a tube into his stomach against his will. He regurgitated two capsules which were found to contain morphine. These were admitted in evidence in the face of his objection. The Supreme Court held on 2 January 1952 that the conviction had been obtained by methods in violation of the Due Process Clause in the Fourteenth Amendment.

50. Mr Justice Frankfurter, delivering the opinion of the Court, found:

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. ... It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law.

Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."

51. In *State of Ohio v. Dario Williams* (2004 WL 1902368 (Ohio App. 8 Dist.)), the Ohio Court of Appeals held on 26 August 2004 that the pumping of the defendant's stomach in the face of his objections was not an unreasonable search and seizure. The defendant was observed engaging in a hand-to-hand transaction typical of drug dealing. When police officers ordered the defendant to their vehicle, he put something in his mouth and ran off. In the opinion of the court, flushing out the defendant's stomach by gastric lavage by a physician in a hospital setting was not an unreasonable measure, even though the defendant violently objected to the procedure and had to be sedated. Swallowing the cocaine, which had been seen in the defendant's mouth, put his life in jeopardy and he was destroying evidence.

52. Mr Justice T.E. McMonagle, delivering the Court of Appeals' opinion, found:

"19. Williams directs us to *Rochin v. California*, 342 US 165 (1952), ... one of the prominent cases on intrusive searches.

...

21. *Rochin* is not dispositive, however. After *Rochin*, the United States Supreme Court decided *Schmerber v. California*, 384 US 757 (1966), 86 S.Ct. 1826, 16 L.Ed.2d 908, in which a police officer ordered an individual suspected of driving while intoxicated to submit to a blood test at the hospital where he was being treated for injuries sustained in an automobile collision. The Supreme Court noted that 'the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner'. ... Finding no Fourth Amendment violation, the Court set forth several criteria to be considered in determining the reasonableness of an intrusive search: 1) the government must have a clear indication that incriminating evidence will be found; 2) the police officers must have a warrant, or, there must be exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and 3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner.

...

23. Applying the *Schmerber* factors to the facts of this case, it is apparent that the pumping of Williams' stomach was a lawful search and seizure. First, the officers observed Williams in an area known for illegal drug activity engage in a hand-to-hand transaction indicative of drug activity. When he saw the officers, he put whatever was in his hand in his mouth and then ran away. This behavior was a 'clear indication' to the officers that Williams had secreted drugs in his mouth. Moreover, it was reasonable for the officers to conclude that Williams' life could be in jeopardy after they observed crack cocaine in his mouth and saw him trying to chew it and swallow it. Furthermore, Williams was destroying the evidence necessary to convict him of drug possession. Accordingly, this case falls within the exigent circumstances exception to the warrant requirement.

24. Finally, it is apparent that the method and manner of the search were not unreasonable. The facts indicate that a physician administered Williams' medical treatment in a hospital setting, according to accepted medical procedures ...

25. In *Schmerber*, the United States Supreme Court expressed an acceptance of a search conducted in a reasonable manner by a physician. The physician is certainly more qualified than a police officer to determine the extent to which a procedure is life threatening.

26. Assuming that [a defendant] swallowed the cocaine, if the drugs were packaged in such a way as to be impervious to intestinal processes, the physician would certainly be in a position to pump the stomach of the [defendant], which is a reasonable medical procedure less traumatic than the forced emetic in *Rochin*. Again, this is the kind of conduct that *Schmerber* finds more reasonable because it is done in the confines of a hospital with appropriate medical supervision."

(c) Practice concerning the administration of emetics in the member States of the Council of Europe

53. The Government submitted a survey based on information obtained from the governments of the member States of the Council of Europe via their Agents or, if the government concerned had not provided information, from the German Embassy in the country concerned. According to the survey, emetics are forcibly administered to suspected drug dealers in practice in four countries (Luxembourg, Norway, "the former Yugoslav Republic of Macedonia" and Germany). In thirty-three countries emetics are not used against a suspect's will to retrieve drug bubbles that have been swallowed (Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Moldova, the Netherlands, Portugal, Romania, Russia, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom). In three countries (Croatia, Poland and Slovenia) there is a legal basis for the use of emetics, but no information was supplied as to whether this measure is applied in practice. No information with respect to the use of emetics in practice was obtained from six member States (Andorra, Azerbaijan, Bulgaria, Liechtenstein, San Marino and Monaco).

54. The applicant partly contested the Government's findings. He noted that the Government had said that three countries other than Germany (Luxembourg, "the former Yugoslav Republic of Macedonia" and Norway) permitted the administration of emetics to suspected drug dealers and used the measure in practice. However, he said that the Government had failed to adduce any evidence of emetics being administered by force against the accused's will in those member States. With respect to Norway in particular, the applicant disputed that the forcible introduction of a nasogastric tube as in his case was legal. As regards the administration of emetics in Croatia, Poland and Slovenia, he contested the existence of any legal basis for such a measure in those countries, irrespective of the position in practice. Consequently, Germany was the only Contracting State which was proven to actually resort to the impugned measure. In all the other

member States the authorities waited for the drugs to pass through the body naturally.

55. Other materials before the Court confirm the parties' findings that emetics are not forcibly administered in practice in several Convention States examined (Belgium, Estonia, France, Ireland, the Netherlands, Spain and the United Kingdom). In these States, the authorities wait for the drugs to pass through the body naturally. Use is routinely made of special toilets to recover and clean drugs that have been swallowed. The materials further indicated that in Norway special toilets (so-called Pacto 500 toilets) are generally used in order to recover ingested drugs. However, during its visit to Norway in 1993, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) witnessed the administration of an emetic (brine) to a detainee in Oslo police headquarters (see the CPT report on its visit to Norway in 1993, § 25). With respect to Poland, it has not been confirmed whether emetics are administered by force in practice.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

56. The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

57. The Government contested this allegation.

A. The parties' submissions

1. The applicant

58. According to the applicant, the administration of emetics by force had constituted a serious interference with his physical integrity and posed a serious threat to his health, and even life, since the emetics used – ipecacuanha syrup and apomorphine – could have provoked life-threatening side effects. The insertion of a tube by force through the nose of a suspect who did not cooperate in the procedure could have caused damage to the nose, throat and gullet and even burst drug bubbles in the stomach. The danger of administering emetics by force was illustrated by the fact that it had already resulted in the deaths of two suspects in Germany. The vast majority of the member States of the Council of Europe as well as the

United States considered this method to be illegal. The interference could not be justified on grounds of medical assistance. On the contrary, it merely increased the risk of the suspect being poisoned by the drugs he had swallowed. A suspect's express opposition to undergoing medical treatment had to be respected in a democratic society as part of the individual's right to self-determination.

59. The applicant further argued that the administration of emetics had been aimed at intimidating and debasing him in disregard of his human dignity. The manner in which he had been forced to undergo a life-threatening medical intervention had been violent, agonising and humiliating. He had been degraded to the point of having to vomit while being observed by several police officers. Being in police custody, he had found himself in a particularly vulnerable position.

60. Moreover, the applicant maintained that no anamnesis to establish his medical history and physical condition had been obtained by a doctor prior to the execution of the impugned measure. Nor had he been given any medical care and supervision in prison afterwards.

61. The applicant also stressed that he had sustained bodily injury, notably to his stomach, as was proved by a gastroscopy that had been performed in the prison hospital. Furthermore, he had been subjected to intense physical and mental suffering during the process of the administration of the emetics and by the chemical effects of the substances concerned.

2. The Government

62. According to the Government, the forcible administration of emetics entailed merely negligible risks to health. Ipecacuanha syrup was not a dangerous substance. In fact, it was given to children who had been poisoned. The introduction of a very flexible tube through the applicant's nose had not put him at risk, even though he had resisted the procedure. The injection of apomorphine had not been dangerous either. The side effects and dangers described by the applicant could only be caused by chronic abuse or misuse of the emetics in question. The fact that two suspected drug dealers had died following the forcible administration of emetics in Hamburg and Bremen did not warrant the conclusion that the measure in general posed health risks. The method had been used on numerous occasions without giving rise to complications. The authorities resorted to the administration of emetics in those *Länder* where drug trafficking was a serious problem. In the vast majority of cases suspects chose to swallow the emetics after being informed that force would be used if they refused to do so. In the Hamburg case the defendant had suffered from an undetected heart condition and would have been equally at risk if he had resisted a different kind of enforcement measure. In the Bremen case the possibility

that the defendant was poisoned by the drugs he had swallowed could not be excluded.

63. The Government pointed out that there had been a real, immediate risk that the drug bubble, which had not been packaged for long-term transport inside the body, would leak and poison the applicant. Even though the emetics had been administered primarily to obtain evidence rather than for medical reasons, the removal of the drugs from the applicant's stomach could still be considered to be required on medical grounds. It was part of the State's positive obligation to protect the applicant by provoking the regurgitation of the drugs. Awaiting the natural excretion of the drugs would not have been as effective a method of investigation or any less humiliating and may, in fact, have posed risks to his health. It was significant in this connection that the administration of emetics to a juvenile was only considered an option if he or she was suspected of selling drugs on a commercial basis.

64. In the Government's view, the impugned measure had not gone beyond what had been necessary to secure evidence of the commission of a drugs offence. The applicant had been administered harmless emetics in a hospital by a doctor acting *lege artis*. Such a measure could not be considered humiliating in the circumstances.

65. The Government further maintained that the emetics were administered to the applicant only after an anamnesis had been obtained by a doctor at the hospital. The same doctor had duly supervised the administration of the emetics to the applicant.

66. The Government stressed that there was no evidence that the applicant had suffered any injuries or lasting damage as a result of the administration of the emetics. He had merely been tired for several hours after the execution of the measure, either because of the effects of the apomorphine or because of the resistance he had put up. In the proceedings before the Court the applicant had claimed for the first time that he had suffered further damage to his health. However, he had not produced any documentary evidence to support his allegations.

B. The Court's assessment

1. Relevant principles

67. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*,

no. 67263/01, § 37, ECHR 2002-IX; and *Naumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004). Allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, § 30, Series A no. 269). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, 18 January 1978, § 161 *in fine*, Series A no. 25, and *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

68. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A no. 280), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "*Greek case*"), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, p. 186, and *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Raninen v. Finland*, 16 December 1997, § 55, *Reports of Judgments and Decisions* 1997-VIII; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; and *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

69. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation (*Mouisel*, cited above, § 40, and *Naumenko*, cited above, § 112). A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and

degrading (see, in particular, *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244, and *Naumenko*, cited above, § 112). This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, ECHR 2005-II).

70. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them (see, *inter alia*, *X v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, Decisions and Reports (DR) 16, pp. 187-89, and *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006).

71. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health (see, *mutatis mutandis*, *Nevmerzhitsky*, cited above, §§ 94 and 97, and *Schmidt*, cited above).

72. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994, DR 77-B; *Schmidt*, cited above; and *Nevmerzhitsky*, cited above, §§ 94 and 97).

73. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical

supervision (see, for example, *Ilijkov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997, unreported).

74. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see *Ilijkov*, cited above, and, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

2. Application of those principles to the present case

75. At the outset the Court notes that in the Government's view the removal of the drugs from the applicant's stomach by the administration of emetics could be considered to be required on medical grounds, as he risked death through poisoning. However, it is to be observed that the domestic courts all accepted that, when ordering the administration of emetics, the authorities had acted on the basis of Article 81a of the Code of Criminal Procedure. This provision entitles the prosecuting authorities to order a bodily intrusion to be effected by a doctor without the suspect's consent in order to obtain evidence, provided that there is no risk of damage to the suspect's health. However, Article 81a does not cover measures taken to avert an imminent danger to a person's health. Furthermore, it is undisputed that the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Government also stated that emetics are never administered to juvenile dealers unless they are suspected of selling drugs on a commercial basis. Juvenile dealers are, however, in no less need of medical treatment than adults. Adult dealers, for their part, run the same risks to their health as juvenile dealers when administered emetics. Consequently, the Court is not satisfied that the prosecuting authorities' decision to order the impugned measure was based on and required by medical reasons, that is, the need to protect the applicant's health. Instead, it was aimed at securing evidence of a drugs offence.

76. This finding does not by itself warrant the conclusion that the impugned intervention contravenes Article 3. As noted above (see paragraph 70 above), the Court has found on several occasions that the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health (compare and contrast also the criteria established by the United States courts in similar cases – see paragraphs 51-52 above). In the light of all the

circumstances of the individual case, the intervention must not attain the minimum level of severity that would bring it within the scope of Article 3. The Court will now examine each of these elements in turn.

77. As regards the extent to which the forcible medical intervention was necessary to obtain the evidence, the Court notes that drug trafficking is a serious offence. It is acutely aware of the problem confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs (see, in particular, *D. v. the United Kingdom*, 2 May 1997, § 46, *Reports* 1997-III). However, in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. This is reflected in the sentence (a six-month suspended prison sentence and probation), which is at the lower end of the range of possible sentences. The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass through his system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences.

78. As regards the health risks attendant on the forcible medical intervention, the Court notes that it is a matter of dispute between the parties whether and to what extent the administration of ipecacuanha syrup through a tube introduced into the applicant's nose and the injection of apomorphine posed a risk to his health. Whether or not such measures are dangerous is, as has been noted above (see paragraphs 41-44), also a matter of dispute among medical experts. While some consider it to be entirely harmless and in the suspect's best interest, others argue that in particular the use of a nasogastric tube to administer emetics by force entails serious risks to life and limb and should therefore be prohibited. The Court is not satisfied that the forcible administration of emetics, a procedure that has to date resulted in the deaths of two people in the respondent State, entails merely negligible health risks. It also observes in this respect that the actual use of force – as opposed to the mere threat of force – has been found to be necessary in the respondent State in only a small proportion of the cases in which emetics have been administered. However, the fatalities occurred in cases in which force was used. Furthermore, the fact that in the majority of the German *Länder* and in at least a large majority of the other member States of the Council of Europe the authorities refrain from forcibly administering emetics does tend to suggest that such a measure is considered to pose health risks.

79. As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was subjected to a further bodily intrusion against his will through the injection of another emetic. Account must also be taken of the applicant's mental suffering while he waited for the emetics to take effect. During this time he was restrained and kept under observation by police officers and a doctor. Being forced to regurgitate under these conditions must have been humiliating for him. The Court does not share the Government's view that waiting for the drugs to pass through his body naturally would have been just as humiliating. Although it would have entailed some invasion of privacy because of the need for supervision, such a measure nevertheless involves a natural bodily function and so causes considerably less interference with a person's physical and mental integrity than forcible medical intervention (see, *mutatis mutandis*, *Peters*, cited above, and *Schmidt*, cited above).

80. As regards the medical supervision of the administration of the emetics, the Court notes that the impugned measure was carried out by a doctor in a hospital. In addition, after the measure was executed the applicant was examined by a doctor and declared fit for detention. However, it is a matter of dispute between the parties whether an anamnesis of the applicant was obtained prior to the execution of the measure in order to ascertain whether his health might be at risk if emetics were administered to him against his will. Since the applicant violently resisted the administration of the emetics and spoke no German and only broken English, the assumption must be that he was either unable or unwilling to answer any questions that were put by the doctor or to submit to a prior medical examination. The Government have not submitted any documentary or other evidence to show otherwise.

81. As to the effects of the impugned measure on the suspect's health, the Court notes that the parties disagree about whether the applicant has suffered any lasting damage to his health, notably to his stomach. Having regard to the material before it, it finds that it has not been established that either his treatment for stomach troubles in the prison hospital two and a half months after his arrest or any subsequent medical treatment he received was caused by the forcible administration of the emetics. This conclusion does not, of course, call into question the Court's above finding that the forcible medical intervention was not without possible risk to the applicant's health.

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the

applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.

83. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

84. In the applicant's submission, the administration of emetics by force also amounted to a disproportionate interference with his right to respect for his private life. He relied on Article 8 of the Convention, the relevant parts of which read:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

85. The Government disagreed with that submission.

86. The Court has already examined the applicant's complaint concerning the forcible administration of emetics to him under Article 3 of the Convention. In view of its conclusion that there has been a violation of that provision, it finds that no separate issue arises under Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicant further considered that his right to a fair trial guaranteed by Article 6 of the Convention had been infringed by the use at his trial of the evidence obtained by the administration of the emetics. He claimed in particular that his right not to incriminate himself had been violated. The relevant part of Article 6 provides:

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

88. The Government contested this view.

A. The parties' submissions

1. The applicant

89. In the applicant's view, the administration of the emetics was illegal and violated Articles 3 and 8 of the Convention. As the evidence thereby obtained had formed the sole basis for his conviction, the criminal proceedings against him had been unfair.

90. The applicant further argued that by forcing him against his will to produce evidence of an offence the authorities had violated his right not to incriminate himself and therefore his right to a fair trial. The principle against self-incrimination was not limited to statements obtained by coercion, but extended to objects so obtained. Moreover, the facts of his case were distinguishable from those in *Saunders v. the United Kingdom* (17 December 1996, *Reports* 1996-VI). Unlike the cases of blood or DNA testing referred to by the Court in its judgment in that case, the administration of emetics entailed the use of chemical substances that provoked an unnatural and involuntary activity of the body in order to obtain the evidence. His refusal to swallow the emetics was overcome by the use of considerable force. Therefore, the evidence that had been obtained had not existed independently of his will and he had been forced to contribute actively to his own conviction. The administration of emetics was comparable to the administration of a truth serum to obtain a confession, a practice which was expressly forbidden by Article 136a of the Code of Criminal Procedure. He referred to the judgment of the Frankfurt (Main) Court of Appeal of 11 October 1996 in support of his contention.

2. The Government

91. In the Government's view, the administration of the emetics to the applicant had not contravened either Article 3 or Article 8 of the Convention. Consequently, the use of the drug bubble thereby obtained as evidence in the criminal proceedings against the applicant had not rendered his trial unfair. Determining the exact nature, amount and quality of the drugs being sold by the applicant had been a crucial factor in securing the applicant's conviction and passing sentence.

92. The Government further submitted that the right not to incriminate oneself only prohibited forcing a person to act against his or her will. Provoking an emesis was a mere reaction of the body which could not be controlled by a person's will, and was therefore not prohibited by the principle against self-incrimination. The suspect was not thereby forced to contribute actively to securing the evidence. The accused's initial refusal to take the emetics could not be relevant, as otherwise all investigative measures aimed at breaking a suspect's will to conceal evidence, such as taking blood samples by force or searching houses, would be prohibited.

93. Moreover, the Government argued that according to the Court's judgment in *Saunders*, cited above, drugs obtained by the forcible administration of emetics were admissible in evidence. If it was possible to use bodily fluids or cells as evidence, then *a fortiori* it had to be possible to use objects which were not part of the defendant's body. Furthermore, the administration of emetics, which the applicant merely had to endure passively, was not comparable to the administration of a truth serum as prohibited by Article 136a of the Code of Criminal Procedure, which broke the suspect's will not to testify.

B. The Court's assessment

1. General principles established under the Court's case-law

94. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV).

95. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

96. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is

no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35 and 37, and *Allan*, cited above, § 43).

97. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, *mutatis mutandis*, *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 57-58, ECHR 2000-XII).

98. As regards, in particular, the examination of the nature of the Convention violation found the Court observes that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, §§ 37-38) it has found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

99. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003, and *Koç v. Turkey* (dec.), no. 32580/96, 23 September 2003). The Court reiterates in this connection that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, *inter alia*, *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V, and *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

100. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court observes that these are generally recognised international standards which lie at the heart

of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders*, cited above, § 68; *Heaney and McGuinness*, cited above, § 40; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan*, cited above, § 44).

101. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Tirado Ortiz and Lozano Martin v. Spain* (dec.), no. 43486/98, ECHR 1999-V; *Heaney and McGuinness*, cited above, §§ 51-55; and *Allan*, cited above, § 44).

102. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (see *Saunders*, cited above, § 69; *Choudhary v. the United Kingdom* (dec.), no. 40084/98, 4 May 1999; *J.B. v. Switzerland*, cited above, § 68; and *P.G. and J.H. v. the United Kingdom*, cited above, § 80).

2. Application of those principles to the present case

103. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained "unlawfully" in breach of domestic law. It recalls in this connection that the national courts found that Article 81a of the Code of Criminal Procedure permitted the impugned measure.

104. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the *Rochin* case (see paragraph 50 above), to "afford brutality the cloak of law". It notes in this connection that Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

109. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However, the Court considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

110. As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is in issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

111. However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was in issue. In *Funke v. France* (25 February 1993, § 44, Series A no. 256-A), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in *J.B. v. Switzerland* (cited above, §§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination (in its broader sense).

112. In *Saunders*, the Court considered that the principle against self-incrimination did not cover "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing" (cited above, § 69).

113. In the Court's view, the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, as with the impugned measures in *Funke* and *J.B. v. Switzerland*, the administration of

emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in *Saunders* concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences (see, *inter alia*, *Tirado Ortiz and Lozano Martin*, cited above).

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

123. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

> "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."

125. The applicant claimed compensation for pecuniary and non-pecuniary damage and the reimbursement of his costs and expenses.

A. Damage

126. The applicant claimed a total of 51.12 euros (EUR) in pecuniary damage, this being the amount he had forfeited as a result of the judgment of the Wuppertal Regional Court. He also sought compensation for non-pecuniary damage. He made reference to his physical injuries and the mental distress and feelings of helplessness he had suffered as a result of the lengthy administration of emetics, which he considered to have been life-threatening and obviously illegal. Furthermore, he had been remanded in custody for five months before being convicted and given a six-month suspended prison sentence and probation because of this illegal measure. He claimed a minimum amount of EUR 30,000 under this head.

127. The Government did not comment on the applicant's claim for pecuniary damage, but maintained that the sum claimed by him for non-pecuniary damage was excessive. As regards the damage allegedly sustained due to the applicant's pre-trial detention, his prosecution and conviction, an award of compensation was not required since full reparation could be made under German law. Should the Court find violations of the applicant's Convention rights, he would be entitled to request the reopening of the criminal proceedings and could, if acquitted, claim damages, notably for the period he had spent in custody.

128. As regards the pecuniary damage claimed, the Court notes that the Wuppertal Regional Court ordered the forfeiture of 100 German marks (approximately EUR 51.12), this being the proceeds of the offence of which he had been found guilty. However, it cannot speculate as to what the outcome of the proceedings might have been if the violation of the Convention had not occurred (see, *inter alia*, *Schmautzer v. Austria*, 23 October 1995, § 44, Series A no. 328-A, and *Findlay v. the United Kingdom*, 25 February 1997, § 85, *Reports* 1997-I). The drug bubble obtained by the impugned measure was a decisive factor in the applicant's conviction. However, since that evidence could have been obtained without any breach of Article 3 (by waiting for the drug bubble to be passed naturally) and, therefore, used without any breach of Article 6, the Court finds that there is insufficient proof of a causal connection between the violation of those provisions and the pecuniary damage sustained by the applicant. There is, therefore, no ground for an award under this head.

129. As to the non-pecuniary damage claimed, the Court notes that according to the Government, it would be possible for the applicant to seek compensation in the national courts if he was acquitted following a reopening of the criminal proceedings against him. It considers, however, that if, having exhausted domestic remedies without success before complaining in Strasbourg of a violation of his rights, then doing so a second time, successfully, to secure the setting aside of the conviction, and finally going through a new trial, the applicant was required to exhaust

domestic remedies a third time in order to be able to obtain just satisfaction from the Court, the total duration of the proceedings would hardly be consistent with the effective protection of human rights and would lead to a situation incompatible with the aim and object of the Convention (see, for example, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, § 17, Series A no. 285-C, and *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 40, Series A no. 330-B). Consequently, it may make an award.

130. Having regard to all the elements before it, the Court finds that the applicant suffered non-pecuniary damage in the form of pain and mental distress as a result of the treatment to which he was subjected to obtain the evidence that was later used against him at the trial. Ruling on an equitable basis, it therefore awards the applicant EUR 10,000 under this head.

B. Costs and expenses

131. The applicant claimed a total of EUR 5,868.88 for costs and expenses. These comprised the costs of legal representation before the Federal Constitutional Court in an amount of EUR 868.88, calculated pursuant to the Federal Regulation on Lawyers' Fees (*Bundesrechtsanwalts-gebührenordnung*). Furthermore, he claimed EUR 5,000 for costs incurred in the Convention proceedings. He did not submit any separate documentary evidence in support of his claims.

132. The Government did not comment on this claim.

133. According to the Court's case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II, and *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X).

134. In the present case, regard being had to the information in its possession and the above criteria, the Court is satisfied that both the costs of legal representation in the proceedings before the Federal Constitutional Court and in the Convention proceedings were incurred in order to establish and redress a violation of the applicant's Convention rights. Having regard to its case-law and making its own assessment, the Court finds the amount claimed to be reasonable as to quantum. It therefore awards the applicant EUR 5,868.88, plus any value-added tax that may be chargeable.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by ten votes to seven that there has been a violation of Article 3 of the Convention;

2. *Holds* by twelve votes to five that no separate issue arises under Article 8 of the Convention;

3. *Holds* by eleven votes to six that there has been a violation of Article 6 of the Convention;

4. *Holds* by eleven votes to six
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 5,868.88 (five thousand eight hundred and sixty-eight euros eighty-eight cents) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) 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;

5. *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 11 July 2006.

Lawrence Early	Luzius Wildhaber
Deputy Registrar	President

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 Judge Bratza;
(b) concurring opinion of Judge Zupančič;
(c) dissenting opinion of Judges Wildhaber and Caflisch;
(d) joint dissenting opinion of Judges Ress, Pellonpää, Baka and Šikuta;
(e) dissenting opinion of Judge Hajiyev.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGE BRATZA

I have voted with the majority of the Court on all aspects of the case but have reservations about certain parts of the reasoning in the judgment in respect of both Article 3 and Article 6 of the Convention.

Article 3

My principal reservation with regard to the reasoning on Article 3 relates to paragraph 77 of the judgment in which, in reaching the conclusion that the treatment to which the applicant was subjected was inhuman and degrading, the majority place particular emphasis on the fact that the forcible medical intervention was not "necessary" to obtain the evidence that the applicant had been dealing in drugs. It is said that, because the applicant was only a street dealer and had, at the time of his arrest, clearly not been dealing in drugs on a large scale, the forcible administration of emetics was not indispensable to obtain the evidence against him and the prosecuting authorities could simply have waited for the drugs to have passed through the applicant's system naturally in accordance with the practice in many other member States of the Council of Europe.

I readily accept that States are confronted with particularly acute problems in combating the scourge of drug trafficking, notably in obtaining admissible evidence to secure convictions of major drug dealers. I can accept, too, that if a medical "necessity" is convincingly shown to exist for forcibly administering emetics rather than waiting for nature to take its course, this would, according to the constant jurisprudence of the Court, constitute a very relevant factor in determining whether the treatment to which an applicant was subjected contravened Article 3 of the Convention (see paragraph 69 of the judgment). What I cannot, however, accept is the implication in paragraph 77 that, even where no medical necessity can be shown to exist, the gravity of the suspected offence and the urgent need to obtain evidence of the offence, should be regarded as relevant factors in determining whether a particular form of treatment violates Article 3. The Court has repeatedly emphasised the special character of the guarantees under Article 3, which prohibits in absolute terms the use of torture or inhuman or degrading treatment or punishment, irrespective of the nature of the victim's conduct and which does not allow for the balancing of competing public interests against the use of treatment which attains the Article 3 threshold. Just as the urgent need to obtain evidence of a serious offence would not therefore justify resort to treatment which would otherwise attain that threshold, so also I consider that the threshold cannot

change according to the gravity of the suspected offence or the urgency of the need to obtain evidence of the offence.

For the same reason, I do not consider that the question whether particular treatment violates Article 3 should depend on whether or not the aim sought by the use of the treatment (in this case, the evidence of drug dealing) could be obtained by other methods which did not involve such treatment. The relevance of the fact that, according to the material before the Court, few if any other member States appear to permit the forcible administration of emetics to suspected drug offenders, under any circumstances and whatever the gravity of the suspected offence, seems to me to lie in the confirmation it provides of what is to be regarded as acceptable treatment of suspects.

In my view, for the other reasons set out in the judgment with which I fully concur, the treatment to which the applicant was subjected did reach the threshold of Article 3 and was in violation of that Article.

Article 6

The Court's finding of a violation of Article 6 of the Convention is based on the principal ground that the use in evidence of drugs obtained by the forcible administration of emetics in violation of Article 3 of the Convention rendered his trial as a whole unfair. The Court, however, goes on in its judgment to address the applicant's additional argument that the manner in which the evidence was obtained and the use made of it at his trial undermined his right not to incriminate himself, before concluding that it would have been prepared to find a violation of Article 6 on this further basis.

I can, in general, agree with the Court's principal ground, and its reasoning, for finding a violation of Article 6 and would echo the words of Mr Justice Frankfurter, in delivering the opinion of the Supreme Court of the United States in *Rochin v. California*, that "the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating a crime too energetically". While, as the Court has frequently observed, the Convention does not lay down any rules on evidence as such, the admissibility of evidence being primarily a matter for regulation by national law, the use of evidence obtained by treatment violating the fundamental values enshrined in Article 3 appears to me to offend against the whole concept of a fair trial, even if the admission of such evidence is not – as it was in the present case – decisive in securing a conviction. As in the case of the use of coerced confessions, it is the offensiveness to civilised values of fairness and the detrimental effect on the integrity of the judicial process, as much as the unreliability of any evidence which may be obtained, which lies at the heart of the objection to its use.

It is true that the treatment to which the applicant was subjected has been found to be inhuman and degrading rather than torture and that the exclusionary rule in Article 15 read in conjunction with Article 16 of the United Nations Convention against Torture (see paragraph 48 of the judgment) expressly distinguishes between the admission of evidence obtained by torture and that obtained by the other forms of ill-treatment. However, not only is the borderline between the various forms of ill-treatment neither immutable nor capable of precise definition, as the Court has previously recognised, but the fairness of the judicial process is in my view irreparably damaged in any case where evidence is admitted which has been obtained by the authorities of the State concerned in violation of the prohibition in Article 3.

I would thus be prepared to go further than the majority of the Court who preferred to leave open the general question whether the use of evidence obtained by acts qualified as inhuman and degrading would automatically render a trial unfair, limiting themselves to a finding of unfairness in the particular circumstances of the present case. While I could accept this narrower basis for finding a violation of Article 6, where, again, I differ from the majority of the Court is in the suggestion in paragraph 107 of the judgment that the result under Article 6 might have been different if the applicant had not been dealing in drugs on a small scale and if the public interest in securing the applicant's conviction could thus be considered to be of greater weight. For substantially the same reasons as I have already expressed under Article 3, the scale of the drug dealing involved seems to me to be immaterial to the Convention issues raised under Article 6. The public interest in securing the applicant's conviction could not in my view in any circumstances have justified the use in evidence of drugs obtained by the treatment to which he was subjected.

Having reached this conclusion, I have not found it necessary or appropriate to address the applicant's additional argument relating to self-incrimination and would not base my finding of a violation of Article 6 on this further ground, which gives rise to problems of exceptional complexity and difficulty.

CONCURRING OPINION OF JUDGE ZUPANČIČ

Although I am in agreement with the result reached in this important case, so far as it goes, I believe that (1) this indeed is a classic case concerning torture *stricto sensu*, (2) that contaminated evidence obtained via this "shocking" behaviour of police should be strictly excluded, and (3) that the reasons for excluding the contaminated evidence do not derive from the torture *per se*. Legal process is a civilised replacement of the resolution of conflicts by uncivilised physical prevalence, and the abandonment of violence is its foremost purpose. Indeed, it is its constitutive component. It is no accident that under different similar dictions the formula "*nemo tenetur seipsum prodere*" goes back to the very origins of Western legal tradition.

In *Selmouni v. France* we integrated Article 1 of the United Nations Convention against Torture[1] (hereinafter "the UNCAT") into our own case-law. Because in the case before us the meaning of "severe pain and suffering" determines everything else, the excellent definition of torture in Article 1 of the UNCAT, which the European Convention does not contain, bears reiterating:

> "[T]he term 'torture' means any act by which [1] *severe pain or suffering*, whether physical or mental, is [2] *intentionally inflicted* on a person for such purposes as [a] obtaining from him or a third person information or a confession, [b] punishing him for an act he or a third person has committed or is suspected of having committed, or [c] intimidating or coercing him or a third person, or [d] for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a [3] *public official* or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." (emphasis added)

Torture, in other words, is (1) a *delictum proprium*; it can only be committed by a public official or other person acting in an official capacity.

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1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46 (annex, 39 UN GAOR Supp. (no. 51) at p. 197, UN Doc. A/39/51 (1984)), which came into force on 26 June 1987. The United Nations Committee against Torture has urged Germany to adopt Article 1 of the UNCAT as a definition of the offence of torture in its own substantive criminal law. Germany was urged, too, to apply strictly the rule excluding all evidence derived from torture from the cognisance of the deciding judges. The failure to follow these early warnings of the United Nations monitoring body contributed to the emergence of the practice that is the subject matter of this case. See, Concluding Observations of the Committee against Torture: Germany, 11/05/98, A/53/44, §§ 179-95 (Concluding Observations/Comments), §§ 185 and 193.
In the context of the case at hand it may also be indicative that the International Covenant on Civil and Political Rights, 1966, in its Article 7 treats torture on a par with medical or scientific experimentation: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

(2) It requires specific intent (*dolus specialis*), namely, conduct must be intended or acquiesced in not only to inflict severe pain or suffering, but also (a) to obtain from the person tortured or from a third person information or a confession, (b) to punish him for an act he or a third person has committed or is suspected of having committed, (c) to intimidate or coerce him or a third person, or (d) to so act for any reason based on discrimination of any kind.

Because acquiescence on the part of the public official suffices, the above *dolus specialis* may at a minimum also be *dolus eventualis* in cases where, for example, the public official in charge at the police station knowingly acquiesces in torture perpetrated by his subordinates. Moreover, the phrase defining the specific intent is open-ended ("for such purposes as"), that is to say, it permits the use of *analogia inter legem*. Finally, torture is a result crime; there is no crime of torture unless there is, (3) as a consequence of the conduct of the public officials, (4) *severe physical or mental pain or suffering*.

Therefore, the key question in the case before us, and increasingly so in other similar considerations, is whether a particular conduct causes "severe pain and suffering" – or something less than that[1]. Torture, in other words, is an aggravated form of inhuman and degrading treatment[2]. Whether in a particular case the pain or suffering of the victim of inhuman and degrading treatment was severe, is a *question of fact* to be determined by the criminal

1. "To require a threshold showing of an 'objective' injury, the sort of thing that might reveal itself on an X-ray, or in missing teeth, or in a bruised and battered physical appearance, would confer immunity from claims of deliberate indifference on sadistic guards, since it is possible to inflict substantial and prolonged pain without leaving any 'objective' traces on the body of the victim" (Judge Posner in *Cooper v. Casey*, 97 F3d 914, 917 (Seventh Circuit 1996) (citations omitted)). Furthermore, substantial and prolonged pain can be psychological as well as physical. "Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases ... to be actionable as cruel and unusual punishment" (Judge Posner in *Thomas v. Farley*, 31 F3d 557, 559 (Seventh Circuit 1994)). In a case involving cross-gender body searches it has been held that "severe psychological injury and emotional pain and suffering" counted as "infliction of pain" under the Eighth Amendment (Judge O'Scannlain in *Jordan v. Gardner*, 986 F2d 1521, 1525, 1528 (Ninth Circuit 1992)). "Many things – beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999' – may cause agony as they occur yet leave no enduring injury. The State is not free to inflict such pains without cause just so long as it is careful to leave no marks" (Judge Easterbrook in *Williams v. Boles*, 841 F2d 181, 183 (Seventh Circuit 1988)). At http://www.yale.edu/lawweb/avalon/diana/harris/110998-2.htm.

2. UNCAT, Article 16 § 1: "Each State Party shall undertake to prevent in any territory under its jurisdiction *other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1*, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." (emphasis added)

court in which the offence of torture is being prosecuted. According to medical science, the subjective threshold of pain may vary a great deal from one person to another. Moreover, the physical invasiveness of the procedure is not decisive. Letting water drop for hours on the shaved head of a person, as in a well-known Japanese form of torture during the Second World War, may not seem very invasive, yet it clearly caused severe suffering. Concerning the practice of force-feeding at Guantanamo, the United Nations Special Reporter on Torture, Manfred Nowak, carefully stated: "If these allegations are true then this definitely amounts to an additional cruel treatment."[1] If, in the considered opinion of one of the world's leading experts on human rights, force-feeding amounts to "cruel treatment" then forced vomiting, at a minimum, is also "cruel". The crucial difference, of course, is that force-feeding is presumably in the interest of the person subjected to it, whereas, despite feeble allegations to the contrary, forced vomiting is not. The purpose of forced vomiting is to obtain evidence. Force-feeding introduces nourishment, whereas the forced insertion of the tube in the case before us introduces an emetic. The consequence of force-feeding is the nutritional restoration of the starved individual, the consequence of forced vomiting is convulsive involuntary vomiting and sometimes death. The force-feeding may be accompanied by anxiety due to the physical insertion of the tube but not as to the consequences of its insertion. In the case of forced vomiting, especially if the person subjected to this procedure is aware of preceding instances of concomitant death, the anxiety is subjectively more severe and objectively, at that, well-founded. Force-feeding lacks the specific intent necessary for the perpetrated conduct to amount to torture yet it can nevertheless be "inhuman and degrading". The specific intent in cases of forced vomiting fits the definition of torture as regards the required subjective motivation of the perpetrator of this conduct, which in the language of Mr Justice Frankfurter, shocks the conscience.

Nevertheless, except in extreme cases of mistreatment (electroshocks, Palestinian hanging, *falaka*, etc.), it is impossible to generalise. The United Nations Convention against Torture is predicated on the idea that the States Parties will incriminate torture precisely as defined in the above-cited Article 1, which Germany has not done although it has repeatedly been urged to do so by the United Nations Committee against Torture. Once prosecuted, the consequences of mistreatment can become a question of fact at the trial of the alleged torturer. This question of fact may be determined, for example, by questioning the victim. In other words, the definition of torture in the UNCAT is *not* predicated on the possibility that a State Signatory to the Convention will introduce and perpetuate a practice of obtaining evidence that not only results in its refraining from prosecuting

1. At http://news.bbc.co.uk/2/hi/americas/4569626.stm.

the perpetrators but also gives official endorsement for such abhorrent conduct. The applicant, Mr Jalloh, has not been treated as a victim in any German criminal proceedings and has thus never been given the possibility to testify. In other words, Mr Jalloh could not claim that his pain and suffering were severe and the German courts have never been given the opportunity to examine this non-prosecuted issue.

The issue comes totally unexplored before this Court. However, as in other analogous situations, the burden would clearly be on the State to show that Mr Jalloh, despite the fact that he had to be restrained by several policemen during this traumatising invasive procedure, possessed a sufficiently elevated threshold of pain and a sufficiently stable nervous system for the procedure of forced vomiting not to cause him severe anxiety, anguish, fear, and physical pain – not to mention the medical sequelae. For this reason, I maintain that the issue is not only whether in general forced vomiting produces severe pain and suffering but whether in this particular case such pain and suffering did in fact occur.

The burden is on the Government. In the absence of proof to the contrary and given the principle that everyone is presumed to know the natural consequences of their acts, I am constrained to maintain that the pain and the suffering in this particular case were severe. Thus, we ought to speak of torture.

II

The second question concerns the use, by the German Courts, of the extracted cocaine package as evidence instrumental in obtaining Mr Jalloh's conviction.

In *Rochin v. California*[1] Mr Justice Douglas stated: "I think that words taken from [the suspect's] lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment."[2] There are seemingly pragmatic reasons for this prescriptive position to have been weakened by subsequent case-law to the contrary (see paragraphs 51-52 of the judgment).

Essentially, however, the problem was that the rationale for the *prescriptive* norm treated as such by Mr Justice Douglas is too elemental – see infra the quote from Wigmore – to be immediately discernible. As a consequence, the exclusionary rule, which is simply the preventive remedy and the alter ego of the privilege against self-incrimination, has been reduced, mostly through the consistent commitment of Mr Justice

1. *Rochin v. California*, 342 US 165 (1952), at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=342&invol=165
2. Fifth Amendment to the United States Constitution: "No person shall be ... compelled in any criminal case to be a witness against himself ..."

Rehnquist, to a manipulable *instrumental* rule deriving from the need to deter police misconduct. As such it was yet interpreted, absurdly, in terms of its marginal utility.

A different kind of misunderstanding is apparent in *Saunders v. the United Kingdom* (17 December 1996, *Reports* 1996-VI) – our own leading case on the exclusion of contaminated evidence:

> "68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting *the will of an accused person to remain silent*. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which *has an existence independent of the will of the suspect* such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.
>
> ..." (emphasis added)

Thus in *Saunders* our Court, presumably because it derived both the privilege against self-incrimination *and* the exclusionary rule from the presumption of innocence, came to the suggestion that only audible words extracted from the mouth of the suspect are inadmissible in evidence. Moreover, by the same token evidence extracted by the cruellest torture – imagine that the suspect in our case was intentionally tormented in order to make him cough up the package – is admissible as long as "it has an existence independent of the will of the suspect".

This is in clear contradiction with Article 15 of the United Nations Convention against Torture. That provision mandates the strict exclusion of *all evidence* from the direct or indirect cognisance of the judges if it is obtained through torture. No insubstantial distinction is made here between verbal and non-verbal evidence[1]. In other words, while *Saunders* is an important case especially because it inextricably connects the two features

1. UNCAT, Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture *shall not be invoked as evidence in any proceedings*, except against a person accused of torture as evidence that the statement was made." (emphasis added)

of the same principle – the privilege against self-incrimination and the exclusionary rule – its rationale is not likely to withstand the test of time.

Yet the true *raison d'être* for the privilege against self-incrimination is very simple.

The reasons must be sought in the rudimentary rationale of the whole legal process as the civilised alternative to the resolution of conflict by combat. This very rationale was put succinctly by John Henry Wigmore, the foremost authority on the law of evidence:

> "to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself ..."[1]

Wigmore's reference to the "proper rules of battle" may have been so understood, but it is certainly not a metaphor. In the context of a legal process as a civilised alternative to barbaric combat, "proper rules of battle" most certainly do not contain a licence to use force, any force. The purpose of the "legal battle" is precisely to replace the logic of the real combat, that is, to replace the logic of power with the power of logic. In legal process, most fundamentally, the use of force as a means of conflict resolution is replaced with logical compulsion. The mere fact that the battle happens between "government and individual", as in criminal law, cannot change this most basic implication.

If force is nevertheless used to obtain evidence whose unwilling source is Wigmore's individual facing the powerful State police apparatus it is fair to say there has been a regression to combat and that the whole criminal process in its principal intention is subverted and deprived of legitimacy. The executive branch of the State, in other words, has relapsed into pre rule of law routine. To paraphrase Mr Justice Frankfurter, these are barbaric methods too close to war of everybody against everybody to permit of legalistic differentiation.

The courts that admit such evidence, because at a minimum they acquiesce in such cruel practices, are *ex post facto* accomplices to such cruel practices.

The issue, therefore, is not only whether Mr Jalloh had been tortured or treated inhumanly and degradingly. The whole system of law enforcement was exposed to degradation that was far more critical and perilous.

1. *Wigmore on Evidence*, McNaughton, rev. 1961, vol. 8, p. 318.

III

Most worrisome of all in all of this, however, is the already apparent change in the zeitgeist and the consequent degradation of minimal standards. What in 1952 was patently "conduct that shocked the conscience"[1] has in 2006 become an issue that must be extensively – and not just in this case – pondered, argued and debated. Despite their apparent evolution, this transmutation has little to do with the scholarly differentiation of juristic standards as, for example, between "inhuman and degrading treatment" on the one hand and "torture" on the other. Particular conduct on the part of the police will or will not shock the conscience of those appointed to consider it and to assess it. If it does they will condemn it as torture. If it does not they will deem it tolerable.

This assessment derives from a certain hierarchy of values – assimilated by everyone from the policeman holding down the person in whom a tube is to be inserted through which an emetic will be administered, to the medical doctor administering the tube and the emetic, to the judge admitting evidence so cruelly obtained. These hierarchies of values are the real origin of all the secondary ratiocination and, more worrisome, often the apparent lack of sensibility and interest.

In other words, human rights are not only a matter of pedantic legal reasoning. They are also a subject matter of a value judgment. True, only when this value judgment is converted into a verbally articulate legal standard can it sustain the rule of law. It is a mistake, however, to forget that underneath – at the origin of the very legal standard to be subsequently applied – lies the moral resolution of those who not only have opinions or even convictions, but also the courage of those convictions.

1. See *Rochin v. California*, cited above, p. 172: "[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."

DISSENTING OPINION OF JUDGES WILDHABER AND CAFLISCH

1. To our regret we cannot agree that the conduct of the German authorities in the instant case amounted to inhuman and degrading treatment and that, consequently, Article 3 of the Convention has been breached. While we do subscribe to the principles set out in paragraphs 67 to 73 of the judgment, these principles have not, in our view, been correctly applied to the present case.

2. A first observation to be made is that, unlike Article 8 of the Convention, Article 3 deals with torture and mistreatment assimilable to it. The treatment proscribed by Article 3 is, to a large extent, inflicted with the intention of punishing an individual or making him confess to a crime. As pointed out in Article 1 of the 1984 United Nations Convention against Torture, "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind" by persons acting in an official capacity. None of this has happened in the present case, which involved the attempt of a suspect to destroy evidence by swallowing it. This attempt could not, it is true, be thwarted without using force, but that use of force had nothing to do with the motivations usually underlying treatment contrary to Article 3. In addition, it would have been unnecessary if the applicant had not tried to make the evidence disappear or had consented to its recovery. Therefore, the present case does not fit into the categories of conduct prohibited by Article 3 of the Convention.

3. The majority of the Court argues that the forcible method used on the applicant can be resorted to only after an anamnesis has been performed by a doctor and the health risks run by the individual concerned carefully weighed. The Government contends that an anamnesis was performed, while the applicant asserts the contrary. We fail to see why the latter rather than the former should be believed and how, indeed, the applicant could make such an assertion since he claims to have no knowledge of German and very little of English (the fact of the matter being, though, that he spoke German or English well enough to sell his drugs). It can be argued, therefore, that, because of the suspect's failure to cooperate, only a partial anamnesis took place and that the German authorities did what they thought right and proper to secure the evidence, on the one hand, and to minimise the risks to the applicant's health, on the other – an applicant who did not, incidentally, by engaging in drug trafficking, show much regard for the health of others.

4. The majority also relies on an argument of proportionality by noting that the applicant had not been "offering drugs for sale on a large scale" since he was able to conceal them in his mouth, that this circumstance was reflected in the relatively lenient sentence (a six-month suspended sentence and probation) imposed on him and that the evidence required could have been obtained via natural elimination rather than by the administration of emetics. This seems a strange line of argument: the more important the dealer, the more licit the use of emetics. The majority appears to value the health of large dealers less than that of small dealers. To us the scale of the trafficking is not decisive when it comes to assessing proportionality.

5. Undoubtedly, as pointed out by the majority (see paragraph 82 of the judgment), the manner in which the impugned measure was carried out "was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him". The same would have been true – though perhaps to a lesser degree – of the administration of a laxative or the long wait for natural elimination. And, while the method used on the applicant did involve some degree of risk to his health – which is why the method is infrequently used (see paragraph 78 of the judgment) – the natural elimination method carries the risk of the ingested drug bubbles bursting in the digestive tract.

6. That being so, and mindful of the fact that drug offences must be prosecuted and evidence secured, we do not think that Article 3 applies in the present case. Even if it did, we are of the view that the treatment to which the applicant was subjected fails to reach the threshold set by that Article. On the latter point we are, therefore, in agreement with Judges Ress, Pellonpää, Baka and Šikuta.

7. This conclusion does not, however, dispense us from examining the matter under Article 8 of the Convention and, more specifically, whether the conduct of the German authorities was justified under paragraph 2 of that Article.

8. To begin with, there is little doubt that the German authorities' conduct was "in accordance with the law" within the meaning of Article 8 § 2, based as it was on Article 81a of the German Code of Criminal Procedure (see paragraph 33 of the judgment), as interpreted by many German domestic courts and writers. Since Article 81a authorises judges and public prosecutors, when seeking to secure evidence, to order bodily intrusions effected by a doctor even without the consent of the accused, provided that there is no risk of damage to the suspect's health, it may also be concluded that the measures complained of, including the use of emetics, were sufficiently foreseeable. Consequently, it may be assumed that the interference complained of was "in accordance with the law" as required by Article 8 § 2 of the Convention.

9. Furthermore, the objectives of the interference – the arrest and prosecution of suspected drug dealers, and the securing of evidence – show

that the measures complained of were taken in the interest of public safety, the prevention of drug offences and the protection of the health and rights of others, in accordance with Article 8 § 2 of the Convention.

10. The last and most important question to be answered is whether the interference with the applicant's private life was "necessary in a democratic society", as prescribed by Article 8 § 2. In other words, did that interference respond to a pressing social need and did the national authorities strike a proper balance between the public interest as set out above, the applicant's interest in preserving his physical and mental integrity, and the possible existence of less intrusive but equally effective means for obtaining the evidence required?

11. Regarding the interests of the applicant, it may be assumed that the latter experienced considerable anxiety (see paragraph 5 above) and that the procedure used entailed health risks since the doctor in charge was not able to conduct a full anamnesis (see paragraph 3 above). The intervention itself required the use of force and the administration of two drugs; and its aim was to induce vomiting, which cannot be perceived as anything but distressing.

12. The issue which arises now is whether, in order to strike a proper balance between the interests of society and those of the applicant, a less intrusive but equally effective alternative method was available. Waiting for the natural elimination of the drugs was an option but carried the risk, for the applicant, of the drug bubble bursting inside his digestive tract; it would also have necessitated further detention and surveillance, especially of the elimination process. One may disagree on whether the first or the second option presented a greater health risk, although the practice of a large majority of the Contracting States suggests that the former does.

13. The Government argued that, by choosing the first option, the German authorities were in fact fulfilling their positive obligation, under Article 8, to protect the applicant's life and health. But in the present case, the health risk was created by the applicant himself, by swallowing the drug bubble concealed in his mouth; the positive obligation of the State did not extend to the forcible removal of that risk against the will of the applicant. In this connection, attention may be drawn to the procedure currently used in the *Land* of Bremen (see paragraph 47 of the judgment), which calls for information to be given by a doctor to the suspect about the risks to his health if the drug remains in his body. It is then up to the suspect to decide whether to take emetics or a laxative if a medical examination shows that neither method entails a risk. Otherwise he will be detained in a special cell until the drug bubbles are eliminated naturally.

14. It is this solution which, in the circumstances of the present case, would likely have struck a proper balance between the public interest in securing evidence for the prosecution of drug offences and the applicant's interest in the protection of his physical and mental integrity. This is why

the interference with the applicant's private life was unnecessary in a democratic society. This is also why there has, in our view, been a breach of Article 8 of the Convention.

15. Regarding the applicant's complaints under Article 6 of the Convention, we agree with the dissenting opinion of Judges Ress, Pellonpää, Baka and Šikuta but should like to add that, in principle, the Court should not find dual or multiple violations in cases where single material acts are involved.

JOINT DISSENTING OPINION OF JUDGES RESS, PELLONPÄÄ, BAKA AND ŠIKUTA

We disagree with the opinion of the majority on all points in this case and wish to explain our reasons for so doing.

Article 3

First, unlike the majority, we do not think that Article 3 has been violated. While we agree with the way in which the general principles concerning Article 3 have been set out in the judgment (see paragraphs 67-74), we disagree with the judgment as to how these principles should be applied to the present case.

The judgment discusses the various elements regarded as relevant, starting in paragraph 77 with the question whether the intervention was necessary in order to obtain evidence. Also the majority accepts that drug trafficking is a serious offence, but adds that in this case "it was clear" that the applicant "had been storing drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale" (see paragraph 77 of the judgment). The relative lack of seriousness of the offence is, according to the judgment, "reflected in the sentence (a six-month suspended sentence and probation), which is at the lower end of the range of possible sentences" (ibid.).

Leaving aside the question whether the seriousness of the offence can have any bearing on the issue whether the interference constitutes inhuman or degrading treatment, we find that the way in which the majority appears to minimise the gravity of the offence is not entirely justified. The judgment of the Wuppertal Regional Court of 17 May 1995, which is in the file, finds it established that before the interference the applicant had already handed over one bubble from his mouth to a buyer at 11.35 a.m. and disappeared for a time before returning at 12.25 p.m., when he again handed over a bubble to a buyer. Thus the situation observed by the police, who could not know how many bubbles the applicant had in his mouth, was one of the repeated sale of drugs.

In these circumstances, it must be accepted that the police officers had reason to believe that the activities the applicant was involved in were of a certain gravity. We accept that it was decisive for the investigations into the applicant's repeated trade in drugs for the authorities to be able to determine the exact amount and quality of the substances that were being offered for sale. The fact that following the administration of the emetics only one cocaine bubble was found cannot be decisive in this context, no more than the fact that in the end the applicant received only a rather lenient prison

sentence after the Regional Court took into account a number of mitigating circumstances[1].

Important in the majority's reasoning is also their conclusion that there were less intrusive means of obtaining the evidence. The majority holds that the "authorities could simply have waited for the drugs to pass through his system naturally" (see paragraph 77 of the judgment), and bluntly rejects the Government's argument "that waiting for the drugs to pass through his body naturally would have been just as humiliating" (see paragraph 79 of the judgment).

It is true that this alternative is not associated with an interference with the suspect's physical integrity in the same way as the use of emetics. However, there is no reason to question the Government's explanations (given at the hearing and also set out in paragraphs 52-54 of the memorial of 4 July 2005) that in a case like the present one an effective use of the alternative would necessarily involve a round-the-clock surveillance of the detainee and especially of his use of the toilet. In other words, under the alternative method the affected person would be deprived, perhaps for several days, not only of his liberty but also of privacy when using the toilet. Privacy when using the toilet has in other cases been regarded as a part of the minimum rights to which detainees should be entitled, so much so that its deprivation has been regarded as an important element justifying the conclusion that conditions of detention amount to degrading treatment in violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 73-75, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 99, ECHR 2002-VI).

While the intrusion into privacy under the alternative of waiting for the drugs to pass may be less far-reaching than with the forcible administration of emetics, the advantages of the alternative method from the point of view of the values protected by the Convention are not so obvious as to dictate the exclusion of emetics.

The judgment goes on to examine the health risks attendant on the forcible medical intervention. The majority correctly notes that this question is a matter of dispute not only between the parties but also among medical experts (see paragraph 78 of the judgment). However, it rejects the

1. Thus, although there were indications that larger amounts of drugs were involved, the court applied the principle of *favor defensionis* and assumed ("*Die Strafkammer geht deshalb zugunsten des Angeklagten davon aus* ...") that both at 11.35 a.m. and 12.25 p.m. the applicant only handed over to the buyer a bubble containing on each occasion 0.15 grams of cocaine. The court also took into account the fact that the applicant was prevented from selling the bubble of 0.2182 grams. In addition, the sentence reflected the fact that the applicant had no criminal record in Germany and that during the one-year period which had elapsed between the applicant's release from pre-trial detention and the conviction now under discussion he had not been connected with any criminal activities. In the light of the judgment, one may safely assume that the kind of behaviour which the police observed the applicant engage in could, in the case of another person, easily have led to a more severe punishment.

Government's arguments concerning the health risks by noting, *inter alia*, that the forcible administration of emetics has to date "resulted" in the deaths of two people in the respondent State (ibid.). We for our part do not see sufficient reason not to believe the Government's contention that in one of the two cases referred to the person suffered from an undetected heart condition and "would have been equally at risk if he had resisted a different kind of enforcement measure" (see paragraph 62 of the judgment). In the other case the proceedings appear to be still pending (see paragraph 46 of the judgment), and thus nothing definitive can be said.

Even so, we do accept that the use of emetics carries health risks, as do many law-enforcement measures. However, in so far as the implicit acceptance by the majority of the alternative method of waiting for the drugs to pass out of the body is to be understood as suggesting that this method clearly entails less risk, we again question whether such a conclusion is in fact borne out by the material presented to the Court. The fact – mentioned in the Government's memorial of 4 July 2005, the accuracy of which we see no reason to question – that in Hamburg alone there have been two cases not involving the use of emetics "of small dealers dying from massive poisoning from heroin or cocaine that they had swallowed in small plastic bags to conceal the drugs from the police" (see paragraph 82 of the memorial) indicates that there are health risks involved also in the alternative of letting the drugs pass through the body.

Although with the benefit of hindsight one may argue that the use of emetics in this case – involving only one bubble containing 0.2182 grams of cocaine – entailed more risks than the alternative method would have, as a general matter we cannot find it established that the use of emetics is more dangerous than that alternative. Even assuming it is, the difference is not so great as to make it obligatory to exclude emetics. Whatever the case may be, we have no reason to believe that the doctor judging the situation could not reasonably conclude that the use of emetics was the appropriate way to proceed in the circumstances. We would add that the measure applied does not seem to have caused any long-lasting damage to the applicant's health.

As regards the manner in which the emetics were administered, we note that the order for their administration was made by a public prosecutor and executed by a doctor in a hospital setting, away from the gaze of the public. Even though the forcible administration of emetics through a nasogastric tube undoubtedly caused some degree of distress and discomfort, it was of relatively short duration. Furthermore, the nasogastric tube is widely used in daily clinical routine, and to this extent there was nothing unusual in the method used. As to the fact that the applicant had to be immobilised by four police officers so as to allow the emetics to be administered, we do not consider the force used to have been excessive in the circumstances, given the risk that any vigorous movement on the part of the applicant could have resulted in the nasogastric tube causing injury.

All in all, we accept that the treatment to which the applicant was subjected was harsh. However, anyone engaging in drug trafficking must take into account the possibility of being subjected to law-enforcement measures which are far from pleasant. The measures applied in this case in our view do not reach the threshold of inhuman or degrading treatment within the meaning of Article 3 of the Convention.

Article 8

As we have voted against finding a violation of Article 3, we have held that a separate issue arises under Article 8 of the Convention[1]. Therefore it is necessary for us to explain why in our view this provision has not been violated either.

We accept without hesitation that the forcible administration of emetics to the applicant constituted an interference with his right to respect for his private life in terms of his physical integrity, and that therefore Article 8 is applicable.

As to the justification for the measure under paragraph 2 of Article 8, we note that it appears to be a point of contention among German criminal courts and legal writers whether Article 81a of the Code of Criminal Procedure provides a statutory basis for the administration of emetics by force (see paragraphs 33-40 of the judgment). However, although the Federal Constitutional Court did not decide this issue in the applicant's case, both the Wuppertal District Court and the Wuppertal Regional Court considered that that Article authorised the forcible administration of emetics. Many criminal courts and legal writers appear to agree with this view. Having regard to this and to the wording of Article 81a, the national courts' interpretation in our view does not disclose any arbitrariness, and therefore we are satisfied that there was a sufficient legal basis for the impugned measure. We also consider that the provision satisfies the foreseeability test and that therefore the interference with the applicant's private life was in accordance with the law, within the meaning of Article 8 § 2 of the Convention.

Moreover, we do not have any hesitation in concluding that the interference in question pursued aims which are consistent with paragraph 2 of Article 8, in particular the prevention of drug-related crime and the protection of the health of others, notably potential drug consumers.

The question remains whether the interference could be regarded as "necessary in a democratic society" as is also required by paragraph 2 of Article 8. We accept that this question is rather more difficult than some of

1. Judge Šikuta considered that the matter should be dealt with exclusively under Article 3. Assuming that a separate issue arises under Article 8, he agrees with the reasoning of this dissenting opinion.

the other questions we have just touched upon. Even so, we conclude that the requirement of necessity is also fulfilled.

We refer, firstly, to what we said above when discussing Article 3. We reiterate in particular that the alternative method of waiting for the drugs to pass through the body naturally would not have been decisively better from the standpoint of the values protected by the Convention. As it can hardly be contended that drug dealers in the applicant's position should be allowed to go unpunished, the choice between the two methods, both of which entail certain risks, largely falls within the Contracting State's margin of appreciation, provided that the principle of proportionality is respected. In view of the Government's explanation that the use of emetics is allowed only in those five *Länder* where the problem caused by drug offences is most acute, we accept that the practice of using emetics does not go beyond what can be regarded as necessary. Absolutely denying the Contracting State the possibility of resorting to this measure even where the drug problem has reached the alarming proportions it has in some parts of Europe in our view fails to strike a proper balance between the State's interest in fighting drug offending and the other interests involved. As the force used by the police in the applicant's case did not go beyond what can be regarded as necessary in the circumstances, we conclude that there has been no violation of Article 8.

Article 6

We have also voted against finding a violation of Article 6. As in our view there has been no violation of either Article 3 or Article 8, the possibility of finding a violation on the grounds set out in the judgment does not really arise for us. Therefore, we will confine ourselves to a few brief remarks.

First, we would like to stress our agreement with the principle, enunciated notably in Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that incriminating evidence obtained as a result of *torture* should never be admitted as evidence against the victim (see paragraph 105 of the judgment). On the other hand, any extension of this principle to cover other violations of the Convention – and this judgment is a step in that direction – calls for caution. The case-law according to which the admissibility of evidence is primarily a matter for regulation under domestic law (see paragraph 94 of the judgment) is an important expression of the principle of subsidiarity, exceptions to which should be construed narrowly. However, as the majority has expressly left open the general question whether evidence obtained by an act qualified as inhuman and degrading treatment (but not torture) automatically renders a trial unfair (see paragraph 107 of the judgment), we do not consider it necessary to pursue the matter further.

As regards the application of the privilege against self-incrimination in this case, we agree that "the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings" (see paragraph 113 of the judgment). On the other hand, it is more doubtful whether an exception to this general rule on the admissibility of evidence was justified for the reasons given in the judgment. In particular, the majority's repeated emphasis on the applicant being only a small-scale drug dealer who was given a relatively lenient sentence (see paragraphs 107 and 119 of the judgment) is unconvincing (see also our comments on Article 3 above). However, in our view it is not necessary to go further than this, as our conclusion that there has been no violation of Article 6 is the more or less inevitable consequence of our conclusions drawn with respect to Articles 3 and 8.

DISSENTING OPINION OF JUDGE HAJIYEV

I voted with the majority of the Grand Chamber in favour of finding a violation of Article 6 of the Convention in the present case on the ground that the applicant's right not to incriminate himself had been breached. However, unlike the majority, I voted in favour of a finding that there has been no violation of Article 3 of the Convention. Regarding the applicant's complaint under Article 3, I fully subscribe to the dissenting opinion expressed by Judges Wildhaber and Caflisch.