FONDAZIONE GAETANO MORELLI

CENTRO PER LO STUDIO DEL DIRITTO PROCESSUALE INTERNAZIONALE
E DEL DIRITTO PROCESSUALE CIVILE INTERNAZIONALE

IL GIUSTO PROCESSO NELLA PROSPETTIVA DELLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO

Corso seminariale – Crotone, 11-15 settembre 2006

Introduzione alla Convenzione europea dei diritti dell'uomo – "Legge Pinto" e Corte europea dei diritti dell'uomo (prof. Giorgio Gaja)

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Corte europea dei diritti dell'uomo, sent. 26 giugno 1992, *Drozd e Janousek* c. *Francia e Spagna* (ric. n. 12747/87) ([1])

[omissis]

AS TO THE FACTS

11. Mr Jordi Drozd, a Spanish citizen, and Mr Pavel Janousek, a citizen of Czechoslovakia, are serving a term of fourteen years' imprisonment in France, following their conviction by a court of the Principality of Andorra for an armed robbery committed in Andorra la Vella. Mr Drozd is in prison at Muret (Haute-Garonne), Mr Janousek at Yzeure (Allier).

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

12. On 6 March 1986 R., a representative of the jewellery firm of F. in Barcelona, was staying in a hotel in Andorra la Vella. While he was in his room he was attacked by two persons who he stated stole from him jewels worth 65,000,000 pesetas and 33,000 pesetas in cash.

A. FACTS NOT IN DISPUTE

13. There are a number of facts which are not in dispute between the respondent Governments and the applicants.

1. *The investigation*

14. Following the criminal complaint brought by R. against persons unknown for armed robbery, the police arrested Mr Drozd and Mr Janousek on 7 March.

15. An investigation was then opened by one of the episcopal *batlles* (see paragraph 49 below).

The police arranged a first "identification test" at the police station, which was apparently unsuccessful, followed by a second test in the course of which R. identified the applicants as the persons who had committed the robbery. However, the defence criticised the conditions in which the "tests" in question had taken place.

2. *The trial*

16. The applicants were sent for trial and appeared before the Tribunal de Corts (see paragraph 51 below) on 26 March 1986. The court was composed of the Judge of Appeals, H.P., an honorary judge at the Toulouse Court of Appeal, nominated by the French Co-Prince, and two assessors, N.T., taking the place of the French *veguer*, by whom he had been appointed, an honorary judge at the Montpellier Court of Appeal, and F.B., the episcopal *veguer*, a Spanish jurist appointed by the Bishop of Urgel (see paragraph 52 below).

17. The court gave judgment on the same day, in Catalan, at a public hearing. The applicants were served with the Spanish text on the following day.

The court found both defendants guilty, sentenced them to fourteen years' imprisonment, and ordered them to be expelled from the territory of the Principality.

18. Mr Drozd and Mr Janousek lodged the only appeal which was then open to them, an appeal to the same judges to reconsider their ruling. This was dismissed by the Tribunal de Corts on 3 July 1986.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int*.

19. Both applicants chose to serve their sentences in France rather than Spain (see paragraph 56 below), and were presumably given by the French *veguer*'s office a French translation of the judgment convicting them, this being the usual practice.

20. They did not bring an appeal (*recurs de suplicació*) to the Tribunal Superior de Corts, a new appeal procedure introduced by the decree of 13 July 1990 (see paragraph 54 below) and used, successfully on occasion, by other convicted defendants, including another client of their counsel. This decree, the text of which was not communicated to Mr Drozd and Mr Janousek or their counsel, was published in the Butlletí Oficial del Principat d'Andorra on 21 July.

B. CONTESTED FACTS

21. The respondent Governments and the applicants submitted differing versions of certain facts.

1. *The presence of an episcopal battle at the court's deliberations*

22. While conceding that they were unable to prove this, as they had obviously not been present, the applicants claimed that the episcopal *batlle* in charge of the investigation had been present at the deliberations of the Tribunal de Corts.

23. According to the respondent Governments, that was not the case, nor could it have been.

2. *The inadequate linguistic knowledge of one of the members of the court*

24. The applicants maintained that the French assessor had not had an adequate command of Spanish, still less of Catalan, the language in which the hearing was conducted, which deprived him of any real possibility of taking part in the proceedings.

25. The French Government stated that a knowledge of Catalan and at least an understanding of Spanish were among the criteria for the appointment of French judges called upon to carry out judicial functions in Andorra. The Government added that in the present case all three members of the court had been of Catalan origin, spoke and understood Catalan perfectly, and had made oral interventions during the hearing.

The Spanish Government noted that it was the practice of the Tribunal de Corts to put questions and receive answers in French or Spanish, if a defendant understood one of those languages (in this case both applicants understood Spanish) and did not ask for the assistance of an interpreter (it did not appear from the record of the hearing that they had so asked). At no time had Mr Drozd and Mr Janousek been questioned in Catalan.

3. *The failure to "isolate" the witnesses and the victim before giving evidence*

26. The applicants maintained that the witnesses had not been "isolated" before giving their evidence, and that the alleged victim had heard the statements of the defendants before he gave evidence.

27. The Government considered these claims to be incorrect, having regard to the provisions of Article 161 of the Andorran Code of Criminal Procedure in the version in force at the time.

4. *The lack of assistance of an interpreter*

28. Mr Janousek claimed that he had not had the benefit of the assistance of an interpreter during the investigative stage; the interpretation provided at the trial had been incomplete, and this had prevented him from taking an active part in the hearing and in particular from commenting on the witnesses' evidence.

29. According to the information given to the Commission by the Governments, an interpreter appointed by the Spanish authorities had been on duty during the entire proceedings, and there were no reasons for considering that the oral translations done by him had been inaccurate.

Before the Court, the Spanish Government produced documents showing that a German-speaking interpreter, and later another interpreter, had acted during the investigation. They conceded, however, that the record of the trial was silent on this point.

5. *The lack of assistance of a lawyer*

30. Finally, Mr Janousek complained that he had not had the assistance of a lawyer during the investigation.

31. The Governments stated that the applicants had been informed when they were charged of their right to nominate a lawyer of their choice to defend their interests, and that they had made use of this right.

II. THE ANDORRAN LEGAL SYSTEM

32. Andorran public law derives from two *pareatges* or arbitral awards of 1278 and 1288. These asserted the principle of equality of rights between the feudal overlords, namely the Count of Foix (whose rights were subsequently transferred to the King of France and later to the President of the French Republic) and the Bishop of Urgel. On the basis of these *pareatges* the overlords in the course of time granted privileges to the people of Andorra and issued decrees; these decrees were supplemented by customary law relating *inter alia* to the apportionment of powers among the institutions of the Principality.

33. In civil cases the Andorran courts apply customary law as set out in the Manual digest of 1748 and the Politar of 1767, supplemented by Roman law, Catalan law and canon law. In criminal matters the relevant sources of law are various decrees of the *veguers* and customary law, which were codified in 1984. Finally, the relevant laws in administrative cases are the provisions issued by the parish councils and the General Council of the Valleys and those decreed by the Permanent Delegates (see paragraphs 40, 42 and 44 below).

A. INSTITUTIONS

1. *The Co-Princes*

34. Andorra is ruled by two Co-Princes, the President of the French Republic and the Bishop of Urgel (province of Lleida/Lerida, Spain).

The latter has no public function in Spain, and since the agreement between the Holy See and the Kingdom of Spain of 19 August 1976 his appointment has been the exclusive responsibility of the Pope. Canon law does not impose any conditions as to nationality, and the bishop is very often a Spanish or Andorran citizen. According to the Spanish courts (Audiencia Nacional, judgments of 3 October 1990 and 25 April 1991), he enjoys the privileges and immunities which foreign heads of state have under international law.

The Co-Princes' rights and prerogatives are attached to their offices and are consequently acquired and lost with them.

(a) Their powers

(i) Joint powers

35. According to consistent and constant practice, the Co-Princes exercise their powers jointly. This general rule is based on custom and demonstrates the equality between the Co-Princes; there are only very limited exceptions to it.

(ii) Sole powers

36. Each Co-Prince also has powers which are his own. These are the appointment of a *veguer* and Permanent Delegate, and of the members of one of the two "Senates" of the Higher Court (see paragraphs 37, 39 and 66 below); the General Council of the Valleys, however, has the right of nomination of the *batlles* (see paragraph 49 below) and the notaries, which limits the freedom of the episcopal Co-Prince and the French *veguer*. There is also the right to decide on appeals *en queixa* - survivals from the feudal right of petition - brought against administrative regulations and decisions or laws passed by the General Council of the Valleys.

(b) Their representatives

(i) The *veguers*

37. The *veguers* are the direct representatives of the Co-Princes in Andorra; they reside there and have Andorran nationality during their term of office. They are appointed for an indefinite period, the French *veguer* (a diplomat) by the French Co-Prince and the episcopal *veguer* (generally a Spanish or Andorran jurist) by the episcopal Co-Prince.

38. They have powers of a legislative nature which are exercised by means of decrees and cover a number of fields: the organisation of civil and criminal justice and procedure; immigration; public safety, public order and the protection of morals. They also carry out tasks of an executive nature: command of the Andorran militia, which includes all men aged from sixteen to sixty years, and of the Andorran police; issue or refusal of long-term residence permits to foreigners; validation of Andorran passports; examination of requests for acquisition of nationality. Finally, they have judicial functions: they carry out investigations for decisions of the Co-Princes on appeals *en queixa* (see paragraph 36 above) and are entitled to sit on the Tribunal de Corts (see paragraph 52 below).

(ii) The Permanent Delegates

39. The Permanent Delegates, an institution set up at the end of the last century, are not resident in Andorra. The French Permanent Delegate is the Prefect of the Department of Pyrénées-Orientales and is assisted in his duties by part of the prefect's office. The office of episcopal Permanent Delegate is traditionally given to the Vicar General of the Diocese of Urgel.

40. The two Delegates have legislative, judicial and administrative powers, which they exercise jointly on behalf of the Co-Princes. In particular, they issue decrees - sometimes very important ones - in the "constitutional" field (for example, the creation of the parish of Les Escaldes Engordany in 1978 and the establishment of the Court of Taxes in 1979) and the "administrative" field other than economic (for example, the Code of Andorran Nationality of 1977).

2. *The "popular" representative bodies*

41. The Principality also has a number of institutions whose members are elected by universal suffrage.

(a) The parish councils

42. The territory of Andorra is divided into seven parishes, each of which is administered by a council (*comu*) consisting of ten to fourteen people elected for four years, who choose from among their number a consol major and a consol minor. It manages the parish's affairs and property, and also has power to make regulations. Appeals to the Government can be brought against its decisions.

(b) The quart councils

43. A quart is a village or hamlet and exists in certain parishes only. Its council consists of one member from each household (*casa*), and the members appoint a representative (*llevador*). In some cases it has administrative functions.

(c) The General Council of the Valleys

44. The origin of the General Council of the Valleys goes back to the creation of the Council of the Land in 1419. It was restructured in 1886 and again in 1981 and is now defined as "the political assembly most representative of the Andorran people". It has twenty-eight members (four per parish) who are elected for four years by all Andorrans over the age of eighteen. The members elect a *syndic general* (President) and a *sub-syndic* (Vice-President) and work through *juntas* (committees).

The General Council passes laws, approves the budget of the Principality and exercises oversight over the Government. In practice, the Co-Princes do not intervene in areas where it has competence, except when they are called on to decide an appeal *en queixa* (see paragraph 36 above).

The General Council chooses, from among its own members or from outside, the Chief Executive, who in turn appoints the other four to six members of the Executive Council. This institution was recently set up by the Co-Princes (decree of 15 July 1981 "on the process of institutional reform"). The Executive Council has a variety of duties: implementation of decisions of the General Council; proposing texts for adoption; preparation and subsequent implementation of the budget; management and supervision of the administration and public services.

The General Council may adopt, by at least nineteen votes, a motion of no confidence in the Executive Council.

(d) The Magna Assembly

45. The Magna Assembly (*Assemblea magna*) may be convened when decisions of exceptional importance are to be taken. It consists of the General Council, the consols and four other representatives from each parish, who are usually elected at a "meeting of the people".

B. THE LEGAL SYSTEM

46. With the exception of the Court of Visura, which settles disputes between neighbours and is responsible to the General Council, the courts of Andorra have their legal basis in the Co-Princes' historic "right of justice" and are thus directly responsible to the Co-Princes.

The members of the lower courts are always of Andorran nationality, while those of higher courts are often of foreign origin, because of the smallness of the Principality and out of concern for preserving the independence of the judiciary.

47. As a general rule, judges are appointed by the Co-Princes.

The French Co-Prince traditionally selects French judges, either honorary judges or serving judges seconded by the Ministry of Justice, chosen with regard to personal competence, knowledge of Andorran law, knowledge of Catalan and understanding of Spanish.

The episcopal Co-Prince bases his choice on the criteria of competence, independence, lack of personal interests in Andorra and availability for service, judicial office in Spain being incompatible with the position of judge in Andorra, even on a part-time basis and for a fixed term.

1. *Criminal justice*

48. A decree of the *veguers* of 30 December 1975 laid the foundations of a new criminal justice system, providing in particular for the intervention of counsel and the establishment of a public prosecutor's office. A decree on criminal procedure followed on 10 April 1976. A Code of Criminal Procedure, based on the *veguers*' decrees and on customary law, was introduced in 1984 and amended on 16 February 1989.

(a) The institutions

(i) The *batlles*

49. The *batlles* are first-instance judges with criminal and civil jurisdiction, and also have other duties. They carry out investigations into crimes which have been committed, supervise the enforcement of court judgments pronounced in Andorra, and sit on the Tribunal de Corts as non-voting assessors (see paragraph 52 below).

Since the *veguers'* decree of 6 August 1977 they are four in number. The French *veguer* and the episcopal Co-Prince each appoint two of them, chosen from a list of seven names drawn up by the General Council of the Valleys. The persons appointed must have Andorran nationality.

(ii) The Court of Minor Offences

50. The Court of Minor Offences was established by the Co- Princes in 1988. It has first-instance jurisdiction over minor criminal cases and appeals against its judgments can be brought before the Tribunal de Corts.

(iii) The Tribunal de Corts

51. The Tribunal de Corts was until 15 October 1990 the supreme criminal court. It "judges ... all cases relating to offences committed on the territory of the Valleys, without difference or distinction of persons, and offences committed by Andorrans abroad" (Article 2 of the Andorran Code of Criminal Procedure). It also rules on appeals brought against judgments of the *batlles*.

52. The court is composed of three members, the Judge of Appeals and the two *veguers*.

The Judge of Appeals presides over the court, directs the proceedings and acts as the reporting judge who drafts the judgment. He decides alone on appeals concerning detention on remand. He is a French or Spanish judge appointed for five years by each Co-Prince alternately; he must have a knowledge of the law of the Principality and its official language, Catalan.

The *veguers* (see paragraphs 37-38 above) are entitled to sit but generally do not do so. The French *veguer* - a diplomat appointed by the French Co-Prince for an indefinite period - has since 1981 been substituted by a French judge, either honorary or seconded by the Ministry of Justice. The episcopal *veguer* has not sat since 22 April 1988 and now delegates his duties to a Spanish judge (see paragraph 16 above). The *veguers* or their substitutes need not be Andorran, nor need they be jurists, but they must speak Catalan. They are assisted by two *batlles*, two notaries who act as clerks of court, an usher and two *rahonadors*, who are delegated by the General Council of the Valleys, of which they are members.

53. The public prosecutor's office is composed of a fiscal general and an assistant fiscal general, who are appointed for five years by whichever of the Co-Princes has not appointed the Judge of Appeals.

(iv) The Tribunal Superior de Corts

54. By a decree of 12 July 1990, which had been in the course of preparation since 1981, the *veguers* established a new court, the Tribunal Superior de Corts, which consists of four judges appointed for five years by the Co-Princes and decides on appeals (*recursos de suplicació*) against judgments of the Tribunal de Corts.

On the following day they issued a further decree dealing with procedure, including the following transitional provisions: "1. Convicted persons who before the coming into force of the present decree have to serve or [as in the case of the applicants] are in the course of serving sentences of imprisonment as a result of judgments of the Tribunal de Corts may bring an appeal (*recurs de suplicació*) against such sentences to the Tribunal Superior within a period of two months from the coming into force of the present decree. 2. The present decree shall come into force on 15 October 1990."

(b) Enforcement of sentences

55. Article 234 of the Andorran Code of Criminal Procedure provides for two distinct systems of enforcement for sentences of imprisonment passed in Andorra: a convicted person serves his sentence in an Andorran prison if the sentence is less than three months, and in a French or Spanish prison in other cases.

(i) The choice of country of detention

56. In the latter case it is for the convicted person to choose between France and Spain. The choice is definitive and implies the tacit acceptance of the prison regime of the country chosen. This practice originates in customary law as traditionally applied since the twelfth century.

From 1979 to 1989, transfer to France was requested by 32 convicted persons and to Spain by 134. No prisoners from Andorra were admitted to French prisons in 1990 and 1991.

(ii) The French system

57. If a convicted person chooses France, as in the present case, enforcement of the sentence is governed by the provisions of the French Code of Criminal Procedure (circular of the Minister of Justice of 8 February 1983). Like any person convicted in a foreign country and transferred to France, he is entitled (according to the Government) to remission of sentence, prison leave and semi-imprisonment in the same way and subject to the same conditions as prisoners sentenced by a French court (Article D.505 of the Code of Criminal Procedure).

58. The judge responsible for the enforcement of sentences has sole jurisdiction to decide whether to grant the prisoner release on licence or to remit part of his sentence, within the legal limits.

If the term of imprisonment exceeds three years, it is for the Minister of Justice to grant release on licence. The Minister must first obtain the consent of the Tribunal de Corts (Article 253 of the Andorran Code of Criminal Procedure).

59. Under Article 710 of the French Code of Criminal Procedure, disputes relating to the enforcement of sentences are brought before the court which pronounced the sentence, in this case the Andorran court.

(iii) Pardons

60. An individual pardon can only be granted by the two Co-Princes acting jointly.

61. Collective pardons do not apply to prisoners sentenced by Andorran courts who serve their sentences in France, as they were expressly excluded by a decree of the President of the French Republic of 1985. The presidential decrees of 17 June 1988 and 13 June 1989 did authorise pardons to take effect if this was allowed by international agreements ratified by France, but there is no specific arrangement with Andorra on this point.

(iv) Amnesties

62. Only the Andorran authorities have jurisdiction to grant an amnesty. In addition, the Tribunal de Corts can vary its own decision by reducing the sentence and granting genuine release on licence, which is referred to as "provisional release".

2. *Civil justice*

63. There are three levels of jurisdiction in civil matters.

64. The *batlles* (see paragraph 49 above) have first-instance jurisdiction, as in criminal cases.

65. The Judge of Appeals (see paragraph 52 above) hears appeals against the decisions of the *batlles*.

66. The court of final jurisdiction is the Higher Court of Andorra which consists of two "senates", the Higher Court of Perpignan and the Higher Court of the Mitre.

The former consists of two ex officio members (the President of the Perpignan tribunal de grande instance and the French *veguer*, who has not sat for many years now) and two members appointed for four years by the French Co-Prince (a lawyer from the Perpignan bar and a person with knowledge of the language and customs of Andorra). It does not apply French law or follow French procedure; in particular, it is not subject to review by the Court of Cassation.

The latter senate consists of a President, a Vice-President and four judges (vocals), appointed by the episcopal Co-Prince.

The two senates have their seats at Perpignan and Urgel respectively, but carry out their functions in Andorra.

III. THE INTERNATIONAL "STATUS" OF ANDORRA

67. The status in public international law of the Principality of Andorra is striking by its originality and ambiguity, so much so that it is often regarded as an entity *sui generis*.

The practice followed in recent years suggests that there is now agreement between the Co-Princes to regard themselves as equals in the conduct of Andorra's international relations. Andorra has entered into a number of bilateral and multilateral relations in this field.

A. BILATERAL RELATIONS

1. *Relations with France*

68. Relations between Andorra and France do not fit into the pattern of relations between sovereign States. They have never taken the form of international agreements, as the French Co-Prince is the President of the French Republic and the French Government have always refused to recognise the Principality's statehood. Such relations take a number of forms: unilateral French acts, such as the establishment of French schools; administrative arrangements, such as those dealing with social security, telephone networks and customs regimes; de facto relationships, sometimes deriving from custom (this is the case with the enforcement of certain sentences outside Andorra - see paragraphs 55-62 above), sometimes based on administrative or judicial practice (decisions of the Andorran courts have the status of *res judicata* in France and do not require an exequatur for enforcement).

The French Government also place a unit of police (gendarmerie) at the disposal of Andorra.

Finally, France does not have a consulate in the Principality. French nationals in Andorra are dealt with by the prefecture of the Pyrénées-Orientales department.

2. *Relations with Spain*

69. Relations between Andorra and Spain follow a similar pattern. They feature unilateral Spanish acts, such as the royal decree of 10 October 1922 regulating trade between the Principality and the Kingdom of Spain, and bilateral arrangements such as the agreements of an administrative type relating to social security.

The Spanish Government also make certain facilities available to the Mitre. Thus a unit of the *guardia civil* is stationed in Andorra: the members of this unit are no longer responsible to their original administrative department and the episcopal *veguer* can effectively veto their appointment or presence in Andorra; the Spanish authorities are responsible for their pay, while the costs of equipment and operational expenditure in respect of administrative and in particular consular functions are borne by the Andorran budget.

There is no Spanish consulate in Andorra. The episcopal *veguer* acts as *de facto* consul for Spanish citizens.

3. *Relations with States other than France and Spain*

70. Andorra does not maintain diplomatic relations with any other State.

On the other hand, it has entered into consular relations with the following eight countries: Argentina, Belgium, Germany, Italy, Switzerland, the United Kingdom, the United States of America and Venezuela. It does not have its own consular representation, however, and its nationals are protected by the French and Spanish authorities in this respect.

B. MULTILATERAL RELATIONS

1. *International organisations*

71. Andorra is not a member of any intergovernmental international organisation.

On 15-18 October 1990 the Committee of Ministers of the Council of Europe "asked the Secretary General to contact the two Co-Princes to define the areas suitable for co-operation between the Council of Europe and the Principality of Andorra". In so doing it was giving an "interim response" to Recommendation 1127 (1990) on the Principality of Andorra, adopted by the Consultative Assembly of the Council of Europe on 11 May 1990.

2. *International agreements*

72. Andorra has acceded to two international agreements, the Universal Copyright Convention (Geneva, 1952) and the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954).

3. *International conferences*

73. Since the Universal Copyright Conference (Geneva, 1952) Andorra has regularly taken part in meetings of UNESCO. It has also sent delegations to three conferences: the conference on the protection of cultural property in the event of armed conflict (The Hague, 1954), the conference to revise the Universal Copyright Convention (Paris, 1971), and the conference on the protection of phonographic recordings (Geneva, 1971).

Since 1973, on the order of the Co-Princes, the Principality's representatives at these conferences have been appointed by the *veguers* jointly. Four members of the General Council of the Valleys now accompany the said representatives; the Head of Government is the spokesman of the delegation.

4. *The European Communities*

74. For some decades Andorra was not part of the Communities' customs territory.

On 20 March 1989 the Council of the European Communities adopted a directive inviting the (Brussels) Commission to negotiate an agreement with Andorra with a view to creating a customs union for industrial products.

The agreement in question came into being on 28 June 1990 in the form of an exchange of letters, and entered into force on 1 January 1991. The Principality's letter was signed by the representatives of the Co-Princes and by the Head of Government.

IV. THE OUTLOOK FOR CHANGE

75. The development of the institutions and international "status" of the Principality of Andorra has for some time now been the subject of discussions and plans.

76. The French Co-Prince referred to these on 26 November 1991 in a speech made at the Élysée Palace in Paris on the occasion of the presentation of the *questia*, a symbolic sum of money which is paid to him in odd years:

“Here we are once more gathered together, in accordance with a custom which, as you know, is several centuries old, in order to give expression to the continuity and strength of the links which unite the people of Andorra with their Co-Prince.

We set great store by this ceremony, which for the sixth time gives me the opportunity to receive here the elected representatives of the Andorran people and to discuss the affairs of the Principality with them personally. I am especially pleased to welcome today those of them whom I have not yet had the pleasure of meeting since their assumption of their high offices.

By coming here for the payment of the *questia* you demonstrate the depth of your faithfulness to our traditions. This sentiment is not one of nostalgia, or so I presume, for you are at the same time resolutely looking to the future; it is your firm will to play a full part in the progress of the modern world. The remarkable economic progress of the Valleys during recent decades bears witness to this, as does the modernisation of your institutions, which was embarked upon ten years ago and has gained new momentum in the last two years.

Since our last meeting in 1989 a decisive step has been taken for the future of the Principality. This relates to the constitution which the elected representatives of Andorra have wished the Principality to be endowed with. At the last ceremony of the *questia* I stated my willingness to encourage developments in the internal and international order, where they responded to the legitimate aspirations of the people of Andorra. In this spirit I naturally gave my approval and support to the unanimous request of the General Council of the Valleys to draft a constitution with the agreement of the episcopal Co-Prince and the active support of the Andorran representatives, whose high sense of the public interest I wish to salute here. Agreement was reached on the working method, the objectives and the structure of the draft constitution.

Thus there have already been written into the draft, on which much work has already been done, such fundamental principles as the establishment of a democratic sovereign State under the rule of law, recognition of the sovereignty of the people, respect for the territorial organisation of the parishes which has come down from history, the guarantee of rights and freedoms, the institution of a parliamentary system provided with rules to ensure the authority of the Government and an effective control by the General Council of the Valleys.

You are likewise resolved to simplify and unify the organisation of the legal system, while preserving the greatest respect for its independence, in order better to ensure and guarantee the rights of those subject to the law, taking as your inspiration the principles and rules defined in the European Convention on Human Rights; no doubt while awaiting the accession of the Principality to that Convention.

I fully agree with these principles and I am delighted at the significant results obtained so far. I congratulate you on them.

I have confidence in your will and your capacity for carrying on the work of drafting the constitution at the speed at which it has progressed until now, thanks to the excellent spirit of co-operation which inspires the joint meetings of your delegation and those of the two Co-Princes. I am indeed convinced that we can bring this task to a successful conclusion with a view to swiftly and democratically putting in place the constitution drawn up jointly by the General Council of the Valleys and the Co-Princes. This method of permanent consultation has demonstrated its effectiveness. The tripartite commission has met nine times since April 1991, at the House of the Valleys in Andorra. Its work, which has invariably been constructive, has made it possible to avoid misunderstandings and overcome all sorts of difficulties.

We do not conceal the facts, however. You are within sight of the goal, but the path to follow to reach it is still difficult. That is inevitable; indeed, it is natural. Every innovative work, especially in the political field, is accompanied by hopes and fears, and arouses the necessary democratic debate, as well as legitimate ambitions and fervent personal commitment.

I do not think that anything will weaken your determination. Mountain-dwellers like you know how to save their breath and measure their step according to the length or difficulty of the ascent. You are experienced men, patient men. You know, and you do not need me to tell you, that once the way to the summit has been decided on by common consent, there is no choice other than to succeed or fail together.

You have very recently provided proof of your sense of your responsibilities by coming together despite your political differences so as the better to overcome the obstacles and attain the goal you have set yourselves.

The ambitious and proud people you represent know the value of effort and of perseverance. I cannot encourage you too much to continue with your task, certain as I am that you will know how to legislate, govern, administer, give justice and in short assume full responsibility for the Principality, which will soon be completely devolved to you.

You will doubtless, at least to start with, have to act with boldness, but also with care to preserve the richness of your traditions and the identity of the parishes which originally joined together to form Andorra.

In this task, on which considerable progress has now been made, I am with you so that social justice may prevail, for without that there can be no true economic progress, and so that the elected representatives of Andorra may exercise fully the internal sovereignty of Andorra, without which there can be no international recognition.

France and no doubt Spain, as your neighbours, will surely be the first to establish relations of friendship and co- operation with the future State of Andorra.

The signing of the association agreement between the EEC and Andorra was the first step towards the integration of the Principality into the European Economic Area. Other steps will follow. The interest shown by you in particular in the regulation of the banking profession and the control of international flows of money demonstrates your concern not to stay apart from the new forms of solidarity which are coming into being so that law and fairness can prevail in the international order.

You will henceforth be fully responsible for the Principality. The new institutions will be the cement, freely consented to, holding your nation together. Your freedom, given expression in elections, will strengthen your traditions and allow your country to join the international community while still affirming the power of its special features, its history and culture.

That, gentlemen, is what I wished to say to you. You will be so kind as to pass the essence of it on to the people of Andorra, so now we have a few moments left in which to stay together and improve our mutual acquaintance, passing some time in the useful, fruitful and friendly way which our relationship demands." (FRENCH MINISTRY OF FOREIGN AFFAIRS, *Bulletin d'information of 27 November 1991* (231/91))

PROCEEDINGS BEFORE THE COMMISSION

77. In their application to the Commission (no. 12747/87) of 26 November 1986 Mr Drozd and Mr Janousek put forward two series of complaints.

(a) The first series of complaints, based on Article 6 (art. 6) of the Convention, were directed against France and Spain, who were regarded as responsible at international level for the conduct of the Andorran authorities.

i. Certain complaints were common to both applicants, in reliance on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d). These were that they had not had a fair trial before the Tribunal de Corts because:
   - two of the judges were the representatives of the Co-Princes in Andorra and the superior officers of the police (see paragraph 16 above);
   - the judge in charge of the investigation was present at the court's deliberations in chambers (see paragraph 22 above);
   - one of the judges knew little Spanish and less Catalan, Catalan being the language of the proceedings (see paragraph 24 above);
   - the witnesses had not been "isolated" before giving evidence and the victim of the theft had heard the defendants' statements before he gave evidence (see paragraph 26 above).

ii. The other complaints were made by Mr Janousek alone, in reliance on sub-paragraphs (b), (d) and (e) of Article 6 para. 3 (art. 6-3-b, art. 6-3-d, art. 6-3-e). He complained that he had not received the assistance of an interpreter or a lawyer during the investigation, nor a complete translation during the trial (see paragraphs 28 and 30 above).

(b) The second group of complaints, based on Article 5 para. 1 (art. 5-1) of the Convention, were directed against France alone. Both applicants considered that their imprisonment in France after being convicted by an Andorran court was "unlawful" as there was no provision of French law relating to the enforcement of such judgments.

78. The Commission declared the application admissible on 12 December 1989. In its report of 11 December 1990 (Article 31) (art. 31) it expressed the opinion that there had not been a violation of Article 6 (art. 6) either by France (ten votes to six) or by Spain (twelve votes to four), nor had there been a violation of Article 5 para. 1 (art. 5-1) by France (eight votes to eight, with the President's casting vote). The complete text of its opinion and of the six separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

79. In their memorial the French Government asked the Court to "declare the application introduced by Mr Jordi Drozd and Mr Pavel Janousek inadmissible and, in the alternative, ill-founded".

80. The Spanish Government for their part made the following submissions: "Neither France nor Spain may be considered as States responsible for the actions of the Andorran judicial authorities. Consequently it is not relevant to examine the question of the alleged violation of Article 6 (art. 6) of the Convention. In conclusion, there has been no violation by either Spain or France of Article 6 (art. 6) of the Convention."

81. In his written observations, the Delegate of the Commission asked the Court "to dismiss the [French] Government's objection based on Article 26 (art. 26) of the Convention".

AS TO THE LAW

I. THE COURT'S JURISDICTION TO EXAMINE THE MATTER FROM THE POINT OF VIEW OF ARTICLE 6

82. Mr Drozd and Mr Janousek complained that they had not had a fair trial before the Tribunal de Corts. Mr Janousek also claimed that he had not had the assistance of an interpreter or a lawyer during the investigative stage, nor a complete translation during the hearing. They relied on Article 6 (art. 6) of the Convention, which reads as follows: "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ... 3. Everyone charged with a criminal offence has the following minimum rights: ... (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

They both regarded France and Spain as responsible at international level for the conduct of the Andorran authorities.

83. In the opinion of the two respondent Governments and the Commission, on the other hand, the conviction of the applicants by a criminal court of the Principality of Andorra did not entail responsibility on the part of France and Spain with respect to Article 6 (art. 6).

The Governments raised several preliminary objections on this point, as they had done before the Commission, while the Commission declared the application admissible but then decided that it did not have jurisdiction to examine the merits of the case from the point of view of the Article (art. 6) in question.

A. THE OBJECTION OF LACK OF JURISDICTION *RATIONE LOCI*

84. The two respondent Governments and the Commission agreed in considering that the Convention did not apply on the territory of Andorra, despite having been ratified by France and Spain.

85. In the opinion of the French Government the President of the French Republic embodied "a duality in his person", to use an expression from an opinion of the French Conseil d'État of 27 January 1953; he exercised his functions as Co-Prince of Andorra on a personal basis (just as the King of France once did) and not in the name of the French State or the French people, and was not their mandatary or representative in this context; the consequence of this autonomy was that France did not exercise any sovereignty over the Valleys and could not enter into commitments on their behalf.

86. The Spanish Government maintained that only a declaration of territorial extension made under Article 63 (art. 63) of the Convention would have been capable of binding Spain with respect to Andorra; however, there would be a legal obstacle to the making of such a declaration, as the international relations of Andorra were the exclusive responsibility of the Co-Princes jointly.

87. The Commission emphasised the complex and unusual nature of the status of the Principality in public international law, and stressed two points: firstly, the entity in question, often described as sui generis, did not form part of either France or Spain, so that the Convention could not be regarded as automatically applicable on its territory; secondly, the practice of recent years appeared to reflect agreement between the Co-Princes to regard themselves as equals in the exercise of the international functions of Andorra, with the effect that neither France nor Spain had jurisdiction of their own to act on behalf of the Principality.

88. The applicants maintained that Andorra formed a "vacuum of sovereignty" which was filled by the French Co-Prince, who was an emanation of French sovereignty; international treaties, such as the Convention, which had been ratified by France were therefore also valid for Andorra.

89. The Court agrees in substance with the arguments of the Governments and the opinion of the Commission. It also takes into consideration certain circumstances which were not mentioned, or only mentioned briefly, by those appearing before it.

To begin with, the Principality is not one of the members of the Council of Europe, and this prevents it being a party to the Convention in its own right (Article 66 para. 1) (art. 66-1). It could no doubt have sought to be admitted as an "associate member" of the organisation under Article 5 of the Statute; if its application had been accepted by the Committee of Ministers, it would have had the right, as Saarland had in 1950, to sign and ratify the Convention. But it appears never to have taken any steps to do this.

Secondly, the territory of Andorra is not an area which is common to the French Republic and the Kingdom of Spain, nor is it a Franco-Spanish condominium.

Moreover, the relations between the Principality and France and Spain do not follow the normal pattern of relations between sovereign States and do not take the form of international agreements. The Court nevertheless notes that the development of the institutions of Andorra, if continued, might allow Andorra to "join the international community", as the French Co-Prince said on 26 November 1991 (see paragraph 76 above).

In short, the objection of lack of jurisdiction *ratione loci* is well-founded.

90. This finding does not dispense the Court from examining whether the applicants came under the "jurisdiction" of France or Spain within the meaning of Article 1 (art. 1) of the Convention because of their conviction by an Andorran court.

B. THE OBJECTION OF LACK OF JURISDICTION *RATIONE PERSONAE*

91. The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory (see the Commission's decisions on the admissibility of applications no. 1611/62, *X* v. *the Federal Republic of Germany*, 25 September 1965, Yearbook, vol. 8, p. 158; no. 6231/73, *Hess* v. *the United Kingdom*, 28 May 1975, Decisions and Reports (DR) no. 2, p. 72; nos. 6780/74 and 6950/75, *Cyprus* v. *Turkey*, 26 May 1975, DR 2, p. 125; nos. 7289/75 and 7349/76, *X and Y* v. *Switzerland*, 14 July 1977, DR 9, p. 57; no. 9348/81, *W.* v. *the United Kingdom*, 28 February 1983, DR 32, p. 190).

The question to be decided here is whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States.

92. According to the respondent Governments and the Commission, the Tribunal de Corts and the other Andorran courts cannot be regarded as French, Spanish or Franco-Spanish, nor even as institutions subject to effective control by France or Spain or both.

93. The French Government did not accept that France could be considered responsible for the judicial acts of Andorra on the grounds that the courts of the Principality included French judges and were under the control of the French courts.

On the first point, they acknowledged that serving or retired French judges did carry out some judicial functions in Andorra. However, they made certain observations with respect to them. They were in a minority, as the batlles were Andorran citizens, and they invariably acquired Andorran nationality when taking up their office and lost it at the end of their service. If they were still serving judges, the Ministry of Justice placed them at the disposal of the French Co-Prince, who then proceeded to appoint them. More generally, the practice of seconding officials belonged to a long French tradition of judicial cooperation - in particular with Monaco and with African States - and of the independence of the judges in question with respect to their country of origin. Moreover, the Higher Court of Perpignan (see paragraph 66 above) was not a de facto French civil court, as it had a different composition from that of a French court and did not apply French law or follow French procedure.

On the second point, the Government stated that the French courts had no direct or indirect power of supervision over judgments and decisions given in the Principality. They conceded, however, that different views had been taken in the case-law as regards the legal analysis of relations between France and Andorra with respect to jurisdiction. Thus the first civil division of the Court of Cassation had held that the formality of an exequatur was not needed for the enforcement of Andorran judgments in France (decisions of 6 January 1971, *Elsen et autre* c. *Consorts Bouillot and c. Boudet*, Bulletin civil [Bull.] 1971, I, no. 2, pp. 1-2; decision of 8 February 1977, *Boudet* c. *Compagnie Le Patrimoine et autre*, Bull. 1977, I, no. 69, pp. 55-56). This interpretation had not been followed by the criminal division (judgment of 10 February 1987, unreported) or the second civil division (judgment of 27 October 1966, *Armengol* c. *Mutualité sociale agricole de l'Hérault*, Bull. 1966, II, no. 874, p. 609), and had been rejected by several courts of appeal (Versailles, 10 October 1983, *Consorts Courtiol* c. *Chappard*, Gazette du Palais 1984, jurisprudence, pp. 229-231, with comments by Mr Bommart and Mr Gautron; 10 October 1983, *Gauvain* c. *Chabard*; Paris, 20 March 1991, *Fortuny Soler*). The Conseil d'État (decision of 1 December 1933, Société Le Nickel, Recueil Lebon 1933, p. 1132; opinion of 27 January 1953) and the Jurisdiction Disputes Court (Tribunal des Conflits) (decision of 2 February 1950, *Radiodiffusion Française* c. *Société de gérance et de publicité du poste de radiodiffusion Radio Andorre*, Recueil Lebon 1950, p. 652) did not accept that Andorran courts and authorities had any French character.

94. The Spanish Government argued that the Tribunal de Corts, in common with the other Andorran courts, represented an emanation of the Co-Princes' historic "right of justice"; it gave its rulings in their name and not on the basis of French and Spanish sovereignty. The episcopal veguer, a member of that court who sat in the present case (see paragraphs 16 and 52 above), was appointed by the episcopal Co-Prince, the Bishop of Urgel; the bishop was a private person, whose appointment had since 1976 been the exclusive responsibility of the Holy See and who might very well not

possess Spanish nationality. Neither he nor his representatives in Andorra could thus engage the responsibility of the Kingdom of Spain.

95. The applicants for their part claimed that France at least had responsibility for the administration of justice in Andorra. This was so in particular in their case, as the Tribunal de Corts had included an honorary judge of the Toulouse Court of Appeal, as Judge of Appeals, and an honorary judge of the Montpellier Court of Appeal, sitting as an assessor (see paragraph 16 above). Both had been appointed directly or indirectly by the French Co-Prince, and had permitted various violations of Article 6 (art. 6) of the Convention; in addition, they had tolerated the participation in the proceedings of the episcopal *veguer*, who also had legislative and executive powers.

96. The Court, like the Commission, accepts the arguments of the Governments. Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.

Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial.

Finally, it should be recalled that the secondment of judges or their placing at the disposal of foreign countries is also practised between member States of the Council of Europe, as is demonstrated by the presence of Austrian and Swiss jurists in Liechtenstein.

97. In short, the objection of lack of jurisdiction *ratione personae* must also be upheld.

98. This conclusion means that it is not necessary to examine the other preliminary objections brought by the French and Spanish Governments on this point.

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1)

99. The applicants claimed that they were victims of a violation of Article 5 para. 1 (art. 5-1) of the Convention, which reads, as far as relevant: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; ..."

They argued that their detention in France was unlawful for want of a legal basis, and was against *ordre public* (public policy) in the absence of any control by the French courts.

A. THE PRELIMINARY OBJECTION OF THE FRENCH GOVERNMENT

100. The French Government objected, as they had done before the Commission, that the complaint was inadmissible on the grounds of failure to exhaust domestic remedies.

The Court, referring to its consistent case-law (see, as the most recent authority, the *B.* v. *France*, judgment of 26 March 1992, Series A no. 232-C, p. 45, paras. 34-36), considers that it has jurisdiction to examine the objection, despite the contrary opinion of the Commission.

101. The French Government argued that Mr Drozd and Mr Janousek had neglected two remedies which were available to them before the French courts and would have given them the opportunity to refer to Article 5 (art. 5) of the Convention: bringing criminal proceedings, joining in as civil parties, against the officials or judges who were responsible for their detention; or bringing an action for a flagrantly unlawful act (*voie de fait*) by the said officials or judges.

102. The applicants admitted that they had not made use of either of these possibilities, but argued that they could not have remedied the situation complained of.

103. The Court, in agreement with the Commission, finds that the aim of the remedies in question is to obtain compensation for damage caused by deprivation of liberty and to impose sanctions on public officials. While they may have the indirect effect of putting an end to a person's detention, they have not hitherto brought about such a result where the detention originates from a decision by an Andorran court. In such cases, as the Government themselves pointed out before the Commis-

sion, the French courts do not regard themselves as having jurisdiction to assess the lawfulness of criminal convictions pronounced in the Principality.

The objection must therefore be dismissed.

B. THE MERITS OF THE COMPLAINT

104. The lawfulness of the detention raises two distinct but closely linked questions in this case: firstly, the question of whether there was a sufficient legal basis in French law; and secondly, the question of whether the French courts should have exercised any control in respect of the judgment pronounced in Andorra.

1. *The legal basis of the detention in issue*

105. The applicants considered that their detention in France was unlawful; it lacked a legal basis, as there was no French statutory provision, nor any international treaty which permitted the enforcement on French territory of criminal convictions pronounced in the Principality of Andorra.

106. The Government did not deny that these elements were absent, but in their opinion an adequate legal basis was provided by international custom and by the French and Andorran domestic law which implemented that custom.

The custom that persons convicted by Andorran courts served their sentences in French or Spanish prisons dated back to the Middle Ages. It had continued without interruption since then, and until the present case had never been challenged. It was indeed of a bilateral and local character, and admittedly linked a State with an entity which did not have legal personality in international law, but it nevertheless constituted a compulsory rule which created reciprocal rights and obligations.

As for French law, it included a law, no. 84-1150 of 21 December 1984, on the transfer to France of persons convicted and imprisoned abroad, and this law had inserted into the Code of Criminal Procedure the new Articles 713-1 to 713-8. Although the only hypothesis mentioned was an "international convention or agreement", it also applied in the case of a custom. It was fleshed out by instructions to prison establishments issued by the Minister of Justice.

Andorran law for its part included a relevant provision, Article 234 of the Code of Criminal Procedure, which had replaced Article 112 of the decree on criminal procedure of 10 April 1976, which had been applicable at the time of the applicants' trial. It offered a convicted person the choice of country (France or Spain) in which to serve his sentence if it exceeded three months' imprisonment.

107. For reasons similar to those set out in paragraphs 89 and 96 above, the Court considers that it does not have jurisdiction to review the observance of Andorran legal procedures, or more generally to review the lawfulness of the applicants' deprivation of liberty in terms of the laws of the Principality. It merely notes that the Tribunal de Corts followed the procedure laid down by Andorran law, not by the French Code of Criminal Procedure, passed sentences provided for in Andorran legislation and not in the French Criminal Code, and pronounced a judgment which could not be appealed against before the French Court of Cassation.

As for compliance with French law, the Court considers this to have been shown. The Franco-Andorran custom referred to above, dating back several centuries, has sufficient stability and legal force to serve as a basis for the detention in issue, notwithstanding the particular status of the Principality in international law. Moreover, there is no reason to doubt that the said detention was in accordance with the procedures prescribed by French law, especially as the applicants did not challenge before the French courts the validity of the custom in question and the corresponding provisions of French law.

2. *The necessity of a control by the French courts of the conviction in issue*

108. The applicants claimed that their detention was also contrary to French public policy (ordre public), of which the Convention formed part; the French courts had not carried out any review of

the judgments of an Andorran court whose composition and procedure had not complied with the requirements of Article 6 (art. 6).

109. The Government argued that a distinction should be drawn between the lawfulness of detention under Article 5 para. 1 (art. 5-1) and the lawfulness of the conviction from the point of view of Article 6 (art. 6); the former could be assessed only by reference to the internal law of the country of detention. If the authorities of that country were obliged to assure themselves of the latter, in the case of a trial which had taken place abroad, the result would be to make the transfer of prisoners extremely difficult, or even impossible. It would also have a paradoxical effect, in that, as it would not be possible to retry the defendant in the receiving country, it would have to be left to the country which had been found responsible for breaching the Convention to enforce the sentence itself. Besides, the Principality would itself have to accommodate the prisoners who are now in France and Spain, and would thus have to provide itself with the appropriate institutions and personnel.

In any event, the French Code of Criminal Procedure did provide for an administrative and - to a certain extent - judicial review of the transfer. This safeguard was more than a mere formality, since if the sentence imposed abroad was more severe in its nature or extent than that provided for in French law, the criminal court would, if the matter were referred to it by the public prosecutor or the convicted person, substitute the corresponding penalty in French law.

Furthermore, the French authorities could refuse a transfer in the case of a serious and flagrant breach of French *ordre public* or of the fundamental rights of the defence, such as to deprive the judgment of legal validity.

110. The Court, like the Commission, considers that in this case the Tribunal de Corts, which pronounced the conviction of Mr Drozd and Mr Janousek, is the "competent court" referred to in Article 5 para. 1 (a) (art. 5-1-a). As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 (art. 6) of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 (art. 6) would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, *mutatis mutandis*, the *Soering* v. *the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 45, para. 113).

The Court takes note of the declaration made by the French Government to the effect that they could and in fact would refuse their customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 (art. 6) or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a country where it is not possible for him to be retried on surrendering to justice (see, for example, the decision of the Limoges Court of Appeal, 15 May 1979, cited in the *Bozano* v. *France* judgment of 18 December 1986, Series A no. 111, p. 10, para. 18), and the Conseil d'État has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy (see, for instance, the *Fidan* judgment of 27 February 1987, with submissions by Government Commissioner Jean-Claude Bonichot, Recueil Dalloz Sirey 1987, jurisprudence, pp. 305-310, and the *Gacem* judgment of 14 December 1987, Recueil Lebon 1987, tables, p. 733).

In the Court's opinion, it has not been shown that in the circumstances of the case France was required to refuse its co-operation in enforcing the sentences.

3. *Conclusion*

111. In short, no violation of Article 5 para. 1 (art. 5-1) has been established.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that it does not have jurisdiction to examine the merits of the case from the point of view of Article 6;

2. *Holds* unanimously that it has jurisdiction to examine the preliminary objection of failure to exhaust domestic remedies raised by the French Government with respect to the complaint relating to Article 5 para. 1;

3. *Dismisses* unanimously the said objection;

4. *Holds* by twelve votes to eleven that there has not been a violation of Article 5 para. 1.

[omissis]

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Cremona;

(b) concurring opinion of Mr Matscher;

(c) joint dissenting opinon of Mr Pettiti, Mr Valticos and Mr Lopes Rocha, approved by Mr Walsh and Mr Spielmann;

(d) joint dissenting opinion of Mr Macdonald, Mr Bernhardt, Mr Pekkanen and Mr Wildhaber;

(e) dissenting opinion of Mr Russo.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 18 febbraio 1999, *Waite e Kennedy* c. *Germania* (ric. n. 26083/94) ([1])

[omissis]

THE FACTS

10. Mr Richard Waite is a British national, born in 1946 and resident in Griesheim. Mr Terry Kennedy is also a British national, born in 1950 and resident in Darmstadt.

I. THE CIRCUMSTANCES OF THE CASE

11. In 1977 the applicants, systems programmers by profession and employed by the British company SPM, were placed at the disposal of the European Space Agency to perform services at the European Space Operations Centre in Darmstadt.

12. The European Space Agency ("ESA") with headquarters in Paris, formed out of the European Space Research Organisation ("ESRO") and the European Organisation for the Development and Construction of Space Vehicle Launchers ("ELDO"), was established under the Convention for the Establishment of a European Space Agency ("ESA Convention") of 30 May 1975 (United Nations Treaty Series 1983, vol. 1297, I – no. 21524). ESA runs the European Space Operations Centre ("ESOC") as an independent operation in Darmstadt (Agreement concerning the European Space Operations Centre of 1967 – Official Gazette (*Bundesgesetzblatt*) II no. 3, 18.1.1969).

13. In 1979 the applicants' contracts were taken over from SPM by CDP, a limited company established in Dublin. In 1982 the applicants founded Storepace, a limited company with its registered office in Manchester, which contracted with CDP on the services to be performed by the applicants for ESA and on the payment due. As from 1984 ESA participated in the above contractual relations through Science System, a firm associated with it. Subsequently, the applicants liquidated Storepace, replacing it by Network Consultants, a company with its registered office on the island of Jersey. These changes in contractual relations had no bearing on the applicants' services at ESOC.

14. By letter of 12 October 1990, CDP informed the applicants that the cooperation with their company Network Consultants would terminate on 31 December 1990, when the term of their contracts expired.

15. The applicants thereupon instituted proceedings before the Darmstadt Labour Court (*Arbeitsgericht*) against ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*), they had acquired the status of employees of ESA. In their submission, the termination of their contracts by the company CDP had no bearing on their labour relationship with ESA.

16. In the labour court proceedings, ESA relied on its immunity from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I.

17. On 10 April 1991 the Darmstadt Labour Court, following a hearing, declared the applicants' actions inadmissible, considering that ESA had validly relied on its immunity from jurisdiction.

In its reasoning, the Labour Court considered in particular that ESA had been established in 1975 as a new and independent international organisation. It therefore rejected the applicants' argument that ESA was bound by Article 6 § 2 of the Agreement concerning ESOC, which had subjected the former ESRO to German jurisdiction in cases of disputes with its employees which were outside the competence of its Appeals Board.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int*.

18. On 20 May 1992 the Frankfurt/Main Labour Appeals Court (*Landesarbeitsgericht*) dismissed the applicants' appeal. It gave leave to an appeal on points of law (*Revision*) to the Federal Labour Court (*Bundesarbeitsgericht*).

19. The Labour Appeals Court, referring to sections 18 to 20 of the Courts Act (*Gerichtsverfassungsgesetz*), considered that immunity from jurisdiction meant that foreign States, members of diplomatic missions, etc. were generally not subject to German jurisdiction and that no judicial action could be taken against them. Section 20(2) of the Courts Act supplemented the provisions of sections 18 and 19, listing three further sources of law, *inter alia* international agreements, which could give rise to immunity from jurisdiction, especially for international organisations. ESA in principle enjoyed such immunity from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I. Moreover, even assuming that the former ESRO had previously waived immunity as regards labour disputes outside the competence of its Appeals Board, ESA was not bound thereby. In this respect, the Labour Appeals Court, referring to the reasoning of the decision of the first instance, set out in detail that ESA had been established as a new international organisation and not as a mere legal successor to the former ESRO.

20. In 1992 the applicants unsuccessfully requested the German federal government and the British authorities to intervene with the Council of ESA in their favour with regard to a waiver of immunity in accordance with Article IV § 1 (a) of Annex I. While the British authorities did not reply, the German Federal Foreign Office referred the applicants to the ESA Appeals Board. In response to their letter to the Council of ESA, its Chairman, by letter of 16 December 1992, informed the applicants that the Council, at its 105th meeting of 15 and 16 December 1992, had decided not to waive the immunity from jurisdiction in their case. This position was confirmed in subsequent correspondence.

21. On 10 November 1993 the Federal Labour Court dismissed the applicants' appeal on points of law (file no. 7 AZR 600/92).

22. The Federal Labour Court considered that immunity from jurisdiction was an impediment to court proceedings, and that an action against a defendant who enjoyed immunity from jurisdiction, and had not waived this immunity, was inadmissible. According to section 20(2) of the Courts Act, German jurisdiction did not extend to international organisations which were exempted in accordance with international agreements. In this respect, the Federal Labour Court noted that, pursuant to Article XV § 2 of the ESA Convention, ESA had the immunities provided for in Annex I of the said Convention, and that it had not waived immunity under Article IV § 1 (a) of that annex.

23. As regards the question of waiver, the Federal Labour Court found that Article 6 § 2 of the Agreement concerning ESOC did not apply in the applicants' situation as they had not been employed by ESA, but had worked for ESA on the basis of a contract of employment with a third person. The questions of whether the rule in question amounted to a waiver of immunity and whether ESA was bound by this rule could therefore be left open.

24. Furthermore, the Federal Labour Court found no violation of the right of recourse to court under Article 19 § 4 of the German Basic Law (*Grundgesetz*), as the acts of ESA, being those of an international organisation, could not be regarded as acts of a public authority within the meaning of that provision.

25. Finally the Federal Labour Court considered that a rather broad competence of international organisations to regulate staff matters was not unusual. The regulations on the immunity of ESA did not conflict with fundamental principles of German constitutional law. Employees of ESA could either lodge an appeal with the Appeals Board of the organisation, or the labour contract had to provide for arbitration in accordance with Article XXV of Annex I. In case of any contract conflicting with the Provision of Labour (Temporary Staff) Act which was not covered by the aforementioned regulation, the employee hired out was not without any legal protection, but could file an action against his or her employer. The question of whether the applicants could claim under German public law that positive action be taken by the German government to use their influence to achieve a waiver of immunity in the present case, or to submit the case to international arbitration under Article XVIII of the ESA Convention, could not be solved in labour court proceedings.

26. Sitting as a panel of three members, on 11 May 1994 the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to accept the applicants' appeal (*Verfassungsbeschwerde*) for adjudication.

27. The Federal Constitutional Court found in particular that the applicants' appeal did not raise a matter of general importance. The alleged absence of rights resulted from the particular contracts entered into by the applicants, who had not been directly employed by an international organisation but had worked there on the order of a third person.

28. Furthermore, the alleged violation of the applicants' constitutional rights was not of special importance, nor were the applicants significantly affected. In this respect the Constitutional Court noted the applicants' submissions according to which they had suffered major disadvantages on the ground that the European legislation on the hiring out of temporary staff had been insufficient and that the termination of their contracts had affected their earning capacity. However, they had failed to show any disadvantages other than those associated with any loss of work. In particular there was no indication that they remained permanently unemployed and dependent upon social welfare benefits.

II. RELEVANT LAW

1. *The Provision of Labour (Temporary Staff) Act*

29. Section 1(1)(1) of the Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*) provides that an employer who, on a commercial basis (*gewerbsmäßig*), intends to hire out his employees to third persons – hiring employers (*Entleiher*) – must obtain official permission. Section 1(9)(1) provides that contracts between the hirer-out (*Verleiher*) and the hiring employer and between the hirer-out and the employee hired out (*Leiharbeitnehmer*) are void if no official permission has been obtained as required by section 1(1)(1). If the contract between a hirer-out and an employee hired out is void under section 1(9)(1), a contract between the hiring employer and the employee hired out is deemed to have been concluded (*gilt als zustande gekommen*) as from the envisaged start of employment (section 1(10)(1)(1)). Section 1(10)(2) further provides for a claim in damages against the hirer-out in respect of any loss suffered as a consequence of having relied on the validity of the contract, except where the employee hired out was aware of the factor rendering the contract void.

2. *Immunity from jurisdiction*

30. Sections 18 to 20 of the German Courts Act (*Gerichtsverfassungs-gesetz*) regulate immunity from jurisdiction (*Exterritorialität*) in German court proceedings. Sections 18 and 19 concern the members of diplomatic and consular missions, and section 20(1) other representatives of States staying in Germany upon the invitation of the German government. Section 20(2) provides that other persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules.

3. *The ESA Convention*

31. The ESA Convention came into force on 30 October 1980, when ten States, members of ESRO or ELDO, had signed it and had deposited their instruments of ratification or acceptance.

32. The purpose of ESA is to provide for and to promote, for exclusively peaceful purposes, co-operation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems (Article II of the ESA Convention). For the execution of the programmes entrusted to it, the Agency shall maintain the internal capability required for the preparation and supervision of its tasks and, to this end, shall establish and operate such establishments and facilities as are required for its activities (Article VI § 1 (a)).

33. Article XV regulates the legal status, privileges and immunities of the Agency. According to paragraph 1, the Agency shall have legal personality. Paragraph 2 provides that the Agency, its staff members and experts, and the representatives of its member States, shall enjoy the legal capacity, privileges and immunities provided for in Annex I. Agreements concerning the headquarters of the Agency and the establishments set up in accordance with Article VI shall be concluded between the Agency and the member States on whose territory the headquarters and the establishments are situated (Article VI § 3).

34. Article XVII concerns the arbitration procedure in case of disputes between two or more member States, or between any of them and ESA, concerning the interpretation or application of the ESA Convention or its annexes, and disputes arising out of damage caused by ESA, or involving any other responsibility of ESA (Article XXVI of Annex I), which are not settled by or through the Council.

35. Article XIX provides that on the date of entry into force of the ESA Convention the Agency shall take over all the rights and obligations of ESRO.

36. Annex I relates to the privileges and immunities of the Agency.

37. According to Article I of Annex I, the Agency shall have legal personality, in particular the capacity to contract, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings.

38. Pursuant to Article IV § 1 (a) of Annex I, the Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such immunity in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

39. Article XXV of Annex I provides for arbitration with regard to written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any member State may submit to the International Arbitration Tribunal referred to in Article XVII of the ESA Convention any dispute, *inter alia*, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. According to Article XXVII of Annex I, the Agency shall make suitable provision for the satisfactory settlement of disputes arising between the Agency and the Director General, staff members or experts in respect of their conditions of service.

40. Chapter VIII of the ESA Staff Regulations (Regulations 33 to 41) concerns disputes within ESA. As regards the competence of its Appeals Board, Regulation 33 provides as follows: "33.1 There shall be set up an Appeals Board, independent of the Agency, to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member, a former staff member or persons entitled under him. 33.2 The Appeals Board shall rescind any decision against which there has been an appeal if the decision is contrary to the Staff Regulations; Rules or Instructions or to the claimant's terms of appointment or vested rights; and if the claimant's personal interests are affected. 33.3 The Appeals Board may also order the Agency to repair any damage suffered by the claimant as a result of the decision referred to in paragraph 2 above. 33.4 Should the Agency – or the claimant – maintain that execution of a rescinding decision would raise major difficulties the Appeals Board may, if it considers the argument valid, award compensation to the claimant for the damage he has suffered. 33.5 The Appeals Board shall also be competent in the case where a staff member wishes to sue another staff member and such action has been prevented by the Director General's refusal to waive the immunity of the latter. 33.6 The Appeals Board shall also be competent to settle disputes concerning its jurisdiction, as defined in these Regulations, or any question of procedure."

4. *The Agreement concerning ESOC*

41. The Agreement was concluded between the government of the Federal Republic of Germany and ESRO for the purpose of establishing a European Space Operations Centre, including the European Space Data Centre. Articles 1 to 4 of the Agreement concern the site for construction of the ESOC buildings and related matters.

42. Part III of the Agreement contains general provisions. Article 6 provides as follows: "1. Subject to the provisions of the Protocol on Privileges and Immunities of the Organisation and of any complementary Agreement between the Federal Republic of Germany and the Organisation according to Article 30 of that Protocol, the activities of the Organisation in the Federal Republic of Germany shall be governed by German law. If the terms of employment of a staff member of the Organisation are not governed by the Organisation's staff regulations, then they shall be subject to German laws and regulations. 2. Disputes between the Organisation and such staff members of the Organisation in the Federal Republic of Germany who are not within the competence of the Organisation's Appeals Board, shall be subject to German jurisdiction."

PROCEEDINGS BEFORE THE COMMISSION

43. Mr Waite and Mr Kennedy applied to the Commission on 24 November 1994. Relying on Article 6 § 1 of the Convention, they complained that they had been denied access to a court for a determination of their dispute with ESA in connection with an issue under German labour law.

44. On 24 February 1997 the Commission declared the application (no. 26083/94) admissible. In its report of 2 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 6 § 1 (seventeen votes to fifteen). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

45. In their memorial the Government asked "for the applications to be rejected as inadmissible, or as an alternative for a finding that the Federal Republic of Germany has not violated Article 6 of the Convention".

46. The applicants invited the Court to hold that their rights pursuant to Article 6 § 1 of the Convention had been violated and to award them just satisfaction under former Article 50 of the Convention (now Article 41).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

47. The applicants contended that they had not had a fair hearing by a tribunal on the question of whether, pursuant to the German Provision of Labour (Temporary Staff) Act, a contractual relationship existed between them and ESA. They alleged that there had been a violation of Article 6 § 1 of the Convention, which provides: "In the determination of his civil rights and obligations …, everyone is entitled to a … hearing … by [a] … tribunal …"

48. The Government and the Commission took the opposite view.

A. Applicability of Article 6 § 1

49. The Government did not dispute that the labour court proceedings instituted by the applicants involved the "determination of [their] civil rights and obligations". This being so, and bearing in mind that the parties' arguments before it were directed to the issue of compliance with Article 6 § 1, the Court proposes to proceed on the basis that it was applicable to the present case.

B. Compliance with Article 6 § 1

50. Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil

matters, constitutes one aspect only (see the *Golder* v. *the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and the recent *Osman* v. *the United Kingdom* judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3166, § 136).

51. The applicants had access to the Darmstadt Labour Court and then the Frankfurt/Main Labour Appeals Court and the Federal Labour Court, only to be told that their action was barred by operation of law (see paragraphs 17 to 25 above). The Federal Constitutional Court declined to accept their case for adjudication on the grounds that it did not raise a matter of general importance and that the alleged violation of their constitutional rights was not of special importance (see paragraphs 26 to 28 above).

The proceedings before the German labour courts had thus concentrated on the question of whether or not ESA could validly rely on its immunity from jurisdiction.

52. In their memorial and at the hearing before the Court, the applicants maintained their argument that ESA had wrongfully pleaded immunity before the German labour courts. According to them, the waiver of immunity which had been agreed for its predecessor organisation, ESRO, under Article 6 § 2 of the Agreement concerning ESOC (see paragraph 42 above) was binding on ESA.

53. In the Government's submission, this view was not justifiable, having regard to the clear differentiation between the immunity enshrined in Article XV and the transfer of rights and duties set out in Article XIX of the ESA Convention (see paragraphs 33, 35 to 38 above).

54. The Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *inter alia*, the *Pérez de Rada Cavanilles* v. *Spain* judgment of 28 October 1998, Reports 1998-VIII, p. 3255, § 43). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.

55. The German labour courts regarded the applicants' action under the German Provision of Labour (Temporary Staff) Act inadmissible as the defendant, ESA, had claimed immunity from jurisdiction in accordance with Article XV § 2 of the ESA Convention and Article IV § 1 of its Annex I. Section 20(2) of the German Courts Act provides that persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules (see paragraph 30 above).

56. In the instant case the German labour courts concluded that the conditions under section 20(2) of the German Courts Act for finding that the applicants' action was inadmissible were fulfilled. The Darmstadt Labour

Court, as upheld by the Frankfurt/Main Labour Appeals Court, considered that ESA enjoyed immunity from jurisdiction according to the ESA Convention and its Annex I. In their view, ESA had been established as a new and independent organisation and was therefore not bound by Article 6 § 2 of the Agreement concerning ESOC (see paragraphs 17 to 19 above). According to the Federal Labour Court, this provision could not, in any event, apply in the applicants' situation as they had not been employed by ESA, but had worked for that organisation on the basis of a contract of employment with a third person (see paragraphs 21 to 25 above).

57. The Court observes that ESA was formed out of ESRO and ELDO as a new and single organisation (see paragraph 12 above). According to its constituent instrument, ESA enjoys immunity from jurisdiction and execution except, *inter alia*, to the extent that the ESA Council expressly waives immunity in a particular case (see paragraphs 33 and 36 to 38 above). Considering the exhaustive rules in Annex I to the ESA Convention and also the wording of Article 6 § 2 of the ESOC Agreement (see paragraph 42 above), the reasons advanced by the German labour courts to give effect to the immunity from jurisdiction of ESA under Article XV of the ESA Convention and its Annex I cannot be regarded as arbitrary.

58. Admittedly, the applicants were able to argue the question of immunity at three levels of German jurisdiction. However, the Court must next examine whether this degree of access limited

to a preliminary issue was sufficient to secure the applicants' "right to a court", having regard to the rule of law in a democratic society (see the *Golder* judgment cited above, pp. 16-18, §§ 34-35).

59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the *Osman* judgment cited above, p. 3169, § 147, and the recapitulation of the relevant principles in the *Fayed* v. *the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65).

60. The applicants maintained that the right of access to the courts was not met merely by the institution of proceedings. This right, they argued, required that the courts examine the merits of their claim. They considered that the German courts had disregarded the priority of human rights over immunity rules based on international agreements. They concluded that the proper functioning of ESA had not required immunity from German jurisdiction in their particular cases.

61. The Government and the Commission were of the opinion that the purpose of immunity in international law lay in the protection of international organisations against interference by individual governments. They saw therein a legitimate aim of restriction of Article 6. According to the Government, international organisations performed tasks of a particular significance in an age of global, technical and economic challenges; they were able to function only if they adopted uniform internal regulations, including appropriate service regulations, and if they were not forced to adapt to differing national regulations and principles.

62. The Committee of Staff Representatives of the Coordinated Organisations in their written comments (see paragraph 7 above) considered that the statutory provisions concerning immunity had to be interpreted so as to satisfy the fundamental rights under Article 6 § 1 of the Convention.

63. Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.

The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.

Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.

64. As to the issue of proportionality, the Court must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case.

65. The Government submitted that the limitation was proportionate to the objective of enabling international organisations to perform their functions efficiently. With regard to ESA, they considered that the detailed system of legal protection provided under the ESA Convention concerning disputes brought by staff and under Annex I in respect of other disputes satisfied the standards set in the Convention. In their view, Article 6 § 1 required a judicial body, but not necessarily a national court. The remedies available to the applicants were in particular an appeal to the ESA Appeals

Board if they wished to assert contractual rights, their years of membership of the ESA staff and their integration into the operation of ESA. According to the Government, the applicants were also left with other possibilities, such as claiming compensation from the foreign firm which had hired them out.

66. The Commission in substance agreed with the Government that in private-law disputes involving ESA, judicial or equivalent review could be obtained, albeit in procedures adapted to the special features of an international organisation and therefore different from the remedies available under domestic law.

67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, as a recent authority, the *Aït-Mouhoub* v. *France* judgment of 28 October 1998, Reports 1998-VIII, p. 3227, § 52, referring to the *Airey* v. *Ireland* judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

68. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.

69. The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation (see paragraphs 31 to 40 above).

Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board. In accordance with Regulation 33 § 1 of the ESA Staff Regulations, the ESA Appeals Board, which is "independent of the Agency", has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member" (see paragraph 40 above).

As to the notion of "staff member", it would have been for the ESA Appeals Board, under Regulation 33 § 6 of the ESA Staff Regulations, to settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members".

70. Moreover, it is in principle open to temporary workers to seek redress from the firms that have employed them and hired them out. Relying on general labour regulations or, more particularly, on the German Provision of Labour (Temporary Staff) Act, temporary workers can file claims in damages against such firms. In such court proceedings, a judicial clarification of the nature of the labour relationship can be obtained. The fact that any such claims under the Provision of Labour (Temporary Staff) Act are subject to a condition of good faith (see paragraph 29 above) does not generally deprive this kind of litigation of reasonable prospects of success.

71. The significant feature of the instant case is that the applicants, after having performed services at the premises of ESOC in Darmstadt for a considerable time on the basis of contracts with foreign firms, attempted to obtain recognition of permanent employment by ESA on the basis of the above-mentioned special German legislation for the regulation of the German labour market.

72. The Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisations (see paragraph 63 above), the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.

73. In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the Ger-

man courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.

74. Accordingly, there has been no violation of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 6 § 1 of the Convention.

[omissis]

Corte europea dei diritti dell'uomo, sent. 20 luglio 2001, *Pellegrini* c. *Italia* (ric. n. 30882/96) ([1])

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. On 29 April 1962 the applicant married Mr A. Gigliozzi in a religious ceremony which was also valid in the eyes of the law (*matrimonio concordatario*).

1. *Judicial separation proceedings*

12. On 23 February 1987 the applicant petitioned the Rome District Court for judicial separation.

13. In a judgment dated 2 October 1990 the District Court granted her petition and also ordered Mr Gigliozzi to pay the applicant maintenance (*mantenimento*) of 300,000 Italian lira per month.

2. *Proceedings to have the marriage annulled*

14. In the meantime, on 20 November 1987, the applicant was summoned to appear before the Lazio Regional Ecclesiastical Court of the Rome Vicariate on 1 December 1987 "to answer questions in the Gigliozzi-Pellegrini matrimonial case".

15. On 1 December 1987 the applicant went alone to the Ecclesiastical Court without knowing why she had been summoned to appear. She was informed that on 6 November 1987 her husband had sought to have the marriage annulled on the ground of consanguinity (the applicant's mother and Mr Gigliozzi's father being cousins). She was questioned by the judge and stated that she had known of her consanguineous relationship with Mr Gigliozzi but did not know whether, at the time of her marriage, the priest had requested a special dispensation (*dispensatio*).

16. In a judgment delivered on 10 December 1987 and deposited with the registry on the same day, the Ecclesiastical Court annulled the marriage on the ground of consanguinity. The court had followed a summary procedure (*praetermissis solemnitatibus processus ordinarii*) under Article 1688 of the Code of Canon Law. That procedure is followed where, once the parties have been summoned to appear and the *defensor vinculis* (defender of the institution of marriage) has intervened, it is clear from an agreed document that there is a ground for annulling the marriage.

17. On 12 December 1987 the applicant was notified by the registry of the Ecclesiastical Court that on 6 November 1987 the court had annulled the marriage on the ground of consanguinity.

18. On 21 December 1987 the applicant lodged an appeal with the Roman Rota (*Romana Rota*) against the Ecclesiastical Court's judgment. She submitted first that she had never received a copy of the judgment in question and complained that the court had not heard her submissions until 1 December 1987, which was after it had delivered its judgment of 6 November 1987. The applicant also alleged a breach of her defence rights and of the adversarial principle on account of the fact that she had been summoned to appear before the Ecclesiastical Court without being informed in advance either of the application to have the marriage annulled or the reasons for that application. She had therefore not prepared any defence and, furthermore, had not been assisted by a lawyer.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

19. On 26 January 1988 the registry of the Ecclesiastical Court informed the applicant that there had been a clerical error in the notification sent to her on 12 December 1987 and that the judgment was dated 10 December 1987.

20. On 3 February 1988 the *defensor vinculis* submitted observations to the effect that the applicant "had acted correctly in appealing against the judgment" (*la convenuta aveva agito giustamente facendo appello contro la sentenza*) of the Lazio Court. Accordingly, in a summons of 9 March 1988 the reporting judge of the Rota summoned the parties and the *defensor vinculis* to appear.

21. On 10 March 1988 the applicant was informed that the Rota would examine her appeal on 13 April 1988 and that she had twenty days in which to submit observations. On 29 March 1988 the applicant, who was still unassisted by a lawyer, submitted her observations, in which she complained, *inter alia*, that she had not had adequate time and facilities for the preparation of her defence. She gave details of the financial arrangements between herself and her ex-husband and stressed that the annulment of the marriage would have substantial repercussions on her ex-husband's obligation to pay her maintenance, which was her only source of income.

22. In a judgment of 13 April 1988, which was deposited with the registry on 10 May 1988, the Rota upheld the decision annulling the marriage on the ground of consanguinity. The applicant received only the operative provisions of the judgment, her request for a full copy of it having been refused.

23. On 23 November 1988 the Rota informed the applicant and her ex-husband that its judgment, which had become enforceable by a decision of the superior ecclesiastical review body, had been referred to the Florence Court of Appeal for a declaration that it could be enforced under Italian law (*delibazione*).

3. *Proceedings to have the judgment declared enforceable*

24. On 25 September 1989 the applicant's ex-husband summoned her to appear before the Florence Court of Appeal.

25. The applicant appeared before that court and requested it to set aside the Rota's judgment for infringing her defence rights. She stated that she had not received a copy of the application to have the marriage annulled and had been unable to examine the documents filed in the proceedings, including the observations of the *defensor vinculis*. She requested the court to refuse to declare the Rota's judgment enforceable, submitting that, in any event, the proceedings would have to be reopened in order to allow her to examine and reply to the documents filed in the proceedings under canon law. She requested, in the alternative, in the event that the court should declare the judgment enforceable, that her ex-husband be ordered to pay her monthly maintenance for the rest of her life.

26. In a judgment of 8 November 1991, deposited with the registry on 10 March 1992, the Florence Court of Appeal declared the judgment of 13 April 1988 enforceable. The court found that the opportunity given to the applicant on 1 December 1987 to answer questions had been sufficient to ensure that the adversarial principle had been complied with and that, moreover, she had freely chosen to bring the proceedings before the Rota and had been able to exercise her defence rights in those proceedings "irrespective of the special features of proceedings under canon law". The court went on to hold that it did not have jurisdiction to award her maintenance "for the rest of her life"; as far as a possible award of interim maintenance (*assegno provvisorio*) was concerned, which was a provisional arrangement, the court pointed out that the applicant had not in any event proved that she needed the money.

27. The applicant appealed on points of law, repeating her submission that her defence rights had been infringed in the proceedings before the ecclesiastical courts. She submitted, among other things, that the Court of Appeal had omitted to take account of the following features of the proceedings before the ecclesiastical courts: the parties cannot be represented by a lawyer; the respondent is not informed of the reasons relied on by the petitioner for having the marriage annulled until he or she is questioned; the *defensor vinculis*, who acts as the respondent's guardian, is not obliged to lodge an appeal; an appeal must be lodged personally by the party in question and not by their lawyer; the ecclesiastical court is not particularly autonomous. She repeated that she had not been

informed in detail of the application to have the marriage annulled or of the possibility of being assisted by a lawyer. Furthermore, the proceedings at first instance had been too quick. The applicant also criticised the fact that the Court of Appeal appeared to have omitted to examine the case file relating to the proceedings before the ecclesiastical courts, which might have yielded evidence in the applicant's favour. Besides that, the applicant submitted that she had shown herself to be in financial need and was therefore entitled to maintenance.

28. During the proceedings the applicant had requested the registry of the Ecclesiastical Court to give her a copy of the documents filed in the annulment proceedings in order to produce them before the Court of Cassation, but the court clerk had refused to grant her request on the ground that the parties could receive only the operative provisions of the judgment, "which should be sufficient to allow them to exercise their defence rights".

29. In a judgment of 10 March 1995, deposited with the registry on 21 June 1995, the Court of Cassation dismissed the appeal. It held, first of all, that the adversarial principle had been complied with in the proceedings before the ecclesiastical courts; moreover, there was case-law authority to support the view that while the assistance of a lawyer was not a requirement under canon law, it was not forbidden: the applicant could therefore have taken advantage of that possibility. The court also held that the fact that the applicant had had a very short time in which to prepare her defence in November 1987 did not amount to an infringement of her defence rights because she had not indicated why she had needed more time. With regard to the request for maintenance, the Court of Cassation held that the Court of Appeal could not have decided otherwise, given that the applicant had mistakenly referred to maintenance "for the rest of her life" and, furthermore, had failed to show that she was entitled to maintenance and needed it. The Court of Cassation did not rule on the fact that the case file relating to the proceedings under canon law had not been examined by the Court of Appeal.

4. *Proceedings for payment of maintenance and for joint title to property*

30. From June 1992 the applicant's ex-husband ceased paying her maintenance. The applicant therefore began enforcement proceedings for payment of the maintenance by serving notice (*precetto*) on him to pay it. On 6 November 1994 her ex-husband lodged an objection with the Viterbo Court, which, in a judgment of 14 July 1999, upheld his objection and ruled that he no longer had to pay maintenance because the Florence Court of Appeal had declared that the decision annulling the marriage was enforceable. The applicant did not appeal against that judgment because on 19 June 2000 she reached an agreement with her ex-husband (under the terms of that agreement she also withdrew another set of proceedings that she had instituted in the Viterbo Court claiming joint title to property).

II. RELEVANT DOMESTIC LAW

31. Under Article 8 § 2 of the Concordat between Italy and the Vatican, as amended by the Agreement of 18 February 1984 revising the Concordat, ratified by Italy under Law no. 121 of 25 March 1985, a judgment of the ecclesiastical courts annulling a marriage, which has become enforceable by a decision of the superior ecclesiastical review body, may be made enforceable in Italy at the request of one of the parties by a judgment of the relevant court of appeal.

32. The court of appeal must check:

(a) that the judgment has been delivered by the correct court;

(b) that in the nullity proceedings the defence rights of the parties have been recognised in a manner compatible with the fundamental principles of Italian law; and

(c) that the other conditions for a declaration of enforceability of foreign judgments have been satisfied.

THE LAW

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

33. The applicant complained of a violation of Article 6 of the Convention on the ground that the Italian courts declared the decision of the ecclesiastical courts annulling her marriage enforceable at the end of proceedings in which her defence rights had been breached.

34. The relevant part of Article 6 of the Convention provides: "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair... hearing ... by [a]... court ..."

35. The applicant submitted that, in proceedings under canon law, the respondent is not informed before being questioned by the court either of the identity of the petitioner or of the grounds on which they allege that the marriage should be annulled. The respondent is not informed of the possibility of securing the assistance of a defence lawyer (a possibility which some legal writers, moreover, claim does not exist) or of requesting copies of the case file. Consequently, their defence rights are greatly reduced. In the instant case the applicant was not informed in advance of the reasons for summoning her to appear; nor was she informed of the possibility of instructing a lawyer, either on the summons to appear or when being questioned. She was thus prevented from making a properly considered answer to her ex-husband's requests. She could, for example, have not attended for questioning or have chosen not to reply. Furthermore, without the assistance of a lawyer, she had been intimidated by the fact that the judge was a religious figure.

36. The applicant's defence rights were therefore irremediably compromised after she had appeared before the Ecclesiastical Court and the Italian courts should have refused to ratify the result of such unfair proceedings instead of confining themselves to asserting – without examining the matter thoroughly – that the proceedings before the ecclesiastical courts had been adversarial and fair.

37. The applicant's lawyer had tried to obtain a copy of the case file deposited with the registry of the Ecclesiastical Court when the applicant learnt that the court had heard evidence from three witnesses, but the request was refused. The applicant had therefore been unable to produce those documents in the proceedings before the Italian courts.

38. The applicant also pointed out that the Florence Court of Appeal had dismissed her claim for continued monthly maintenance payments from her ex-husband on the ground that she had failed to establish that she needed the money, although she had produced documents showing that there was such a need. The proceedings in the Italian courts had also, she alleged, been unfair in that regard.

39. The Government submitted that the applicant's defence rights had not in any way been infringed in the present case. They pointed out that the Italian courts had carefully examined all the complaints raised by the applicant and had reached the conclusion, supported by logical argument, that there had not been any infringement of her defence rights. Furthermore, her marriage had been annulled on the basis of objective evidence, namely consanguinity, which had not been disputed by the applicant and had been proved by the documents produced in the proceedings. The fact that the applicant had not been informed of the reason for the summons to appear before the Lazio Regional Ecclesiastical Court and had not been assisted by a lawyer could not be deemed to have harmed her because she had confined herself on that occasion to admitting that she had been aware of the consanguinity.

40. The Court notes at the outset that the applicant's marriage was annulled by a decision of the Vatican courts which was declared enforceable by the Italian courts. The Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy. The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.

41. The Court must examine the reasons given by the Florence Court of Appeal and the Court of Cassation for dismissing the applicant's complaints about the proceedings before the ecclesiastical courts.

42. The applicant had complained of an infringement of the adversarial principle. She had not been informed in detail of her ex-husband's application to have the marriage annulled and had not had access to the case file. She was therefore unaware, in particular, of the contents of the statements made by the three witnesses who had apparently given evidence in favour of her ex-husband and of the observations of the *defensor vinculis*. Furthermore, she was not assisted by a lawyer.

43. The Florence Court of Appeal held that the circumstances in which the applicant had appeared before the Ecclesiastical Court and the fact that she had subsequently lodged an appeal against that court's judgment were sufficient to conclude that she had had the benefit of an adversarial trial. The Court of Cassation held that, in the main, ecclesiastical court proceedings complied with the adversarial principle.

44. The Court is not satisfied by these reasons. The Italian courts do not appear to have attached importance to the fact that the applicant had not had the possibility of examining the evidence produced by her ex-husband and by the "so-called witnesses". However, the Court reiterates in that connection that the right to adversarial proceedings, which is one of the elements of a fair hearing within the meaning of Article 6 § 1, means that each party to a trial, be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *mutatis mutandis*, *Lobo Machado* v. *Portugal*, and *Vermeulen* v. *Belgium*, judgments of 20 February 1996, Reports of Judgments and Decisions 1996-?, pp. 206-07, § 31, and p. 234, § 33, respectively, and *Mantovanelli* v. *France*, judgment of 18 March 1997, Reports 1997-? , p. 436, § 33).

45. It is irrelevant that, in the Government's opinion, as the nullity of the marriage derived from an objective and undisputed fact the applicant would not in any event have been able to challenge it. It is for the parties to a dispute alone to decide whether a document produced by the other party or by witnesses calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see, *mutatis mutandis*, *F.R.* v. *Switzerland*, no. 37292/97, § 39, 28 June 2001, unreported).

46. The position is no different with regard to the assistance of a lawyer. Since such assistance was possible, according to the Court of Cassation, even in the context of the summary procedure before the Ecclesiastical Court, the applicant should have been put in a position enabling her to secure the assistance of a lawyer if she wished. The Court is not satisfied by the Court of Cassation's argument that the applicant should have been familiar with the case-law on the subject: the ecclesiastical courts could have presumed that the applicant, who was not assisted by a lawyer, was unaware of that case-law. In the Court's opinion, given that the applicant had been summoned to appear before the Ecclesiastical Court without knowing what the case was about, that court had a duty to inform her that she could seek the assistance of a lawyer before she attended for questioning.

47. In these circumstances the Court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law.

48. There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 41 OF THE CONVENTION

49. 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."

A. DAMAGE

50. The applicant claimed, under the head of pecuniary damage, 40,884,715 Italian lire (ITL) for the maintenance which her ex-husband should have continued paying her from June 1992 until the end of 1999, as determined in the decree of judicial separation delivered by the Rome District Court on 2 October 1990 (see paragraph 13 above). She also alleged that she had sustained substantial non-pecuniary damage as a result of the violation of the Convention totalling, according to her calculations, ITL 160,000,000.

51. The Government pointed out that no evidence of the alleged pecuniary damage had been adduced and that there was no causal link with the alleged violation. They argued, in particular, that although the applicant's ex-husband had admittedly stopped paying her maintenance following the declaration of enforceability of the decision annulling the marriage, the applicant had subsequently secured a friendly settlement of the issue (see paragraph 30 above): she had therefore already obtained, at least in part, payment of the maintenance due for the years 1992-99. The Government further maintained that a finding of a violation of Article 6 of the Convention would constitute sufficient just satisfaction for the non-pecuniary damage alleged.

52. The Court notes that the cessation of maintenance payments to the applicant was a direct consequence of the declaration that the judgment of the Roman Rota annulling the marriage was enforceable. It observes, however, that, as the Government pointed out, this issue was the subject of a friendly settlement between the applicant and her ex-husband. As the contents of the friendly settlement have not been specified, the Court does not have the evidence necessary to quantify any pecuniary damage which might have been sustained under this head by the applicant. Her request for pecuniary damage must accordingly be rejected.

53. The Court considers that the applicant sustained some non-pecuniary damage, which cannot be compensated simply by a finding of a violation. Ruling on an equitable basis, in accordance with Article 41 of the Convention, the Court decides to award her ITL 10,000,000.

B. COSTS AND EXPENSES

54. The applicant also claimed reimbursement of lawyer's fees incurred in the various domestic proceedings (ITL 21,232,860, of which ITL 2,024,790 for the Court of Appeal proceedings and ITL 6,050,000 for the Court of Cassation proceedings) and before the Convention institutions (ITL 12,203,940), in respect of which she submitted supporting documentary evidence.

55. The Government left the matter to the Court's discretion.

56. The Court reiterates that, according to its established case-law, an award of costs and expenses incurred by an applicant cannot be made unless they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, *inter alia*, *Lucà* v. *Italy*, no. 33354/96, § 50, ECHR 2001-II, and *Zimmermann and Steiner* v. *Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

57. With regard to the costs incurred in the domestic proceedings, the Court notes that only the costs of the Court of Cassation proceedings stem directly from the violation found and the attempt to remedy it. Accordingly, it decides to award only ITL 6,050,000 under this head.

58. With regards to the costs incurred before the Strasbourg institutions, the Court awards the applicant the entire sum claimed of ITL 12,203,940.

C. DEFAULT INTEREST

59. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 3.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts: (i) ITL 10,000,000 (ten million Italian lire) in respect of non-pecuniary damage; (ii) ITL 18,253,940 (eighteen million two hundred and fifty-three thousand nine hundred and forty Italian lire) in respect of costs and expenses; and (b) that simple interest at an annual rate of 3.5% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

[omissis]

Corte europea dei diritti dell'uomo, dec. 6 settembre 2001, *Brusco* c. *Italia* (ric. 69789/01) ([1])

[omissis]

THE FACTS

The applicant [Mr Umberto Brusco] is an Italian national, born in 1958 and living in Quarto Flegreo (Naples). He was represented before the Court by Mr A. Murante Perrotta, of the Naples Bar.

A. THE CIRCUMSTANCES OF THE CASE

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

1. *The criminal proceedings against the applicant*

On 23 March 1992 the applicant, who had been accused of corruption and membership of a criminal organisation, was arrested and placed under house arrest. He was released on 17 July 1992.

On 19 February 1993 the Naples public prosecutor's office requested that the applicant and numerous other people be committed for trial. In an order of 10 November 1993 the Naples investigating judge allowed the request.

The first hearing in the Naples District Court was held on 14 February 1994. After three further hearings – on 30 March and 6 and 9 April 1994 – a number of witnesses were questioned. On 20 April, 11 May and 8 June 1994 the proceedings were adjourned owing to strikes by lawyers. On 28 September 1994 the District Court, noting that the composition of its bench was not the same as at the previous hearings, directed that all the measures taken during the trial should be carried out again. Following a succession of hearings – on 27 September, 4, 11, 18, 23 and 25 October and 3 and 4 November 1995 – the parties presented their submissions.

In a judgment of 4 November 1995, the text of which was deposited with the registry on 11 June 1996, the Naples District Court sentenced the applicant to three years' imprisonment for corruption. It acquitted him of membership of a criminal organisation.

The public prosecutor's office and the applicant both appealed to the Naples Court of Appeal.

The first hearing was scheduled for 21 April 1997. On 5 May 1997 the case was adjourned, initially until 20 September 1997 because of a lawyers' strike and subsequently until 10 November 1997 at the defendants' request. On that day the proceedings were adjourned until 4 May 1998 as the lawyers were on strike.

On 3 November 1998 the defendants, noting that an appeal concerning an issue of relevance to the outcome of their case was pending before the Constitutional Court, applied for an adjournment. The Court of Appeal granted their application. The Constitutional Court delivered its judgment on 22 July 1999 and the applicant's case was set down for hearing in the Naples Court of Appeal on 5 October 1999. Following numerous adjournments, the parties presented their submissions on 7 April 2000.

In a judgment of 7 April 2000, the text of which was deposited with the registry on 20 April 2000, the Naples Court of Appeal acquitted the applicant. That decision became final on 22 June 2000.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

2. *Entry into force of Law no. 89 of 24 March 2001*

In a letter of 15 May 2001 the Registry of the Court informed the applicant that Law no. 89 of 24 March 2001 ("the Pinto Act") had come into force on 18 April 2001, introducing into Italian legislation a remedy in respect of the excessive length of court proceedings. The applicant was at the same time invited to refer his complaint, in the first place, to the national courts.

In a fax of 29 May 2001 the applicant indicated that he did not wish to avail himself of the remedy provided by the Pinto Act and insisted that his application to the Court should be registered. He observed, in particular, that it had been lodged on 6 December 2000, before the publication and entry into force of the Pinto Act.

B. RELEVANT DOMESTIC LAW

In passing Constitutional Amendment Act no. 2 of 23 November 1999, the Italian parliament decided to include the principle of a fair trial in the Constitution itself. The relevant parts of Article 111 of the Constitution are now worded as follows: "1. Jurisdiction shall be exercised through fair proceedings, conducted in accordance with the law. 2. All proceedings shall be conducted in compliance with the principles of adversarial process and equality of arms before a neutral and impartial court. The right to be tried within a reasonable time shall be guaranteed by law."

In order to ensure the effective application at domestic level of the "reasonable time" principle now enshrined in the Constitution, Parliament passed the Pinto Act on 24 March 2001. The relevant parts of the Act provide: Section 2 (Entitlement to just satisfaction) – "1. Anyone sustaining pecuniary or non-pecuniary damage as a result of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law no. 848 of 4 August 1955, on account of a failure to comply with the 'reasonable time' requirement in Article 6 § 1 of the Convention, shall be entitled to just satisfaction. 2. In determining whether there has been a violation, the court shall have regard to the complexity of the case and, in the light thereof, the conduct of the parties and of the judge deciding procedural issues, and also the conduct of any authority required to participate in or contribute to the resolution of the case. 3. The court shall assess the quantum of damage in accordance with Article 2056 of the Civil Code and shall apply the following rules: (a) only damage attributable to the period beyond the reasonable time referred to in subsection 1 may be taken into account; (b) in addition to the payment of a sum of money, reparation for non-pecuniary damage shall be made by giving suitable publicity to the finding of a violation."

Section 3 (Procedure) – "1. Claims for just satisfaction shall be lodged with the court of appeal in which the judge sits who has jurisdiction under Article 11 of the Code of Criminal Procedure to try cases concerning members of the judiciary in the district where the case in which the violation is alleged to have occurred was decided or discontinued at the merits stage or is still pending. 2. The claim shall be made on an application lodged with the registry of the court of appeal by a lawyer holding a special authority containing all the information prescribed by Article 125 of the Code of Civil Procedure. 3. The application shall be made against the Minister of Justice where the alleged violation has taken place in proceedings in the ordinary courts, the Minister of Defence where it has taken place in proceedings before the military courts and the Finance Minister where it has taken place in proceedings before the tax commissioners. In all other cases, the application shall be made against the Prime Minister. 4. The court of appeal shall hear the application in accordance with Articles 737 et seq. of the Code of Civil Procedure. The application and the order setting the case down for hearing shall be served by the applicant on the defendant authority at its elected domicile at the offices of State Counsel [*Avvocatura dello Stato*] at least fifteen days prior to the date of the hearing before the Chamber. 5. The parties may apply to the court for an order for production of all or part of the procedural and other documents from the proceedings in which the violation referred to in section 2 is alleged to have occurred and they and their lawyers shall be entitled to be heard by the court in private if they attend the hearing. The parties may lodge memorials and documents up till five days before the date set for the hearing or until expiry of the time allowed by the court of appeal for that purpose on an application by the parties. 6. The court shall deliver a decision within four months after the application is lodged. An appeal shall lie to the

Court of Cassation. The decision shall be enforceable immediately. 7. To the extent that resources permit, payment of compensation to those entitled shall commence on 1 January 2002."

Section 4 (Time-limits and procedures for lodging applications) – "A claim for just satisfaction may be lodged while the proceedings in which the violation is alleged to have occurred are pending or within six months from the date when the decision ending the proceedings becomes final. Claims lodged after that date shall be time-barred."

Section 5 (Communications) – "If the court decides to allow an application, its decision shall be communicated by the registry to the parties, to State Counsel at the Court of Audit to enable him to start an investigation into liability, and to the authorities responsible for deciding whether to institute disciplinary proceedings against the civil servants involved in the proceedings in any capacity."

Section 6 (Transitional provisions) – "1. Within six months after the entry into force of this Act, anyone who has lodged an application with the European Court of Human Rights in due time complaining of a violation of the 'reasonable time' requirement contained in Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law no. 848 of 4 August 1955, shall be entitled to lodge a claim under section 3 hereof provided that the application has not by then been declared admissible by the European Court. In such cases, the application to the court of appeal must state when the application to the said European Court was made. 2. The registry of the relevant court shall inform the Minister for Foreign Affairs without delay of any claim lodged in accordance with section 3 and within the period laid down in subsection 1 of this section."

Section 7 (Financial provisions) – "1. The financial cost of implementing this Act, which is put at 12,705,000,000 Italian lire from 2002, shall be met by releasing funds entered in the three-year budget 2001-03 in the chapter concerning the basic current-liability estimates from the 'special fund' in the year 2001 forecast of the Ministry of the Treasury, Economy and Financial Planning. Treasury deposits shall be set aside for that purpose. 2. The Ministry of the Treasury, Economy and Financial Planning is authorised to make the appropriate budgetary adjustments by decree."

COMPLAINT

The applicant complained under Article 6 § 1 of the Convention of the length of the criminal proceedings against him.

THE LAW

The applicant complained of the length of the criminal proceedings against him. He relied on Article 6 § 1 of the Convention, the relevant parts of which provide: "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

The Court must first determine whether the applicant has exhausted the remedies available to him in Italian law, in accordance with Article 35 § 1 of the Convention.

It reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni* v. *France* [GC], no. 25803/94, § 74, ECHR 1999-V). That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (ibid.). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others* v. *Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1210, § 65, and *Aksoy* v. *Turkey*, judgment of 18 December 1996, Reports 1996-VI, pp. 2275-76, § 51).

Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, in particular, Akdivar and Others, cited above, p. 1210, § 66, and *Dalia* v. *France*, judgment of 19 February 1998, Reports 1998-I, pp. 87-88, § 38). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see Selmouni, cited above, § 75). However, the Court points out that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see Akdivar and Others, cited above, p. 1212, § 71, and *Van Oosterwijck* v. *Belgium*, judgment of 6 November 1980, Series A no. 40, pp. 18-19, § 37; see also *Koltsidas, Fountis, Androutsos and Others* v. *Greece*, nos. 24962/94, 25370/94 and 26303/95, Commission decision of 1 July 1996, Decisions and Reports 86-A, pp. 83, 93).

In the instant case the Court observes at the outset that the applicant is entitled to rely on the transitional provision in section 6 of the Pinto Act. The remedy of an application to the court of appeal is therefore available to him.

It further notes that one of the aims of the Pinto Act is to ensure the effective application at domestic level of the "reasonable time" principle enshrined in the Italian Constitution following the revision of Article 111. Furthermore, as the Court observed in *Kudla* v. *Poland* ([GC], no. 30210/96, § 152, ECHR 2000-XI), the right to a hearing within a reasonable time will be less effective if there is no opportunity to submit Convention claims to a national authority first. It should also be pointed out that in *Kudla* the Court held that there had been a violation of Article 13 of the Convention in that no remedy was available in Polish law to enable the applicant to enforce his right to a "hearing within a reasonable time" (ibid., cited above, §§ 132-60).

As regards the effectiveness of the remedy available in the instant case it should be noted that, under the Pinto Act, anyone who is a party to judicial proceedings falling within the ambit of Article 6 § 1 of the Convention may lodge an application with a view to obtaining a finding of an infringement of the "reasonable time" principle and, where appropriate, may be awarded just satisfaction for any pecuniary and non-pecuniary damage sustained. Furthermore, as is evident from section 2(2) of the Act, in assessing the reasonableness of the length of proceedings the national courts are required to apply the criteria established by the Court's case-law, namely the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, *Pélissier and Sassi* v. *France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Philis* v. *Greece* (no. 2), judgment of 27 June 1997, Reports 1997-IV, p. 1083, § 35). That being so, the Court considers that there is no reason to believe that the remedy provided by the Pinto Act would not afford the applicant the opportunity to obtain redress for his grievance or that it would have no reasonable prospect of success.

It is true that the present application was lodged before the Pinto Act had come into force and that, consequently, at the time when the applicant first referred his complaint to the Court in Strasbourg, he did not have an effective remedy available in Italian law in respect of the length of the proceedings in issue.

In this connection, the Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann* v. *France*, no. 33592/96, § 47, 22 May 2001).

The Court considers that many factors in the instant case justify a departure from the general principle that the exhaustion requirement must be assessed with reference to the time at which the application was lodged.

It observes, in particular, that the growing frequency with which it has found violations by the Italian State of the "reasonable time" requirement has led it to conclude that the accumulation of such breaches constitutes a practice that is incompatible with the Convention, and to draw the Government's attention to the "important danger" that "excessive delays in the administration of justice"

represent for the rule of law (see *Bottazzi* v. *Italy* [GC], no. 34884/97, § 22, ECHR 1999-V, and *Di Mauro* v. *Italy* [GC], no. 34256/96, § 23, ECHR 1999-V). It has also held that the lack of an effective remedy in respect of the excessive length of proceedings has forced individuals to apply systematically to the Court in Strasbourg when their complaints might have been dealt with more appropriately, in the first place, by the Italian legal system. In the long term, that situation is likely to affect the operation, at both national and international level, of the system of human rights protection set up by the Convention (see, *mutatis mutandis*, *Kudla*, cited above, § 155).

The purpose of the remedy introduced by the Pinto Act is to enable the authorities of the respondent State to redress breaches of the "reasonable time" requirement and, consequently, to reduce the number of applications for the Court to consider. That is true not only of applications lodged after the date on which the Act came into force, but also of those which were already on the Court's list of cases by that date.

In this connection, particular importance should be attached to the fact that the transitional provision in section 6 of the Pinto Act refers explicitly to applications already lodged with the Court in Strasbourg and is therefore designed to bring within the jurisdiction of the national courts all applications currently pending before the Court that have not yet been declared admissible. The provision in question affords Italian litigants a genuine opportunity to obtain redress for their grievances at national level; in principle, it is for them to avail themselves of that opportunity.

In the light of the foregoing, the Court considers that the applicant was required by Article 35 § 1 of the Convention to lodge a claim with the court of appeal under sections 3 and 6 of the Pinto Act. Furthermore, there do not appear to be any exceptional circumstances capable of exempting him from the obligation to exhaust domestic remedies.

It follows that the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Declares the application inadmissible.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 21 novembre 2001, *Al-Adsani* c. *Regno Unito* (ric. n. 35763/97) ([1])

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. THE ALLEGED ILL-TREATMENT

9. The applicant made the following allegations concerning the events underlying the dispute he submitted to the English courts. The Government stated that they were not in a position to comment on the accuracy of these claims.

10. The applicant, who is a trained pilot, went to Kuwait in 1991 to assist in its defence against Iraq. During the Gulf War he served as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sex videotapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who is related to the Emir of Kuwait and is said to have an influential position in Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh.

11. After the Iraqi armed forces were expelled from Kuwait, on or about 2 May 1991, the Sheikh and two others gained entry to the applicant's house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison. The applicant was falsely imprisoned there for several days during which he was repeatedly beaten by security guards. He was released on 5 May 1991, having been forced to sign a false confession.

12. On or about 7 May 1991 the Sheikh took the applicant at gunpoint in a government car to the palace of the Emir of Kuwait's brother. At first the applicant's head was repeatedly held underwater in a swimming-pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol, as a result of which the applicant was seriously burnt.

13. Initially the applicant was treated in a Kuwaiti hospital, and on 17 May 1991 he returned to England where he spent six weeks in hospital being treated for burns covering 25% of his total body surface area. He also suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder, aggravated by the fact that, once in England, he received threats warning him not to take action or give publicity to his plight.

B. THE CIVIL PROCEEDINGS

14. On 29 August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the State of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. On 15 December 1992 he obtained a default judgment against the Sheikh.

15. The proceedings were re-issued after an amendment to include two named individuals as defendants. On 8 July 1993 a deputy High Court judge *ex parte* gave the applicant leave to serve the proceedings on the individual defendants. This decision was confirmed in chambers on 2 August 1993. He was not, however, granted leave to serve the writ on the State of Kuwait.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

16. The applicant submitted a renewed application to the Court of Appeal, which was heard *ex parte* on 21 January 1994. Judgment was delivered the same day.

The court held, on the basis of the applicant's allegations, that there were three elements pointing towards State responsibility for the events in Kuwait: firstly, the applicant had been taken to a State prison; secondly, government transport had been used on 2 and 7 May 1991; and, thirdly, in the prison he had been mistreated by public officials. It found that the applicant had established a good arguable case, based on principles of international law, that Kuwait should not be afforded immunity under section 1(1) of the State Immunity Act 1978 ("the 1978 Act": see paragraph 21 below) in respect of acts of torture. In addition, there was medical evidence indicating that the applicant had suffered damage (post-traumatic stress) while in the United Kingdom. It followed that the conditions in Order 11 rule 1(f) of the Rules of the Supreme Court had been satisfied (see paragraph 20 below) and that leave should be granted to serve the writ on the State of Kuwait.

17. The Kuwaiti government, after receiving the writ, sought an order striking out the proceedings. The application was examined *inter partes* by the High Court on 15 March 1995. In a judgment delivered the same day the court held that it was for the applicant to show on the balance of probabilities that the State of Kuwait was not entitled to immunity under the 1978 Act. It was prepared provisionally to accept that the Government were vicariously responsible for conduct that would qualify as torture under international law. However, international law could be used only to assist in interpreting *lacunae* or ambiguities in a statute, and when the terms of a statute were clear, the statute had to prevail over international law. The clear language of the 1978 Act bestowed immunity upon sovereign States for acts committed outside the jurisdiction and, by making express provision for exceptions, it excluded as a matter of construction implied exceptions. As a result, there was no room for an implied exception for acts of torture in section 1(1) of the 1978 Act. Moreover, the court was not satisfied on the balance of probabilities that the State of Kuwait was responsible for the threats made to the applicant after 17 May 1991. As a result, the exception provided for by section 5 of the 1978 Act could not apply. It followed that the action against the State should be struck out.

18. The applicant appealed and the Court of Appeal examined the case on 12 March 1996. The court held that the applicant had not established on the balance of probabilities that the State of Kuwait was responsible for the threats made in the United Kingdom. The important question was, therefore, whether State immunity applied in respect of the alleged events in Kuwait. Lord Justice Stuart-Smith finding against the applicant, observed: "Jurisdiction of the English court in respect of foreign States is governed by the State Immunity Act 1978. Section 1(1) provides: 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. ...' ... The only relevant exception is section 5, which provides: 'A State is not immune as respects proceedings in respect of (a) death or personal injury ... caused by an act or omission in the United Kingdom.' It is plain that the events in Kuwait do not fall within the exception in section 5, and the express words of section 1 provide immunity to the First Defendant. Despite this, in what [counsel] for the Plaintiff acknowledges is a bold submission, he contends that that section must be read subject to the implication that the State is only granted immunity if it is acting within the Law of Nations. So that the section reads: 'A State acting within the Law of Nations is immune from jurisdiction except as provided ...' ... The argument is ... that international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity. No authority is cited for this proposition. ... At common law, a sovereign State could not be sued at all against its will in the courts of this country. The 1978 Act, by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification. Moreover, authority in the United States at the highest level is completely contrary to [counsel for the applicant's] submission. [Lord Justice Stuart-Smith referred to the judgments of the United States courts, *Argentine Republic* v. *Amerada Hess Shipping Corporation* and *Siderman de Blake* v. *Republic of Argentina*, cited in paragraph 23 below, in both of which the court rejected the argument that there was an implied exception to the rule of State immunity where the State acted contrary to the Law of Nations.] ...

[Counsel] submits that we should not follow the highly persuasive judgments of the American courts. I cannot agree. ... A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination. ..."

The other two members of the Court of Appeal, Lord Justice Ward and Mr Justice Buckley, also rejected the applicant's claim. Lord Justice Ward commented that "there may be no international forum (other than the *forum* of the *locus delicti* to whom a victim of torture will be understandably reluctant to turn) where this terrible, if established, wrong can receive civil redress".

19. On 27 November 1996 the applicant was refused leave to appeal by the House of Lords. His attempts to obtain compensation from the Kuwaiti authorities via diplomatic channels have proved unsuccessful.

II. RELEVANT LEGAL MATERIALS

A. JURISDICTION OF ENGLISH COURTS IN CIVIL MATTERS

20. There is no rule under English law requiring a plaintiff to be resident in the United Kingdom or to be a British national before the English courts can assert jurisdiction over civil wrongs committed abroad. Under the rules in force at the time the applicant issued proceedings, the writ could be served outside the territorial jurisdiction with the leave of the court when the claim fell within one or more of the categories set out in order 11, Rule 1 of the Rules of the Supreme Court. For present purposes only Rule 1(f) is relevant: "... service of a writ out of the jurisdiction is permissible with the leave of the court if, in the action begun by the writ, ... (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction ..."

B. THE STATE IMMUNITY ACT 1978

21. The relevant parts of the State Immunity Act 1978 provide: "1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. ... 5. A State is not immune as regards proceedings in respect of (a) death or personal injury; ... caused by an act or omission in the United Kingdom ..."

C. THE BASLE CONVENTION

22. The above provision (section 5 of the 1978 Act) was enacted to implement the 1972 European Convention on State Immunity ("the Basle Convention"), a Council of Europe instrument, which entered into force on 11 June 1976 after its ratification by three States. It has now been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one other State (Portugal). Article 11 of the Convention provides: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

Article 15 of the Basle Convention provides that a Contracting State shall be entitled to immunity if the proceedings do not fall within the stated exceptions.

D. STATE IMMUNITY IN RESPECT OF CIVIL PROCEEDINGS FOR TORTURE

23. In its Report on Jurisdictional Immunities of States and their Property (1999), the working group of the International Law Commission (ILC) found that over the preceding decade a number of civil claims had been brought in municipal courts, particularly in the United States and United Kingdom, against foreign governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States. The working group of the ILC found that national courts had in some cases shown sympathy for the argument that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded. The working group cited the following cases in this connection: (United Kingdom) *Al-Adsani* v. *State of Kuwait* 100 International Law Reports 465 at 471; (New Zealand) *Controller and Auditor General* v. *Sir Ronald Davidson* [1996] 2 New Zealand Law Reports 278, particularly at 290 (per Cooke P.); Dissenting Opinion of Justice Wald in (United States) *Princz* v. *Federal Republic of Germany* 26 F 3d 1166 (DC Cir. 1994) at 1176-1185; *Siderman de Blake* v. *Republic of Argentina* 965 F 2d 699 (9th Cir. 1992); *Argentine Republic* v. *Amerada Hess Shipping Corporation* 488 US 428 (1989); *Saudi Arabia* v. *Nelson* 100 International Law Reports 544.

24. The working group of the ILC did, however, note two recent developments which it considered gave support to the argument that a State could not plead immunity in respect of gross human rights violations. One of these was the House of Lords' judgment in *ex parte Pinochet (No. 3)* (see paragraph 34 below). The other was the amendment by the United States of its Foreign Sovereign Immunities Act (FSIA) to include a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage or hostage-taking, against a State designated by the Secretary of State as a sponsor of terrorism, where the claimant or victim was a national of the United States at the time the act occurred.

In its judgment in *Flatow* v. *the Islamic Republic of Iran and Others* (76 F. Supp. 2d 16, 18 (D.D.C. 1999)), the District Court for the District of Columbia confirmed that the property of a foreign State was immune from attachment or execution, unless the case fell within one of the statutory exceptions, for example that the property was used for commercial activity.

E. THE PROHIBITION OF TORTURE IN KUWAIT AND UNDER INTERNATIONAL LAW

25. The Kuwaiti Constitution provides in Article 31 that "No person shall be put to torture".

26. Article 5 of the Universal Declaration of Human Rights 1948 states: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

27. Article 7 of the International Covenant on Civil and Political Rights 1966 states as relevant: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

28. The United Nations 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides in Article 3 that: "No State may permit or tolerate torture and other cruel inhuman or degrading treatment or punishment."

29. In the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted on 10 December 1984 ("the UN Convention"), torture is defined as: "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 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."

The UN Convention requires by Article 2 that each State Party is to take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and by Article 4 that all acts of torture be made offences under each State's criminal law.

30. In its judgment in *Prosecutor* v. *Furundzija* (10 December 1998, case no. IT-95-17/I-T, (1999) 38 International Legal Materials 317), the International Criminal Tribunal for the Former Yugoslavia observed as follows: "144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency ... This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. ... This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. 145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. ... 146. The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left. 147. There exists today universal revulsion against torture ... . This revulsion, as well as the importance States attach to the eradication of torture, has led to a cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system. ... 151. ... the prohibition of torture imposes on States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community. ... 153. ... the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force. 154. Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. ..."

31. Similar statements were made in *Prosecutor* v. *Delacic and Others* (16 November 1998, case no. IT-96-21-T, § 454) and in *Prosecutor* v. *Kunarac* (22 February 2001, case nos. IT-96-23-T and IT-96-23/1, § 466).

F. CRIMINAL JURISDICTION OF THE UNITED KINGDOM OVER ACTS OF TORTURE

32. The United Kingdom ratified the UN Convention with effect from 8 December 1988.

33. Section 134 of the Criminal Justice Act 1988, which entered into force on 29 September 1988, made torture, wherever committed, a criminal offence under United Kingdom law triable in the United Kingdom.

34. In its *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, judgment of 24 March 1999 [2000] Appeal Cases 147, the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the United Kingdom at the time when it was allegedly committed. The majority of the Law Lords considered that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect. The majority considered that although under Part II of the State Immunity Act 1978 a former head of State enjoyed immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, torture was an international crime and prohibited by *jus cogens* (peremptory norms of international law). The coming into force of the UN Convention (see paragraph 29 above) had created a universal criminal jurisdiction in all the Contracting States in respect

of acts of torture by public officials, and the States Parties could not have intended that an immunity for ex-heads of State for official acts of torture would survive their ratification of the UN Convention. The House of Lords (and, in particular, Lord Millett, at p. 278) made clear that their findings as to immunity *ratione materiae* from criminal jurisdiction did not affect the immunity *ratione personae* of foreign sovereign States from civil jurisdiction in respect of acts of torture.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicant contended that the United Kingdom had failed to secure his right not to be tortured, contrary to Article 3 of the Convention read in conjunction with Articles 1 and 13.

Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

Article 13 provides: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

He submitted that, correctly interpreted, the above provisions taken together required the United Kingdom to assist one of its citizens in obtaining an effective remedy for torture against another State. The grant of immunity from civil suit to the State of Kuwait had, however, frustrated this purpose.

36. The Government submitted that the complaint under Article 3 failed on three grounds. First, the torture was alleged to have taken place outside the United Kingdom's jurisdiction. Secondly, any positive obligation deriving from Articles 1 and 3 could extend only to the prevention of torture, not to the provision of compensation. Thirdly, the grant of immunity to Kuwait was not in any way incompatible with the obligations under the Convention.

37. The Court reiterates that the engagement undertaken by a Contracting State under Article 1 of the Convention is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering* v. *the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 33-34, § 86).

38. It is true that, taken together, Articles 1 and 3 place a number of positive obligations on the High Contracting Parties, designed to prevent and provide redress for torture and other forms of ill-treatment. Thus, in *A.* v. *the United Kingdom* (judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22) the Court held that, by virtue of these two provisions, States are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment. In *Aksoy* v. *Turkey* (judgment of 18 December 1996, Reports 1996-VI, p. 2287, § 98) it was established that Article 13 in conjunction with Article 3 impose an obligation on States to carry out a thorough and effective investigation of incidents of torture, and in *Assenov and Others* v. *Bulgaria* (judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102), the Court held that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. However, in each case the State's obligation applies only in relation to ill-treatment allegedly committed within its jurisdiction.

39. In *Soering*, cited above, the Court recognised that Article 3 has some, limited, extraterritorial application, to the extent that the decision by a Contracting State to expel an individual might engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person concerned, if expelled, faced a real risk of being subjected to

torture or to inhuman or degrading treatment or punishment in the receiving country. In the judgment it was emphasised, however, that in so far as any liability under the Convention might be incurred in such circumstances, it would be incurred by the expelling Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment (op. cit., pp. 35-36, § 91).

40. The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.

41. It follows that there has been no violation of Article 3 of the Convention in the present case.

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

42. The applicant alleged that he was denied access to a court in the determination of his claim against the State of Kuwait and that this constituted a violation of Article 6 § 1 of the Convention, which provides in its first sentence: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

43. The Government submitted that Article 6 § 1 did not apply to the proceedings, but that, even if it did, any interference with the right of access to a court was compatible with its provisions.

A. Applicability of Article 6 § 1 of the Convention

1. *Submissions of the parties*

44. The Government contended that Article 6 § 1 of the Convention had no applicability in the present case on a number of grounds. They pointed out that the applicant had not made any allegation in the domestic courts that the State of Kuwait was responsible for the events of 7 May 1991, when he was severely burned (see paragraph 12 above), and they submitted that it was not therefore open to him to complain before the European Court of a denial of access to a court in respect of those alleged events. In addition, they claimed that Article 6 could not extend to matters outside the State's jurisdiction, and that as international law required an immunity in the present case, the facts fell outside the jurisdiction of the national courts and, consequently, Article 6. Unlike *Osman* v. *the United Kingdom* (judgment of 28 October 1998, Reports 1998-VIII, pp. 3166-67, § 138), the present case concerned a clear, absolute and consistent exclusionary rule of English law. Applying the *Osman* test, the case fell outside the scope of Article 6.

45. The applicant accepted that he had not alleged in the first-instance inter partes hearing on 15 March 1995 (see paragraph 17 above) that the State of Kuwait was responsible for the events of 7 May 1991. He underlined, however, that he had made clear in the Court of Appeal that he would seek to amend his statement of claim to add those events if the claim for immunity failed and he believed that he would have been allowed to make the amendment in those circumstances. As to the jurisdictional point, he observed that torture is a civil wrong in English law and that the United Kingdom asserts jurisdiction over civil wrongs committed abroad in certain circumstances (see paragraph 20 above). The domestic courts accepted jurisdiction over his claims against the individual defendants. His claim against the State of Kuwait was not defeated because of its nature but because of the identity of the defendant. Thus, in the applicant's submission, Article 6 § 1 was applicable.

2. *The Court's assessment*

46. The Court reiterates its constant case-law to the effect that Article 6 § 1 does not itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. It extends only to contestations (disputes) over "civil rights and obligations" which can

be said, at least on arguable grounds, to be recognised under domestic law (see *Z and Others* v. *the United Kingdom* [GC], no. 29392/95, § 87, ECHR 2001-V, and the authorities cited therein).

47. Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see *Fayed* v. *the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65).

48. The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred *in limine*: if the defendant State waives immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.

49. The Court is accordingly satisfied that there existed a serious and genuine dispute over civil rights. It follows that Article 6 § 1 was applicable to the proceedings in question.

B. Compliance with Article 6 § 1

1. *Submissions of the parties*

50. The Government contended that the restriction imposed on the applicant's right of access to a court pursued a legitimate aim and was proportionate. The 1978 Act reflected the provisions of the Basle Convention (see paragraph 22 above), which in turn gave expression to universally applicable principles of public international law and, as the Court of Appeal had found, there was no evidence of a change in customary international law in this respect. Article 6 § 1 of the Convention could not be interpreted so as to compel a Contracting State to deny immunity to and assert jurisdiction over a non-Contracting State. Such a conclusion would be contrary to international law and would impose irreconcilable obligations on the States that had ratified both the Convention and the Basle Convention.

There were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim.

51. The applicant submitted that the restriction on his right of access to a court did not serve a legitimate aim and was disproportionate. The House of Lords in *ex parte Pinochet (No. 3)* (see paragraph 34 above) had accepted that the prohibition of torture had acquired the status of a *jus cogens* norm in international law and that torture had become an international crime. In these circumstances there could be no rational basis for allowing sovereign immunity in a civil action when immunity would not be a defence in criminal proceedings arising from the same facts.

Other than civil proceedings against the State of Kuwait, he complained that there was no effective means of redress available to him. He had attempted to make use of diplomatic channels but the Government refused to assist him, and although he had obtained judgment by default against the Sheikh, the judgment could not be executed because the Sheikh had no ascertainable recoverable assets in the United Kingdom.

2. *The Court's assessment*

52. In *Golder* v. *the United Kingdom* (judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36) the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to a court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court.

53. The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy* v. *Germany* [GC], no. 26083/94, § 59, ECHR 1999-I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou* v. *Turkey* (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

57. The Court notes that the 1978 Act, applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle Convention, which, while placing a number of limitations on the scope of State immunity as it was traditionally understood, preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State (see paragraph 22 above). Except insofar as it affects claims for damages for torture, the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

58. Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court accepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts,

namely, repeated beatings by prison guards over a period of several days with the aim of extracting a confession (see paragraph 11 above), can properly be categorised as torture within the meaning of Article 3 of the Convention (see *Selmouni* v. *France* [GC], no. 25803/94, ECHR 1999-V, and *Aksoy*, cited above).

59. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances (see, for example, *Aksoy*, cited above, p. 2278, § 62, and the cases cited therein). Of all the categories of ill-treatment prohibited by Article 3, "torture" has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering (ibid., pp. 2278-79, § 63, and see also the cases referred to in paragraphs 38-39 above).

60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*. For example, in its judgment of 10 December 1998 in *Furundzija* (see paragraph 30 above), the International Criminal Tribunal for the Former Yugoslavia referred, *inter alia*, to the foregoing body of treaty rules and held that "[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules". Similar statements have been made in other cases before that tribunal and in national courts, including the House of Lords in the case of *ex parte Pinochet (No. 3)* (see paragraph 34 above).

61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.

62. It is true that in its Report on Jurisdictional Immunities of States and their Property (see paragraphs 23-24 above) the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.

63. The ILC working group went on to note developments, since those decisions, in support of the argument that a State may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act (FSIA) which had been applied by the United States courts in two cases; secondly,

the *ex parte Pinochet (No. 3)* judgment in which the House of Lords "emphasised the limits of immunity in respect of gross human rights violations by State officials". The Court does not, however, find that either of these developments provides it with a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of torture, let alone that it was not enjoyed in 1996 at the time of the Court of Appeal's judgment in the present case.

64. As to the amendment to the FSIA, the very fact that the amendment was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture. Moreover, the amendment is circumscribed in its scope: the offending State must be designated as a State sponsor of acts of terrorism, and the claimant must be a national of the United States. The effect of the FSIA is further limited in that after judgment has been obtained, the property of a foreign State is immune from attachment or execution unless one of the statutory exceptions applies (see paragraph 24 above).

65. As to the *ex parte Pinochet (No. 3)* judgment (see paragraph 34 above), the Court notes that the majority of the House of Lords held that, after the UN Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts (see in particular, the judgment of Lord Millett, mentioned in paragraph 34 above). In so holding, the House of Lords cited with approval the judgments of the Court of Appeal in *Al-Adsani* itself.

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67. In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court.

It follows that there has been no violation of Article 6 § 1 of the Convention in this case.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

2. *Holds* by nine votes to eight that there has been no violation of Article 6 § 1 of the Convention.

[omissis]

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

(a) concurring opinion of Mr Zupancic;

(b) concurring opinion of Mr Pellonpää joined by Sir Nicolas Bratza;

(c) joint dissenting opinion of Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajic;

(d) dissenting opinion of Mr Ferrari Bravo;

(e) dissenting opinion of Mr Loucaides.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 21 novembre 2001, *Fogarty* c. *Regno Unito* (ric. n. 37112/97) ([1])

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. On 8 November 1993 the applicant commenced employment as an administrative assistant at the United States Embassy in London, in the Foreign Broadcasting Information Service, which is a subsidiary of the Central Intelligence Agency. She was dismissed from her employment in February 1995. Following her dismissal the applicant issued proceedings against the United States Government in the North London Industrial Tribunal, claiming that her dismissal had been the result of sex discrimination contrary to sections 1(1)(a), 4(1)(d) and 6(2)(b) of the Sex Discrimination Act 1975 (see paragraph 15 below). In particular she alleged that she had been the victim of persistent sexual harassment from her supervisor and that working relationships had broken down in consequence. The United States Government defended the claim and did not, at any stage in these proceedings, claim State immunity. On 13 May 1996 the Tribunal upheld the applicant's complaint. A compensation figure of GBP 12,000 was agreed between the parties.

11. In June 1995, whilst her first claim in the Industrial Tribunal was still pending, the applicant applied for and obtained a fixed term 12 month contract as an administrative assistant within the Foreign Building Operations section of the Embassy. The contract was due to expire in June 1996. In June 1996 and August 1996 (after the finding in her favour by the Industrial Tribunal), the applicant applied for at least two of the following posts at the Embassy of the United States: secretary with the Office of Foreign Litigation of the United States Department of Justice, temporary secretary with the above office and temporary secretary with the International Marketing Centre, which is operated by the United States Foreign Commercial Service. On each occasion her application was unsuccessful.

12. On 15 September 1996 the applicant issued a second application before the Industrial Tribunal. She claimed that the refusal of the Embassy to re-employ her in two of the above posts was a consequence of her previous successful sex discrimination claim, and accordingly constituted victimisation and discrimination within the meaning of sections 4 and 6 of the Sex Discrimination Act 1975.

13. By a letter of 10 January 1997, solicitors acting for the United States notified the Regional Secretary to the Industrial Tribunal that the United States Government intended to claim immunity from the jurisdiction of the Tribunal under sections 1 and 16(1)(a) of the State Immunity Act 1978 ("the 1978 Act": see paragraph 16 below). The letter enclosed an affidavit sworn by the First Secretary at the Embassy, deposing to the fact that each of the posts for which the applicant had applied were part of the administrative and technical staff of the Embassy, and accordingly fell within the ambit of the immunity imposed by section 16(1)(a) of the 1978 Act.

14. On 6 February 1997 the applicant received the advice of counsel, to the effect that the United States Government were entitled to claim immunity under the 1978 Act, and that once immunity was properly asserted there was no means by which a court or tribunal in the United Kingdom could accept jurisdiction to entertain the application. Accordingly, the applicant was advised that she had no remedy in domestic law.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

II. RELEVANT LEGAL MATERIALS

A. SEX DISCRIMINATION

15. The Sex Discrimination Act 1975 ("the 1975 Act") creates a statutory cause of action which arises when an employer treats an employee or a potential employee less favourably by reason of her sex ("sex discrimination"), or by reason of the fact that she has taken or intends to take proceedings against any person under the 1975 Act ("victimisation").

Section 1(1) of the Act defines "sex discrimination" as follows: "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if: (a) on the ground of her sex he treats her less favourably than he treats or would treat a man ..."

Section 4(1) of the Act defines "victimisation" as follows: "A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has: (a) brought proceedings against the discriminator or any other person under this Act, or ... (d) alleged that the discriminator or any other person has committed an act which ... would amount to a contravention of this Act or give rise to a claim under the Equal Pay Act 1970 ..."

Section 6 of this Act defines the circumstances in which it is unlawful to discriminate against employees and applicants, on the grounds of sex discrimination or victimisation, as follows: "(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman: (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or ... (c) by refusing or deliberately omitting to offer her that employment." (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her ... (b) by dismissing her, or subjecting her to any other detriment."

B. STATE IMMUNITY

16. The United Kingdom's State Immunity Act 1978 provides, *inter alia*, as follows: "1(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. … 4(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there. 4(2) Subject to sub-sections (3) and (4) below, this section does not apply if- (a) at the time when the proceedings are brought the individual is a national of the State concerned; or (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or (c) the parties to the contract have otherwise agreed in writing. 4(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, sub-section (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State. … 16(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and:- (a) Section 4 above does not apply to proceedings concerning the employment of the member of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the member of a consular post within the meaning of the Convention scheduled to said Act of 1968. ..."

17. Article 1 of the Vienna Convention on Diplomatic Relations which is scheduled to the Diplomatic Privileges Act 1964 provides the following definitions: "(b) the 'members of the mission' are the head of the mission and the members of staff of the mission; (c) the 'members of staff of the mission' are the members of diplomatic staff or the administrative and technical staff, and of the service staff of the mission. ... (f) the 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission."

18. The 1972 European Convention on State Immunity ("the Basle Convention"), entered into force on 11 June 1976 after its ratification by three States. It has now been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one other State (Portugal). It entered into force in respect of the United Kingdom on 4 October 1979, and provides, *inter alia*:

Article 5 – "1. A Contracting State cannot claim immunity from the jurisdiction of a Court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed in the territory of the State of the forum.

2. Paragraph 1 shall not apply where: (a) the individual is a national of the employing State at the time when the proceedings were brought; (b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually a resident in that State; or (c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the Courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2(a) and (b) of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him."

Article 32 – "Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them."

19. The International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property, submitted to the General Assembly of the United Nations ((1991), II(2) YBILC 13), provides at Article 11, paragraph 1, that: "a State cannot invoke immunity ... in a proceeding which relates to a contract of employment between the State and an individual for work performed in the territory of [the host] State."

However, this provision is specifically disapplied where "the subject of the proceedings is the recruitment, renewal of employment or reinstatement of the individual" and where "the employee has been recruited to perform functions closely related to the exercise of governmental authority".

Although there is no explicit reference to employment at diplomatic or consular missions in these provisions, the commentary indicates that the latter exception was intended to apply in such a context and that all employees at such missions would be precluded from bringing suit on the basis of State immunity.

20. The Committee on State Immunity of the International Law Association adopted in 1982 its Draft Convention on State Immunity, Article IIIC of which dealt with contracts of employment and was similar in its terms to Article 5 of the Basle Convention. An amendment was added to Article IIIC at the ILA's 1994 conference, providing for immunity to be granted where "the employee was appointed under the public (administrative) law of the foreign state such as, *inter alia*, members of the mission, diplomatic, consular or military staff". In the explanatory commentary on the amendment the Committee stated that it wished "to make clear that the employment relationship of any and all diplomatic and consular staff and other members of the mission should be immune from the jurisdiction of the courts of the forum state".

THE LAW

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

21. The applicant complained that, as a result of the doctrine of State immunity, she had been denied access to court, contrary to Article 6 § 1 of the Convention, which provides: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Applicability of Article 6 § 1 of the Convention

1. *The submissions of the parties*

22. The Government contended that Article 6 § 1 of the Convention did not apply, because the applicant had no actionable domestic claim. The principle of sovereign immunity removed the dispute from the competence of the national courts, which could not assert jurisdiction over the internal affairs of foreign diplomatic missions. Secondly, with reference to *Pellegrin* v. *France*, [GC], no. 28541, §§ 64-67, ECHR 1999, they submitted that there was no "civil" right involved, because questions of employment of members of diplomatic missions fall within the core of sovereign power and thus form part of public law.

23. The applicant argued that there was a "right" under domestic law to be free from sex discrimination, as evidenced by her first successful claim against the Embassy. Sovereign immunity did not extinguish the right but simply prevented the courts from examining disputes thereon. Moreover, the right was "civil". The posts for which she had applied did not fall within the scope of the *Pellegrin* exception. They were of a strictly administrative or secretarial character and they would neither have required nor enabled her to wield a portion of the State's sovereign power.

2. *The Court's assessment*

24. The Court recalls its constant case-law to the effect that Article 6 § 1 does not itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. It extends only to contestations (disputes) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see *Z. and Others* v. *the United Kingdom*, [GC], no. 29392/95, § 87, ECHR 2001, and the authorities cited therein).

25. Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the *Fayed* v. *the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, § 65).

26. Section 6 of the Sex Discrimination Act 1975 ("the 1975 Act": see paragraph 15 above) creates a statutory right which arises, *inter alia*, when an employer refuses to employ a woman on grounds of sex discrimination or by reason of the fact that she has already taken proceedings under the 1975 Act. Thus, the proceedings which the applicant intended to pursue were for damages for a cause of action well known to English law. The Court does not accept the Government's plea that because of the operation of State immunity she did not have a substantive right under domestic law. It notes that an action against a State is not barred *in limine*: if the defendant State does not choose to claim immunity, the action will proceed to a hearing and judgment, as occurred with the first discrimination action brought by the applicant (see paragraph 10 above).

The Court is, therefore, satisfied that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar, preventing the applicant from bringing her claim before the Industrial Tribunal (see, *mutatis mutandis*, *Tinnelly and Sons Ltd* and *McElduff* v. *the United Kingdom*, nos. 20390/92 and 21322/93, § 62, ECHR 1998-IV).

27. The Government have also submitted that because the applicant's claim related to recruitment to the United States' Embassy, it did not concern a "civil right".

28. The Court recalls that in the above mentioned *Pellegrin* judgment, it adopted a functional test for the purposes of determining the applicability of Article 6 § 1 to employment disputes in-

volving public servants, based on the nature of the employee's duties and responsibilities. An employment dispute is excluded from the scope of Article 6 § 1 if it concerns a public servant whose duties typify the specific activities of the public service in so far as he or she acts as the depository of public authority responsible for protecting the general interests of the State. The question therefore arises whether or not the applicant's case falls within this category. However, for the reasons set out in the following paragraphs, the Court does not find it necessary to determine this issue, and will proceed on the assumption that Article 6 is applicable.

B. COMPLIANCE WITH ARTICLE 6 § 1 OF THE CONVENTION

1. *The submissions of the parties*

29. The Government argued that if there was any restriction to the right of access to court, it pursued a legitimate aim, namely promoting respect for the independence and equality of other sovereign States in accordance with public international law.

The restriction was, moreover, proportionate, since section 16(1)(a) of the 1978 Act was a justifiable reflection of the principles of public international law that were its source. In this connection, the Government referred to an article by Richard Garnett ("State Immunity in Employment Matters" in International and Comparative Law Quarterly, [vol. 46, January 1997], pp. 81 - 124) in which the author noted a variety of approaches by States with regard to according immunity to other States in employment matters. He concluded that the variety of approaches suggested that States had difficulty in agreeing where the line should be drawn. On the specific question of the application of State immunity to claims by employees of embassies and consulates, he noted a division between States which based their policy on the context or place of employment (including the United Kingdom and Germany), and those which advocated a relaxation of the strict exclusion of local jurisdiction in the case of employment at a diplomatic mission (including the United States and most European civil law countries).

30. For the Government, selection of embassy staff was a sovereign act *jure imperii*. Even the service staff of an embassy might be involved in sovereign activities and have access to confidential information. Any adjudication upon the fairness of the dismissal of an embassy employee or a decision whether or not to employ her would involve an investigation into the internal organisation of the embassy which would be an interference with the sovereign functions of the State. Given the difficulty in distinguishing between acts *jure imperii* and acts *jure gestionis*, it was appropriate to allow States a considerable margin of appreciation and the United Kingdom legislation fell within that margin. Article 5 of the Basle Convention, read in the light of its Article 32 (see paragraph 18 above), showed that the drafters of that Convention wanted to exclude from its scope matters in the exercise of the functions of diplomatic missions, including recruitment for employment in embassies. The practice of other Contracting States did not support the applicant's claims and the practice of the United Kingdom *vis-à-vis* its own embassy personnel was irrelevant.

31. The applicant accepted that section 16(1)(a) of the 1978 Act pursued a legitimate aim. However, she considered that it introduced a disproportionate limitation to the right of access to court for four reasons.

First, she contended that since her claim concerned sex discrimination, freedom from which is one of the core values of a democratic society, it was disproportionate to block her access to court in respect of it. Secondly, she pointed out that there was no alternative means available to her that could have provided a remedy for this complaint, since the United States was clearly not prepared to exercise jurisdiction. Thirdly, in the applicant's submission, the United Kingdom was not obliged under international law to grant immunity in respect of her claim. The tendency towards restricting the scope of State immunity was reflected in Articles 5 and 7 of the Basle Convention (see paragraph 18 above) and the Government's understanding of Article 5 of that Convention was not supported by the general practice of the other members of the Council of Europe or by academic commentators. The appointment of a member of a mission was not covered by Article 32 of the 1972 Convention. In practice, the United Kingdom did not itself claim absolute immunity in respect of disputes between foreign employees and British embassies and the United States did not

consider itself obliged under international law to confer an immunity in respect of all embassy employment disputes. It followed that absolute sovereign immunity was not required by considerations of international comity. Moreover, the International Law Commission was of the view that disputes concerning habitual residents of the forum State involving functions not closely connected with sovereign acts of government were not the appropriate subject of a claim to State immunity where the subject matter of the dispute did not involve a court ordering another State to take on an employee. Fourthly, the United States had not claimed immunity in relation to the applicant's first Industrial Tribunal claim. If immunity was not considered necessary in respect of the first claim, it was difficult to see how it could genuinely be necessary to meet the requirements of international co-operation in relation to the second claim.

2. *The Court's assessment*

32. In the *Golder* case the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (see the *Golder* v. *the United Kingdom judgment* of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

33. The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy* v. *Germany* [GC], no. 26083/94, ECHR 1999-I, § 59).

34. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

35. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, the *Loizidou* v. *Turkey* judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

36. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

37. The Court observes that, on the material before it (see paragraphs 16-20, 29 and 31 above), there appears to be a trend in international and comparative law towards limiting State immunity in

respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.

38. The Court further observes that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia*, to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions. In this respect, the Court notes that it appears clearly from the materials referred to above (see paragraph 19) that the International Law Commission did not intend to exclude the application of State immunity where the subject of proceedings was recruitment, including recruitment to a diplomatic mission.

39. In these circumstances, the Court considers that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court.

It follows that there has been no violation of Article 6 § 1 in this case.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant submitted that, since the proceedings she sought to pursue were to enforce an anti-discrimination provision, the restriction of access to court engaged Article 14 in conjunction with Article 6 § 1 of the Convention. Article 14 provides: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

41. The Government argued that Article 14 did not apply because Article 6 was inapplicable. In the alternative, they reasoned that the applicant was not treated differently from any other person wishing to sue the United States Embassy in respect of employment.

42. The Court recalls that the applicant was prevented from pursuing her claim in the Industrial Tribunal by virtue of sections 1 and 16(1)(a) of the 1978 Act (see paragraph 16 above), which confer an immunity in respect of proceedings concerning employment within the staff, including the administrative and technical staff, of an embassy. This immunity applies in relation to all such employment-related disputes, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. It cannot therefore be said that the applicant was treated any differently from any other person wishing to bring employment-related proceedings against an embassy, or that the restriction placed on her right to access to court was discriminatory.

43. It follows that there has been no violation of Article 14 in conjunction with Article 6 § 1 of the Convention in this case.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* unanimously that there has been no violation of Article 14 taken in conjunction with Article 6 § 1 of the Convention.

[omissis]

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

(a) concurring opinion of Mr Caflisch, Mr Costa and Mrs Vajic;

(b) dissenting opinion of Mr Loucaides.

[omissis]

Corte europea dei diritti dell'uomo, dec. 27 marzo 2003, *Scordino* c. *Italia* (ric. n. 36813/97) ([1])

[omissis]

THE FACTS

The applicants are four Italian nationals, Giovanni, Elena, Maria and Giuliana Scordino, who were born in 1959, 1949, 1951 and 1953 respectively and live in Reggio di Calabria. Having originally been designated by the initials G.S. and Others, the applicants subsequently agreed to the disclosure of their names. They were represented before the Court by Mr N. Paoletti, a lawyer practising in Rome.

A hearing was held on 27 March 2003 at which the applicants were also represented by Ms A. Mari, Counsel. The respondent Government were represented by Mr F. Crisafulli, Deputy Co-Agent.

A. THE CIRCUMSTANCES OF THE CASE

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

1. *The expropriation of the land*

In 1992 the applicants inherited from Mr A. Scordino several plots of land in Reggio di Calabria, entered in the land register as folio 111, parcels 105, 107, 109 and 662.

On 25 March 1970 Reggio di Calabria District Council adopted a general development plan, which was approved by the Calabria Regional Council on 17 March 1975.

The land in issue in the instant case, an area of 1,786 sq. m designated as parcel 109, was classified as building land; an expropriation permit was issued under the development plan with a view to the construction of housing on the land.

In 1980 Reggio di Calabria District Council decided that a cooperative society, Edilizia Aquila, would carry out building work on the land in question. In a decision of 13 March 1981 the administrative authorities granted the cooperative permission to occupy the land.

On 30 March 1982, pursuant to Law no. 385/1980, Reggio di Calabria District Council offered an advance on the compensation payable for the expropriation, the amount having been determined in accordance with Law no. 865/1971. The sum offered, 606,560 lire (ITL), was calculated according to the rules in force for agricultural land, using a value of ITL 340 per square metre as a basis, with the proviso that the final amount of compensation would be determined once a law had been enacted laying down new compensation criteria for building land.

The offer was refused by Mr A. Scordino.

On 21 March 1983 the Regional Council issued an expropriation order in respect of the land.

On 13 June 1983 the District Council made a second offer for an advance, this time amounting to ITL 785,000. The offer was not accepted.

In judgment no. 223, delivered in 1983, the Constitutional Court declared Law no. 385/1980 unconstitutional on the ground that it made the award of compensation subject to the enactment of a future law.

As a result of that judgment, Law no. 2359/1865, which provided that compensation for expropriation should correspond to the market value of the land in question, came back into force.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

On 10 August 1984 Mr A. Scordino served formal notice on the District Council to determine the final amount of compensation in accordance with Law no. 2359/1865. On 16 November 1989 he learned that Reggio di Calabria District Council had assessed the final amount at ITL 88,414,940 (ITL 50,000 per square metre) in an order of 6 October 1989.

2. *Proceedings for the award of compensation for the expropriation*

On 25 May 1990, contesting the amount of compensation he had been awarded, Mr A. Scordino brought proceedings against the District Council and the cooperative in the Reggio di Calabria Court of Appeal.

He argued that the amount determined by the District Council was ridiculously low in relation to the market value of the land and requested, among other things, to have the compensation calculated in accordance with Law no. 2359/1865. He also sought compensation for the period during which the land had been occupied before the expropriation order had been issued, and for the area of land (1,500 sq. m) that had become unusable as a result of the building work.

Preparation of the case for hearing began on 7 January 1991.

The cooperative gave notice of its intention to defend and raised an objection, arguing that it could not be considered a party to the proceedings.

On 4 February 1991, as the District Council had still not given notice of its intention to defend, the Reggio di Calabria Court of Appeal declared it to be in default and ordered an expert assessment of the land. In an order of 13 February 1991 an expert was appointed and was given three months in which to submit his report.

On 6 May 1991 the District Council gave notice of its intention to defend and raised an objection, arguing that it could not be considered a party to the proceedings. The expert agreed to his terms of reference and was sworn in.

On 4 December 1991 the expert submitted a report.

On 8 August 1992 Law no. 359/1992 came into force. Section 5*bis* of the Law laid down new criteria for calculating compensation for the expropriation of building land. The Law was expressly applicable to pending proceedings.

Following Mr A. Scordino's death on 30 November 1992, the applicants joined the proceedings on 18 September 1993.

On 4 October 1993 the Reggio di Calabria Court of Appeal appointed another expert and instructed him to assess the compensation for the expropriation according to the new criteria laid down in section 5*bis* of Law no. 359/1992.

The expert submitted his report on 24 March 1994, concluding that the land's market value on the date of the expropriation had been ITL 165,755 per square metre. In accordance with the new criteria laid down in section 5*bis* of Law no. 359/1992, the compensation due was ITL 82,890 per square metre.

At the hearing on 11 April 1994 the parties asked for time to submit comments on the expert's report. Counsel for the applicants produced a separate expert opinion and observed that the expert appointed by the court had omitted to calculate the compensation for the 1,500 sq. m of land that were not covered by the expropriation order but had become unusable as a result of the building work.

A hearing was held on 6 June 1994 at which observations were submitted in reply. The next hearing, scheduled for 4 July 1994, was adjourned by the court of its own motion until 3 October 1994 and then until 10 November 1994.

In an order of 29 December 1994 the court ordered a further expert assessment and adjourned the proceedings until 6 March 1995. However, the hearing was subsequently adjourned on several occasions as the investigating judge was unavailable. At the applicants' request, the investigating judge was replaced on 29 February 1996 and the parties made their submissions at a hearing on 20 March 1996.

In a judgment of 17 July 1996 the Reggio di Calabria Court of Appeal held that the applicants were entitled to compensation calculated according to section 5*bis* of Law no. 359/1992, both for the land that had been formally expropriated and for the land that had become unusable as a result of the building work. It also held that the compensation thus determined should not be subject to the further 40% statutory deduction applicable where the owner of the expropriated land had not signed an agreement for its transfer (*cessione volontaria*), seeing that in the applicants' case the land had already been expropriated when the Law had come into force.

In conclusion, the Court of Appeal ordered the District Council and the cooperative to pay the applicants: (a) ITL 148,041,540 (ITL 82,890 per square metre for 1,786 sq. m of land) in compensation for the expropriation; (b) ITL 91,774,043 (ITL 75,012.50 per square metre for 1,223.45 sq. m) in compensation for the part of the land that had become unusable and was to be regarded as having been *de facto* expropriated; and (c) compensation for the period during which the land had been occupied prior to its expropriation.

Those amounts were to be index-linked and interest was payable on them until the date of settlement.

On 20 December 1996 the cooperative appealed on points of law, arguing that it could not be considered a party to the proceedings. On 20 and 31 January 1997 respectively the applicants and the District Council likewise appealed.

On 30 June 1997 the cooperative applied for a stay of execution of the Court of Appeal's judgment. That application was rejected on 8 August 1997.

In a judgment of 3 August 1998, deposited with the registry on 7 December 1998, the Court of Cassation allowed the cooperative's appeal, acknowledging that it could not take part in the proceedings as it had not formally been a party to the expropriation, although it had benefited from it. It upheld the remainder of the Reggio di Calabria Court of Appeal's judgment.

The date on which the applicants actually received the compensation is not known.

In accordance with Law no. 413/1991, the compensation was paid after tax had been deducted at the source at a rate of 20%.

3. *The Pinto Act claim*

On 18 April 2001 the applicants applied to the Reggio di Calabria Court of Appeal, claiming compensation under the Pinto Act for the length of the proceedings.

They sought redress for non-pecuniary and pecuniary damage.

In a decision of 1 July 2001 the Reggio di Calabria Court of Appeal awarded the applicants an aggregate sum of 2,450 euros (EUR) for non-pecuniary damage only and ordered the parties to pay their own costs.

In a letter of 4 December 2002 the applicants stated that, having regard to the Court of Cassation's relevant case-law, they did not intend to appeal on points of law. They appended the two judgments of the Court of Cassation summarised below in "Relevant domestic law and practice".

B. RELEVANT DOMESTIC LAW AND PRACTICE

1. *As regards the complaint concerning the length of proceedings*

The relevant parts of Article 111 of the Constitution provide: "1. Jurisdiction shall be exercised through fair proceedings, conducted in accordance with the law. 2. All proceedings shall be conducted in compliance with the principles of adversarial process and equality of arms before a neutral and impartial court. The right to be tried within a reasonable time shall be guaranteed by law."

The relevant provisions of the Pinto Act (Law no. 89/2001) are worded as follows:

Section 2 (*Entitlement to just satisfaction*)

"(1) Anyone sustaining pecuniary or non-pecuniary damage as a result of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law no. 848 of

4 August 1955, on account of a failure to comply with the 'reasonable time' requirement in Article 6 § 1 of the Convention, shall be entitled to just satisfaction.

(2) In determining whether there has been a violation, the court shall have regard to the complexity of the case and, in the light thereof, the conduct of the parties and of the judge deciding procedural issues, and also the conduct of any authority required to participate in or contribute to the resolution of the case.

(3) The court shall assess the quantum of damage in accordance with Article 2056 of the Civil Code and shall apply the following rules: (a) only damage attributable to the period beyond the reasonable time referred to in subsection 1 may be taken into account; (b) in addition to the payment of a sum of money, reparation for non-pecuniary damage shall be made by giving suitable publicity to the finding of a violation."

Section 3 (*Procedure*)

"... (2) The claim shall be made on an application lodged with the registry of the court of appeal by a lawyer holding a special authority containing all the information prescribed by Article 125 of the Code of Civil Procedure.

... (6) The Court shall deliver a decision within four months after the application is lodged. An appeal shall lie to the Court of Cassation. The decision shall be enforceable immediately. ..."

The Italian Court of Cassation has jurisdiction to deal only with points of law. In civil matters, Article 360 of the Code of Civil Procedure lists the circumstances in which appeals on points of law are possible.

In cases relating to the Pinto Act, the Court of Cassation has to date delivered and published approximately one hundred judgments, copies of which have been sent to the Registry of the Court.

In *Adamo and Others* v. *Ministry of Justice* (judgment of 10 June 2002), the appellants had applied to the Rome Court of Appeal claiming compensation under the Pinto Act for the excessive length of proceedings (in a labour dispute). The Rome Court of Appeal had dismissed their claim on the ground that they had not proved that they had sustained damage. In the Court of Cassation the appellants argued that they were entitled to redress for non-pecuniary damage, in the light of the Strasbourg Court's case-law.

The Court of Cassation held that a claimant was not automatically considered to have sustained damage where there had been a finding of a violation of the right to a hearing within a reasonable time; in other words, to use the Court of Cassation's own expression, the damage was not in re ipsa. In that connection, the Court of Cassation stated that the right to a hearing within a "reasonable time" was not a fundamental human right guaranteed by an immediately applicable constitutional provision, but merely a right laid down in an ordinary law (the Pinto Act). That right could not even come under the "right to a fair hearing", which was protected by the Constitution but did not give rise to individual safeguards since it was an outline provision. Consequently, where a court held that the length of proceedings had been excessive it could award compensation only where it had been proved that damage had actually been sustained. The Court of Cassation accordingly dismissed the appeal on the ground that no proof of non-pecuniary damage had been made out.

In *Ministry of Justice* v. *Maccarone* (judgment of 10 June 2002), the claimant had been awarded ITL 8,000,000 (EUR 4,132) by the Perugia Court of Appeal. The ministry had contested that decision, arguing, in particular, that where a court held that the length of proceedings had been excessive, non-pecuniary damage was not in re ipsa and the court then had to assess the evidence of the alleged damage.

The Court of Cassation allowed the appeal, quashed the decision complained of and remitted the case to the Court of Appeal. In so doing, it reiterated that a violation of the right to a hearing within a reasonable time was not in itself a source of damage and that it was necessary to ascertain whether any damage had been sustained by the claimant. The Court of Cassation considered that the right to a hearing within a reasonable time was not a fundamental right since it was laid down solely in an ordinary law. Consequently, the existence of any damage, in particular non-pecuniary damage, had to be proved by the claimant. Such proof could in practice follow from inferences or

presumptions on the basis of what was known about the effects of the length of proceedings on those concerned.

It is clear from a comparative examination of the Court of Cassation's judgments available to date that the principles established in the two cases cited above have been applied consistently.

There are no cases in which the Court of Cassation has entertained a complaint to the effect that the amount awarded by the Court of Appeal was insufficient in relation to the alleged damage or inadequate in the light of the Strasbourg institutions' case-law. The Court of Cassation has treated such complaints either as factual issues outside its jurisdiction or as issues arising on the basis of provisions that are not directly applicable.

2. *As regards the expropriation*

Section 39 of Law no. 2359/1865 provided that where land was expropriated, the compensation to be paid should correspond to its market value at the time of the expropriation.

Article 42 of the Constitution, as interpreted by the Constitutional Court (see, among other authorities, judgment no. 138 of 6 December 1977), guarantees the payment of compensation for expropriation, in an amount lower than the market value of the land.
Law no. 865/1971 laid down new criteria: compensation for any land, whether it was agricultural or building land, should be paid as though it were agricultural land.

In judgment no. 5/1980 the Constitutional Court declared Law no. 865/1971 unconstitutional on the ground that it afforded the same treatment to two very different situations by providing for the same form of compensation for building and agricultural land.

In order to remedy the situation, Parliament enacted Law no. 385 of 29 July 1980, which reaffirmed, but this time on a provisional basis, the criteria that had been declared unconstitutional. The Law provided that compensation should be paid in the form of an advance, to be supplemented by a payment calculated on the basis of a subsequent law that would lay down specific compensation criteria for building land.

In judgment no. 223/1983 the Constitutional Court declared Law no. 385/1980 unconstitutional on the ground that it made the award of compensation subject to the enactment of a future law.

As a result of that judgment, Law no. 2359/1865 came back into force. Consequently, the compensation payable for building land was to correspond to the land's market value (see, for example, Court of Cassation, Section I, judgment no. 13479 of 13 December 1991, and Section I, judgment no. 2180 of 22 February 1992).

Legislative Decree no. 333 of 11 July 1992, which became Law no. 359 of 8 August 1992, introduced (in section 5 bis) a "temporary, exceptional and urgent" measure aimed at stabilising public finances, to remain valid until structural measures were adopted.

Section 5 *bis* provides that the compensation payable for the expropriation of building land is to be calculated using the following formula: market value of the land plus the total of annual ground rent multiplied by the last ten years, divided by two, minus a 40% deduction.

In such cases, the compensation corresponds to 30% of the market value. That amount is subject to tax, deducted at source at a rate of 20% (in accordance with section 11 of Law no. 413/1991).

The 40% deduction can be avoided if the basis for the expropriation is not an expropriation order but a "voluntary agreement" for the transfer of the land or, as in the instant case, if the expropriation took place before section 5 *bis* came into force (see the Constitutional Court's judgment no. 283 of 16 June 1993).

In such cases, the resulting compensation corresponds to 50% of the market value. Again, that amount is subject to tax at a rate of 20% (see above).

The Constitutional Court has held section 5 *bis* of Law no. 359/1992 and its retrospective application to be compatible with the Constitution (judgment no. 283 of 16 June 1993; judgment no. 442 of 16 December 1993) on account of the urgent and temporary nature of the Law.

COMPLAINTS

1. Relying on Article 6 § 1 of the Convention, the applicants complained of the length of the proceedings.

2. The applicants also complained of an infringement of their right to the peaceful enjoyment of their possessions in that compensation had been paid to them a long time after the confiscation of their land and had not been sufficient, having been calculated on the basis of section 5 *bis* of Law no. 359/1992. They alleged a violation of Article 1 of Protocol No. 1.

3. The applicants complained under Article 6 § 1 of the Convention that the enactment of section 5 *bis* of Law no. 359/1992 and its application in their case had amounted to interference by the legislature in breach of their right to a fair hearing.

THE LAW

1. The applicants complained of the length of the proceedings. They relied on Article 6 § 1 of the Convention, the relevant parts of which provide: "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

1. *The Government's objections*

The Government raised two objections.

Firstly, they submitted that the applicants had not exhausted domestic remedies as they had not appealed to the Court of Cassation against the Reggio di Calabria Court of Appeal's decision.

The Government put forward several arguments to show that an appeal to the Court of Cassation was an effective remedy. Firstly, they observed that the Court of Cassation's jurisdiction to consider appeals lodged under the Pinto Act was the same as in all other cases in which appeals were lodged with it in the ordinary manner under Article 360 of the Code of Civil Procedure. Although it was accordingly true that the amount of compensation as such could not form the subject of an appeal on points of law, the applicants could nonetheless have argued in the Court of Cassation that the Court of Appeal's decision had not been logical or had been based on inconsistent reasoning, or they could have contested the amount awarded at first instance by arguing that the criteria used had not complied with the law. The Government further pointed out that the Court of Cassation was empowered to quash a decision and to refer the case to a new trial court.

The Government submitted that the applicants had contested the effectiveness of the remedy without adducing any evidence and that their allegations were based solely on two Court of Cassation judgments.

In that connection, they observed that the Court of Cassation's case-law in such matters was fairly extensive but had not yet become settled, in the absence of a judgment by the full court.

As to the Court of Cassation's application of the criteria established in the Strasbourg institutions' case-law, the Government considered that that was a non-issue as it concerned "alleged criteria". In that connection, the Government noted that the Court's case-law did not lay down "criteria" for calculating just satisfaction, because the word "criteria" could be used only if the basis for the calculation was explicitly defined and clearly identifiable and could be expressed as a mathematical formula. In addition, the Government observed that the Court awarded just satisfaction on an optional basis as it could decide not to make an award where the finding of a violation was considered sufficient, and that it ruled on such awards "on an equitable basis", without giving detailed reasons.

In conclusion, the Government submitted that there were no grounds for complaining of a failure to observe "criteria" which, firstly, did not exist and, secondly, could not exist because the very nature of the assessment for which they were to serve as a basis was not suited to their use.

The Government also argued that the question of the status of the Convention in the Italian legal system was irrelevant. In that connection, they observed that a domestic remedy was effective if the violations alleged by an applicant could be made good in substance. There was no need for the

standards laid down in the Convention and in the Strasbourg institutions' case-law to be applied strictly.

As to the issue of quantum, the Government submitted that the Court of Cassation could have determined whether the amount of compensation obtained by the applicants had been adequate. On that point, they observed that the two Court of Cassation judgments cited by the applicants were consistent with the now settled line of case-law that the existence of non-pecuniary damage did not follow automatically from a finding that the length of proceedings had been unreasonable. The Government accepted that the possibility of obtaining compensation was conditional on the applicant's adducing proof of the damage, or at least sufficient evidence to give rise to a presumption on the part of the court. In that connection, the Government pointed out that in certain judgments the Court of Cassation had dismissed complaints concerning, for example, the inadequacy of an award of compensation, on the ground that they were too vague and based on mere allegations.

In conclusion, the Government considered that the applicants should have appealed to the Court of Cassation, and asked the Court to dismiss their complaint for failure to exhaust domestic remedies.

The Government raised a second objection, arguing that the applicants did not have standing as victims.

They observed in that connection that in making an award to the applicants, the Reggio di Calabria Court of Appeal had not only acknowledged that there had been a violation of their right to a hearing within a reasonable time but had also made good the damage sustained. In the Government's submission, the amount of compensation awarded was not open to question by the Court, since the national court had made its assessment on an equitable basis, acting within its margin of appreciation in ruling on the award of just satisfaction.

The Government observed that Article 41 of the Convention did not oblige the Court to award just satisfaction. In their submission, the Court was therefore at liberty not to make an award, without having to give any reasons for its decision, since its assessment was made on an equitable basis; moreover, an applicant who was not satisfied with the amount awarded did not have the possibility of applying to the Grand Chamber.

2. *The applicants' arguments*

The applicants maintained that an appeal to the Court of Cassation was not a remedy that had to be used, having regard to that court's relevant case-law, of which they cited two examples (see "Relevant domestic law and practice" above).

They argued that it had not been open to them to submit complaints as to the amount of compensation and the extent of the alleged damage.

The applicants maintained that they were still "victims" within the meaning of Article 34 of the Convention, in spite of the Reggio di Calabria Court of Appeal's decision, since the decision had not afforded redress for the violation of the Convention found by that court. The Court of Appeal had awarded the applicants an insufficient amount of compensation, owing to the fact that the national courts did not consider the right to a hearing within a reasonable time to be a fundamental right and that the Convention was not regarded as applicable.

3. *The Court's assessment*

The Court must first determine whether the applicants have exhausted the remedies available to them in Italian law, as required by Article 35 § 1 of the Convention. The question in their case is whether they were required to appeal to the Court of Cassation against the Court of Appeal's decision on a matter coming under the Pinto Act.

The Court points out that in recent cases concerning claims lodged with courts of appeal (see *Brusco* v. *Italy* (dec.), no. 69789/01, ECHR 2001-IX, and *Di Cola and Others* v. *Italy* (dec.), no. 44897/98, 11 October 2001) it held that the remedy introduced by the Pinto Act was accessible and that there was no reason to question its effectiveness. Furthermore, the Court took the view that, having regard to the nature of the Pinto Act and the context in which it was passed, there were

grounds for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated into national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others* v. *Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1210, § 65).

Although there is no formal obligation on Contracting States to incorporate the Convention in their domestic legal system (see *James and Others* v. *the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 48, § 86, and *Christine Goodwin* v. *the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI), it follows from the principle of subsidiarity outlined above that the national courts must, where possible, interpret and apply domestic law in accordance with the Convention. While it is primarily for the national authorities to interpret and apply domestic law, the Court is in any event required to verify whether the way in which domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention (see *Carbonara and Ventura* v. *Italy*, no. 24638/94, § 68, ECHR 2000-VI, and *Streletz, Kessler and Krenz* v. *Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II), of which the Court's case-law is an integral part.

In this connection, the Court notes, lastly, that by substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (Document H (61) 4, pp. 664-703, 733 and 927). That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law (see *De Wilde, Ooms and Versyp* v. *Belgium*, judgment of 18 June 1971, Series A no. 12, p. 43, § 82; *Swedish Engine Drivers' Union* v. *Sweden*, judgment of 6 February 1976, Series A no. 20, p. 18, § 50; and *Ireland* v. *the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, § 239). Nevertheless, the Convention, which lives through the Court's case-law, is now directly applicable in practically all the States Parties.

Under Article 35 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. However, there is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see *Akdivar and Others*, cited above, p. 1210, §§ 66-67).

The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant (ibid., p. 1211, § 69).

The Court has carried out a comparative analysis of the one hundred Court of Cassation judgments available to date. It has noted that the principles set forth in the two cases cited by the applicants (see "Relevant domestic law and practice" above) have been consistently applied: in other words, the right to a hearing within a reasonable time has not been regarded as a fundamental right and the Convention and the Strasbourg case-law are not directly applicable in relation to just satisfaction.

The Court has not found any instances in which the Court of Cassation has entertained a complaint to the effect that the amount awarded by the Court of Appeal was insufficient in relation to the alleged damage or inadequate in the light of the Strasbourg institutions' case-law. Such complaints have been dismissed by the Court of Cassation, being treated either as factual issues outside its jurisdiction or as issues arising on the basis of provisions that are not directly applicable.

The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (see *Golder* v. *the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and *Waite and Kennedy* v. *Germany* [GC], no. 26083/94, § 50, ECHR 1999-I). It accordingly safeguards everyone's right to a "hearing within a reasonable time".

The right to a hearing within a "reasonable time", as protected by Article 6 § 1 of the Convention, is a fundamental right and an imperative for all proceedings to which Article 6 applies; in so providing, the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility (see *Pélissier and Sassi* v. *France* [GC], no. 25444/94, § 74, ECHR 1999-II).

Having regard to the foregoing, the Court concludes that there would have been no point in the applicants' appealing to the Court of Cassation as their complaint concerned the amount of compensation and thus fell within the categories referred to above. Furthermore, the applicants risked being ordered to pay costs.

In conclusion, the Court considers that in the instant case the applicants were not required to appeal to the Court of Cassation for the purpose of exhausting domestic remedies. Accordingly, the Government's first objection must be dismissed.

That conclusion does not, however, call into question the obligation to lodge a claim for compensation under the Pinto Act with the Court of Appeal and the Court of Cassation, provided that it is clear from the case-law of the national courts that they apply the Act in keeping with the spirit of the Convention and, consequently, that the remedy is effective.

The Court must next examine the Government's second objection, based on Article 34 of the Convention. The issue of whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an ex post facto examination of his or her situation. In this connection, the question whether he or she has received reparation for damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue. It is the Court's settled case-law that where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention.

The Court accordingly considers that an applicant's status as a victim may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court (see *Andersen* v. *Denmark*, no. 12860/87, and *Frederiksen and Others* v. *Denmark*, no. 12719/87, Commission decisions of 3 May 1988; *Normann* v. *Denmark* (dec.), no. 44704/98, 14 June 2001; and *Jensen and Rasmussen* v. *Denmark* (dec.), no. 52620/99, 20 March 2003) and on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Eckle* v. *Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 et seq., and *Jensen* v. *Denmark* (dec.), no. 48470/99, ECHR 2001-X).

The Court further reiterates that Article 34 of the Convention requires applicants to be personally affected by the measure of which they complain, and that the provision cannot be used to bring an *actio popularis* before the Court. Moreover, the conditions for lodging an application are not neces-

sarily the same as national criteria relating to *locus standi* (see *Scozzari* and *Giunta* v. *Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII).

In the instant case the Reggio di Calabria Court of Appeal acknowledged in its decision of 1 July 2001 that the length of the proceedings instituted by the applicants had been excessive and awarded them an overall sum of EUR 2,450 – that is, approximately EUR 600 each.

The Court considers that the Court of Appeal's acknowledgment of the excessive length of the proceedings satisfies in substance the first condition laid down in the Court's case-law: acceptance by the authorities that there has been an infringement of a right protected by the Convention.

As regards the second condition, namely whether the authorities have provided appropriate redress for the wrong suffered by the applicants, the Court notes that the applicants argued before it that the amount awarded by the Court of Appeal could not be regarded as sufficient to make good the alleged damage and breach.

The Court notes that it has held in numerous Italian length-of-proceedings cases that appropriate relief for the damage sustained should always take the form of financial compensation. In that context, in cases similar to the present one – for example, *De Pilla* v. *Italy* (no. 49372/99, 25 October 2001) and *Tartaglia* v. *Italy* (no. 48402/99, 23 October 2001) – the amounts awarded by the Court have been significantly higher. In those two cases it awarded ITL 10,000,000 (approximately EUR 5,000) and ITL 14,000,000 (approximately EUR 7,000) respectively.

It cannot be disputed that the assessment of the length of proceedings and the effects thereof, particularly as regards non-pecuniary damage, does not lend itself to precise quantification and must by its very nature be carried out on an equitable basis. The Court consequently accepts that judicial or other authorities may calculate compensation in a length-of-proceedings case in a manner not entailing strict and formalistic application of the criteria adopted by the Court. However, in the present case the amount awarded to the applicants by the Reggio di Calabria Court of Appeal does not bear a reasonable relationship to the amounts awarded by the Court in the similar cases cited above, those amounts being more than ten times higher than the amount awarded to the applicants by the Court of Appeal.

Although the margin of appreciation enjoyed by the national courts should be observed, those courts must also comply with the Court's case-law by awarding corresponding amounts.

Having regard to the evidence before it, the Court considers that there is no justification for such a discrepancy between the Strasbourg case-law and the application of the Pinto Act in the instant case. Consequently, the sum awarded to the applicants cannot be regarded as adequate and hence capable of making good the alleged violation.

It follows that the applicants can claim to be victims within the meaning of Article 34 of the Convention and that the Government's second objection should be dismissed.

4. *The merits*

The Government observed that the length of the proceedings could not be considered excessive, in view of the objective difficulties that had arisen during their conduct, such as the new law on expropriation, the death of Mr A. Scordino and the lack of judges. The Government observed in that connection that the case had been dealt with by three successive investigating judges.

The applicants disputed the Government's submissions.

The Court considers, in the light of the parties' submissions, that this complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application, but require examination on the merits. It follows that this part of the application cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicants complained of an infringement of their right to the peaceful enjoyment of their possessions in that compensation had been paid to them a long time after the confiscation of their land and had not been sufficient, having been calculated on the basis of section 5 *bis* of Law no. 359/1992, applied retrospectively. They alleged a violation of Article 1 of Protocol No. 1, which provides: "Every natural or legal person is entitled to the peaceful enjoyment of his posses-

sions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The applicants also complained that the enactment of Law no. 359/1992 and its application in their case had amounted to interference by the legislature in breach of Article 6 of the Convention, the relevant parts of which provide: "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Government argued that the application of section 5 *bis* of Law no. 359/1992 in the instant case did not raise any issues under Article 1 of Protocol No. 1 and Article 6 of the Convention.

They observed in that connection that in the calculation of compensation for expropriation, a balance had to be struck between private interests and the general interest. Accordingly, the amount of compensation deemed adequate could be lower than the market value of the land in question, as, indeed, the Constitutional Court had acknowledged (judgments nos. 283 of 16 June 1993, 80 of 7 March 1996, and 148 of 30 April 1999).

Relying on the Court's judgments in The *Holy Monasteries* v. *Greece* (judgment of 9 December 1994, Series A no. 301-A), *Lithgow and Others* v. *the United Kingdom* (judgment of 8 July 1986, Series A no. 102), and *James and Others* v. *the United Kingdom* (judgment of 21 February 1986, Series A no. 98), the Government submitted that the present case should be examined in the light of the principle that public-interest grounds (such as economic reform or policies designed to promote social justice) could militate in favour of awarding compensation below the full market value.

In the Government's submission, that reflected a political desire to establish a system going beyond traditional nineteenth-century liberalism. The fundamental issue was whether the gap between the market value and the compensation paid was reasonable and justified.

The Government acknowledged that the provision in issue, section 5 *bis*, had been guided by budgetary considerations. They nonetheless remarked that, in view of its temporary nature, the provision had been declared constitutional by the Constitutional Court.

The Government observed that the land's market value had not been excluded from the calculation used to determine the compensation payable, but had been adjusted by another criterion, the ground rent calculated on the value entered in the land register.

They submitted in conclusion that the system applied in the instant case for calculating the compensation payable for the expropriation was not unreasonable and had not upset the necessary fair balance.

As to the time that had elapsed between the expropriation and the payment of compensation, the Government noted that the proceedings in the Reggio di Calabria Court of Appeal had not been instituted until 1990 and contended that the applicants could have brought a civil action from 1983 onwards. That effectively meant that they themselves had contributed to the delay in payment of the compensation.

In addition, the Government observed that the damage caused by the passing of time had been made good by the payment of interest.

The Government further maintained that the retrospective application of section 5 *bis* of Law no. 359/1992 was compatible with the Convention. They pointed out in that connection that, in accordance with the Convention institutions' case-law and Italian law, the principle that laws should not have retrospective effect was not absolute. In the instant case, the law in issue had been enacted against a background in which the criterion of market value for the calculation of compensation for expropriation had already been revised twice by the Italian parliament. After the Constitutional Court had abrogated those laws and the criterion of market value as laid down in Law no. 2359/1865 had been deemed applicable again in accordance with the Court of Cassation's case-law, the law in issue had filled the legal vacuum created by the Constitutional Court's judgments. The enactment of Law no. 359/1992 had therefore responded to that need.

The Government submitted, lastly, that from 1993 onwards the compensation received by the applicants could have been 40% higher if they had accepted the offer made to them by the authorities. In conclusion, the Government submitted that the applicants' complaint was ill-founded.

The applicants observed that the compensation they had been paid for the expropriation corresponded to half the market value of the land and that that amount had subsequently been decreased by a further 20% once tax had been deducted at source pursuant to Law no. 413/1991. As a result, the amount they had actually received represented 40% of the value of their property.

In the applicants' submission, the compensation thus received could not be regarded as bearing a reasonable relationship to the value of the property. They therefore considered that they had borne a disproportionate burden.

The applicants pointed out that Reggio di Calabria District Council had not made them an offer of compensation until 1989, six years after the expropriation order, and that the possibility of lodging an objection with the Court of Appeal had been open to them from that date only.

The applicants also asserted that their land had been expropriated in order to allow a cooperative society to build accommodation there for private individuals, who, in accordance with domestic law (section 20 of Law no. 179/1992), would be free to sell their homes at market value five years later. The expropriation of the applicants' land had therefore benefited private individuals.

Next, the applicants observed that section 5 *bis* had been declared constitutional by the Constitutional Court because it was a temporary measure designed to deal with a specific situation. The provision had, however, been in force for more than ten years.
In addition, the applicants pointed out that the subsequent 40% deduction prescribed in section 5 *bis* for persons who did not accept an offer of compensation had not been applied in their case.

The applicants further observed that the amount they had been awarded had resulted from the retrospective application of two laws enacted long after their land had been expropriated. They accordingly considered that to be a further reason for finding a violation of Article 1 of Protocol No. 1.

Lastly, the applicants argued that the enactment and application of section 5 *bis* of Law no. 359/1992 had been incompatible with Article 6 of the Convention because there had been interference by the legislature in breach of the requirement of lawfulness. They submitted in that connection that the law in issue had not served a vital public interest and had been designed purely to settle pending proceedings in a manner advantageous to the respondent authorities.

The Court considers, in the light of the parties' submissions, that this complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application, but require examination on the merits. It follows that this part of the application cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Declares the application admissible, without prejudging the merits of the case.

[omissis]

Corte europea dei diritti dell'uomo, dec. 24 giugno 2004, *Di Sante* c. *Italia* (ric. n. 56079/00) ([1])

[omissis]

EN FAIT

Le requérant, M. Paolo di Sante, est un ressortissant italien, né en 1958 et résidant à Bisenti (Terame). Le gouvernement défendeur a été représenté successivement par ses agents, MM. U. Leanza et I. M. Braguglia et leurs coagents successifs, MM. V. Esposito et F. Crisafulli.

A. LES CIRCONSTANCES DE L'ESPECE

Les faits de la cause, tels qu'ils ont été exposés par les parties, peuvent se résumer comme suit.

1. *La procédure principale*

Le 29 juillet 1991, le requérant déposa un recours devant le juge d'instance de Rome, à l'encontre de M. R., afin d'obtenir la réparation des dommages résultant d'une agression.

La mise en état de l'affaire commença, après un renvoi d'office, le 16 décembre 1992. A cette audience, le juge ordonna aux gendarmes d'envoyer le procès verbal qui avait été rédigé lors de l'agression. Le 8 juin 1992, les parties demandèrent un renvoi pour étudier le document envoyé par les gendarmes. Des dix audiences fixées entre le 20 mars 1993 et le 7 avril 1997, quatre concernaient l'audition des parties, deux l'audition de témoins, deux furent renvoyées d'office, une le fut à la demande des parties et une parce que l'avocat de l'autre partie était absent.

Le 2 juin 1997, le greffe communiqua la suspension de l'affaire. Le 14 septembre 1998, l'affaire fut attribuée au collège de magistrats chargé de traiter les affaires les plus anciennes (*sezione stralcio*) et une audience fut fixée au 27 avril 1999. Le jour venu l'audience fut renvoyée d'office au 9 novembre 1999, date à laquelle le juge fixa l'audience de présentation des conclusions au 15 février 2000. Par une ordonnance hors audience du 18 janvier 2000, le juge se dessaisit de l'affaire en faveur du juge de paix. Une audience fut fixée au 29 mars 2000. Au moins cinq audiences eurent lieu par la suite. Selon les informations fournies par le requérant, une audience devait avoir lieu le 13 mai 2004.

2. *La procédure « Pinto »*

Le 15 avril 2002, le requérant saisit la cour d'appel de Pérouse au sens de la loi no 89 du 24 mars 2001, dite « loi Pinto » afin de se plaindre de la durée excessive de la procédure décrite ci-dessus. Le requérant demanda à la cour de dire qu'il y avait eu une violation de l'article 6 § 1 de la Convention et de condamner le gouvernement italien au dédommagement des préjudices matériels et moraux subis. Le requérant demanda globalement 40 000 000 lires [20 658,28 euros (EUR)] à titre de dommage matériel et moral.

Par une décision du 13 octobre 2003, dont le texte fut déposé au greffe le 30 octobre 2003, la cour d'appel constata le dépassement de la durée raisonnable pour la période allant jusqu'au 15 avril 2002. Elle rejeta la demande relative au dommage matériel au motif qu'il n'était pas démontré, accorda 4 500 EUR en équité comme réparation du dommage moral et 500 EUR pour frais et dépens.

Par une lettre du 18 mars 2004, le requérant informa la Cour du résultat de la procédure nationale et demanda que la Cour reprenne l'examen de sa requête.

([1]) Testo, disponibile esclusivamente in francese, tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

Si la décision n'avait pas notifiée, le délai pour se pourvoir en cassation expirait le 14 décembre 2004. Par une lettre du 2 avril 2004, le greffe attira l'attention du requérant sur l'évolution de la jurisprudence de la Cour de cassation.

Par une lettre du 1er mai 2004, le requérant répondit qu'il avait notifié la décision au ministère le 6 février 2004, le délai pour se pourvoir en cassation était donc échu le 7 avril 2004 et qu'il avait reçu notre lettre le 8 avril 2004.

Malgré la notification, au 1er mai 2004 il n'avait toujours pas été payé par le ministère. Lorsqu'il avait demandé l'aide judiciaire, on lui avait désigné une avocate qui n'avait pas le droit de plaider devant la Cour de cassation. Il fournit un certificat daté du 28 mars 2004 attestant ce fait.

B. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

Le droit et la pratique internes pertinents sont décrits dans la décision *Scordino* c. *Italie* (no 36813/97, CEDH 2003-IV).

Par la suite, la Cour de cassation en assemblée plénière saisie de recours contre des décisions rendue par des cours d'appel dans le cadre de procédures « Pinto », a rendu quatre arrêts (nos 1338, 1339, 1340 et 1341) de cassation avec renvoi dans lesquels elle dit que « la jurisprudence de la Cour de Strasbourg s'impose aux juges italiens en ce qui concerne l'application de la loi no 89/2001 [dite loi Pinto].

Elle a notamment affirmé dans son arrêt no 1340 le principe selon lequel « la détermination du dommage non patrimonial effectuée par la cour d'appel selon l'article 2 de la loi nº 89/2001, bien que par nature fondée sur l'équité, doit se mouvoir dans un environnement qui est défini par le droit puisqu'il doit se référer aux montants alloués, dans des affaires similaires, par la Cour de Strasbourg. »

Ces arrêts du 27 novembre 2003, dont le texte fut déposé au greffe le 26 janvier 2004, furent le jour même mis à disposition sur la base de données de la Cour de cassation et sur différents autres sites internet dès début février et commentés par des avocats suivant de près ce genre de question. Certains journaux non spécialisés publièrent des articles dès le lendemain du dépôt au greffe du texte des arrêts et les revues juridiques firent de même dans leurs numéros de février ou mars, selon les cas.

GRIEF

Invoquant l'article 6 de la Convention, le requérant se plaignait de la durée de la procédure civile. Après avoir tenté la procédure « Pinto » le requérant considère que le montant accordé par la cour d'appel à titre de dommage moral n'est pas suffisant pour réparer le dommage subi pour la violation de l'article 6.

EN DROIT

Le grief du requérant porte sur la durée de la procédure qui a débuté le 29 juillet 1991 et était encore pendante au 13 mai 2004. Elle avait donc déjà duré douze ans et neuf mois pour une instance.

Selon le requérant, la durée de la procédure ne répond pas à l'exigence du « délai raisonnable » tel que prévu par l'article 6 § 1 de la Convention. Le Gouvernement s'oppose à cette thèse.

Après l'entrée en vigueur de la loi Pinto, le Gouvernement excipa du non-épuisement des voies de recours internes.

Le requérant saisit donc la cour d'appel compétente mais ne se pourvut pas en cassation et invoqua en substance la jurisprudence *Scordino* c. *Italie* (précitée). Il soutient en outre que la lettre de la Cour attirant son attention sur le changement de jurisprudence de la Cour de cassation lui est parvenue après l'expiration du délai pour se pourvoir en cassation.

La Cour rappelle qu'aux termes de l'article 35 § 1 de la Convention, elle ne peut être saisie qu'après l'épuisement des voies de recours internes. A cet égard, elle souligne que tout requérant

doit avoir donné aux juridictions internes l'occasion que l'article 35 § 1 a pour finalité de ménager en principe aux Etats contractants : éviter ou redresser les violations alléguées contre lui (arrêt *Cardot* c. *France* du 19 mars 1991, série A no 200, p. 19, § 36). Néanmoins, les dispositions de l'article 35 de la Convention ne prescrivent l'épuisement que des recours à la fois relatifs aux violations incriminées, disponibles et adéquats. Ils doivent exister à un degré suffisant de certitude non seulement en théorie mais aussi en pratique, sans quoi leur manquent l'effectivité et l'accessibilité voulues. (voir notamment les arrêts *Vernillo* c. *France* du 20 février 1991, série A no 198, pp. 11–12, § 27 ; *Dalia* c. *France* du 19 février 1998, Recueil 1998-I, pp. 87-88, § 38).

La Cour rappelle que, s'agissant du recours devant les cours d'appel, (*Brusco* c. *Italie* (déc.), no 69789/01, 6.9.2001, à paraître dans CEDH 2001; *Di Cola* c. *Italie* (déc.), no 44897/98, 11.10.2001), elle a estimé que le remède introduit par la loi Pinto est accessible et que rien ne permettait de douter de son efficacité. De plus, la Cour a considéré qu'au vu de la nature de la loi Pinto et du contexte dans lequel elle est intervenue, il était justifié de faire une exception au principe général selon lequel la condition de l'épuisement doit être appréciée au moment de l'introduction de la requête.

Dans l'affaire *Scordino* (précitée) la Cour avait estimé d'une part que lorsqu'un requérant se plaint uniquement du montant de l'indemnisation il n'est pas tenu aux fins de l'épuisement des voies de recours interne de se pourvoir en cassation contre la décision de la cour d'appel et d'autre part que le requérant peut continuer à se prétendre « victime » au sens de l'article 34 de la Convention dans la mesure où même si la cour d'appel a reconnu l'existence de la durée excessive de la procédure, la somme accordée ne saurait être considérée comme adéquate pour réparer le préjudice et la violation allégués.

Pour arriver à cette conclusion, la Cour s'était basée sur l'examen d'une centaine d'arrêts de la Cour de cassation et n'avait trouvé aucun cas où la Cour de cassation avait pris en considération un grief tiré de ce que le montant accordé par la cour d'appel était insuffisant par rapport au préjudice allégué ou inadéquat par rapport à la jurisprudence de Strasbourg.

Or, la Cour relève que la Cour de cassation en assemblée plénière a cassé avec renvoi quatre décisions dont le montant du dommage moral était contesté et a posé le principe selon lequel « la détermination du dommage non patrimonial effectuée par la cour d'appel selon l'article 2 de la loi nº 89/2001, bien que par nature fondée sur l'équité, doit se mouvoir dans un environnement qui est défini par le droit puisqu'il doit se référer aux montants alloués, dans des affaires similaires, par la Cour de Strasbourg. »

La Cour prend bonne note de ce revirement de jurisprudence et du fait que la nouvelle s'est diffusée très rapidement dans le milieu juridique concerné et même dans le public. Elle estime qu'à compter de l'arrêt déposé le 26 janvier 2004, la voie de recours interne devant la Cour de cassation avait à nouveau acquis un degré de certitude juridique suffisant non seulement en théorie mais aussi en pratique pour pouvoir et devoir être à nouveau utilisé aux fins du même article 35 §1 de la Convention, ceci, à première vue, dès le jour du dépôt au greffe de l'arrêt (voir *Broca* et *Texier-Micault* c. *France*, nos 27928/02 et 31694/02, § 19, 21 octobre 2003).

Toutefois, il est clair que pour certains requérants le délai pour se pourvoir en cassation pouvait se terminer dans les jours suivants le dépôt au greffe de l'arrêt de la Cour de cassation. Il convient donc de fixer une date postérieure à celle du dépôt de l'arrêt prenant en considération le temps d'avoir connaissance du revirement, de trouver un avocat ayant le droit de plaider devant la Cour de cassation et de préparer le pourvoi.

La Cour juge raisonnable de retenir que ces arrêts, et notamment l'arrêt no 1340 de la Cour de cassation, ne peuvent plus être ignorés du public à partir du 26 juillet 2004. Elle en conclut que c'est à partir de cette date qu'il doit être exigé des requérants qu'ils usent de ce recours aux fins de l'article 35 § 1 de la Convention.

En l'espèce, la Cour relève que le requérant a notifié la décision Pinto le 6 février 2004 et que ce faisant le délai pour se pourvoir en cassation a été raccourci au 7 avril 2004 ; que cette démarche tendait également à inciter la partie défenderesse à payer la somme due suite à la décision Pinto et que l'avocate attribuée par l'aide judiciaire n'était pas autorisée à plaider en cassation.

Le délai pour se pourvoir en cassation ayant expiré avant le 26 juillet 2004, la Cour estime que dans ces circonstances le requérant est dispensé de l'obligation d'épuiser les voies de recours interne et que l'objection du Gouvernement ne saurait être retenue.

La Cour estime, à la lumière de l'ensemble des arguments des parties, que ce grief pose de sérieuses questions de fait et de droit qui ne peuvent être résolues à ce stade de l'examen de la requête, mais nécessitent un examen au fond ; il s'ensuit que ce grief ne saurait être déclaré manifestement mal fondé, au sens de l'article 35 § 3 de la Convention. Aucun autre motif d'irrecevabilité n'a été relevé.

De plus, la Cour considère que l'affaire n'est pas en état pour un examen au fond et partant elle décide de mettre fin à l'application de l'article 29 § 3 de la Convention.

PAR CES MOTIFS, LA COUR, A L'UNANIMITÉ,

Déclare la requête recevable, tous moyens de fond réservés.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 30 giugno 2005, *Bosphorus* c. *Irlanda* (ric. n. 45036/98) ([1])

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. THE LEASE BETWEEN JAT AND THE APPLICANT

11. The applicant is an airline charter company incorporated in Turkey in March 1992.

12. By agreement dated 17 April 1992, the applicant leased two Boeing 737-300 aircraft from Yugoslav Airlines ("JAT"), the national airline of the former Yugoslavia. These were, at all material times, the only two aircraft operated by the applicant. The lease agreement was a "dry lease without crew" for a period of 48 months from the dates of delivery of the two aircraft (22 April and 6 May 1992). According to the terms of the lease, the crew were to be the applicant's employees and the applicant was to control the destination of the aircraft. While ownership of the aircraft stayed with JAT, the applicant could enter the aircraft on the Turkish Civil Aviation Register once it noted JAT's ownership.

13. The applicant paid a lump sum of US$1,000,000 per aircraft on delivery and the monthly rental was US$150,000 per aircraft. On 11 and 29 May 1992 the two aircraft were registered in Turkey as foreseen by the lease. On 14 May 1992 the applicant obtained its airline licence.

B. PRIOR TO THE AIRCRAFT'S ARRIVAL IN IRELAND

14. From 1991 onwards the United Nations ("UN") adopted, and the European Community ("EC") implemented, a series of sanctions against the former Federal Republic of Yugoslavia (Serbia and Montenegro) - "the FRY" - designed to address the armed conflict and human rights violations taking place in the former Yugoslavia.

15. In January 1993 the applicant began discussions with TEAM Aer Lingus ("TEAM") with a view to having maintenance work ("C-Check") done on one of its leased aircraft. TEAM was a limited liability company the principal business of which was aircraft maintenance. It was a subsidiary of two Irish airline companies in turn wholly owned by the Irish State. Memoranda of TEAM dated 8 and 18 January 1993 showed that TEAM considered, on the basis of information obtained, that the applicant was not in breach of the sanctions regime, TEAM noting that the applicant was doing business with many companies including Boeing, SABENA and SNECMA (a French aero-engine company). By letter of 2 March 1993 TEAM requested the opinion of the Department of Transport, Energy and Communications ("the Department of Transport") and included copies of its memoranda of January 1993. On 3 March 1993 the Department of Transport forwarded the request to the Department of Foreign Affairs.

16. On 17 April 1993 the Security Council of the UN adopted a Resolution - UNSC Resolution 820 (1993). It provided that States should impound, *inter alia*, all aircraft in their territories "in which a majority or controlling interest is held by a person or undertaking in or operating" from the FRY. That Resolution was implemented by EC Regulation 990/93 which entered into force on 28 April 1993 (paragraph 65 below).

17. On 5 May 1993 the Department of Foreign Affairs decided to refer the matter to the UN Sanctions Committee.

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

18. By letter of 6 May 1993 the Turkish Foreign Ministry indicated to the Turkish Ministry of Transport that it considered that the leased aircraft were not in breach of the sanctions regime and requested flight clearance pending the Sanctions Committee's decision. On 12 May 1993 Turkey sought the opinion of the Sanctions Committee.

C. THE IMPOUNDING OF THE AIRCRAFT

19. On 17 May 1993, one of the applicant's leased aircraft arrived in Dublin. A contract with TEAM was signed for the completion of C-Check.

20. On 18 May 1993 the Irish Permanent Mission to the UN indicated by facsimile to the Department of Transport that informal advice from the Secretary to the Sanctions Committee was to the effect that there was no problem with TEAM carrying out the work but an "informal opinion" from the "legal people in the secretariat" had been requested. On 19 May 1993 the Department of Transport explained this to TEAM by telephone.

21. On 21 May 1993 the Irish Permanent Mission confirmed to the Department of Foreign Affairs that the "informal legal advice" obtained from the "UN legal office" was to the effect that TEAM should seek the "guidance and approval" of the Sanctions Committee before signing any contract with the applicant. It was recommended that TEAM submit an application to the Committee with relevant transaction details: if the applicant was to pay for the maintenance, it was unlikely that the Committee would have a problem with the transaction. On 24 May 1993 the Department of Transport received a copy of that facsimile, sent a copy to TEAM and TEAM was also informed by telephone. By letter dated 26 May 1993 the Irish Permanent Mission provided the Sanctions Committee with the required details and requested the latter's "guidance and approval".

22. On 21 May 1993 the Sanctions Committee disagreed with the Turkish Government's view that the aircraft could continue to operate, recalling UNSC Resolution 820 (1993). The Turkish Permanent Mission to the UN was informed of that opinion by letter dated 28 May 1993.

23. At noon on 28 May 1993 the applicant was informed by TEAM that C-Check was completed and that, on payment of US$250,000, the aircraft would be released. Later that day payment was received and the aircraft was released. While awaiting air traffic control clearance to take off, the aircraft was stopped. The report of the duty manager of Dublin airport noted that TEAM informed him that it had been advised by the Department of Transport that it would be "in breach of sanctions" for the aircraft to leave. It was also recorded that the aircraft had been scheduled to depart during that shift and that the airport police had been advised. TEAM informed the applicant accordingly. The Department of Transport later confirmed by letter (of 16 June 1993) its instructions of 28 May 1993: "... [TEAM] were advised by this Department that, in the circumstances, TEAM should not release the [aircraft] ... . Furthermore it was pointed out that if TEAM were to release the aircraft TEAM itself might be in serious breach of the UN Resolutions (as implemented by Council regulation (EEC) No. 990/93) ... and the matter was under investigation. At the same time directions were given to Air Traffic Control, whose clearance is necessary for departure of aircraft, not to clear this aircraft for take-off".

24. By letters dated 29 May 1993 to the applicant, TEAM noted that the opinion of the Sanctions Committee was awaited and that TEAM had been advised by the authorities that release of the aircraft before receipt of that opinion would be a violation of the UN sanctions regime.

D. PRIOR TO JUDICIAL REVIEW PROCEEDINGS

25. By memorandum dated 29 May 1993 the Turkish Embassy in Dublin requested, given its State's commitment to the sanctions regime, the release of the detained aircraft to Turkey.

26. By letter dated 2 June 1993 the Irish Permanent Mission informed the Sanctions Committee that the maintenance work had, in fact, already been carried out, that the Government regretted their failure to abide by the procedure they had initiated and that the matter had been taken up with TEAM. The aircraft was being detained pending the Committee's decision.

27. On 3 June 1993 the Irish Government learned of the response of the Sanctions Committee to the Turkish Government and that the Chairman of the Committee had indicated that the Committee would likely favour impounding. The Committee would not meet until 8 June 1993.

28. On 4 June 1993 the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro) Regulations 1993 (S.I. 144 of 1993) was adopted. By letter dated 8 June 1993 the Minister for Transport (Energy and Communications) informed Dublin airport managers that he had authorised the impounding, until further notice, of the aircraft pursuant to that statutory instrument.

29. Shortly thereafter the applicant's second aircraft was grounded in Istanbul although the parties disagreed as to precisely why.

30. The letter of 14 June 1993 of the Sanctions Committee informed the Irish Permanent mission of its findings at its meeting of 8 June 1993: "... the provision of any services to an aircraft owned by an undertaking in the [FRY], except those specifically authorised in advance by the Committee ..., would not be in conformity with the requirements of the relevant Security Council resolutions. The members of the Committee also recalled the provisions of paragraph 24 of [UNSC Resolution 820 (1993)] regarding such aircraft, under which the aircraft in question should have already been impounded by the Irish authorities. The Committee, therefore, would be extremely grateful for being apprised of any action on behalf of Your Excellency's Government to that effect."

By letter dated 18 June 1993 the Irish Permanent Mission informed the Sanctions Committee that the aircraft had been detained on 28 May 1993 and formally impounded on 8 June 1993.

31. In its letter of 16 June 1993 to the Department of Transport, the applicant challenged the impoundment arguing that the purpose of EC Regulation 990/93 was not to deal with bare legal ownership but rather with operational control. On 24 June 1993 the Department responded: "The Minister is advised that the intention and effect of the UN Resolution as implemented through [EC Regulation 990/93] is to impose sanctions by impounding the types of commercial asset mentioned in Article 8, including aircraft, in any case where a person or undertaking in or operating from the [FRY] has any ownership interest of the kind mentioned. As this view of the scope and effect of the original Resolution has been confirmed by the [Sanctions Committee], the Minister does not feel entitled to apply [EC Regulation 990/93] in a manner which would depart from that approach. ... the aircraft must remain impounded. ... the Minister appreciates the difficulty that [the applicant] finds itself in and would be anxious to find any solution that was available to him under [EC Regulation 990/93] which would permit the release of the aircraft."

32. By letter dated 5 July 1993 the Turkish Embassy in Dublin repeated its request for the release of the aircraft stating that the Turkish Government would ensure impoundment in accordance with sanctions. The Irish Government indicated to the Sanctions Committee, by letter of 6 July 1993, that they would be favourably disposed to grant that request. On 4 August 1993 the Sanctions Committee ruled that the aircraft had to remain in Ireland, since the relevant resolutions required the Irish State to withhold all services from the aircraft including services which would enable it to fly.

E. THE FIRST JUDICIAL REVIEW PROCEEDINGS: THE HIGH COURT

33. In November 1993 the applicant applied for leave to seek judicial review of the Minister's decision to impound the aircraft. Amended grounds were later lodged taking issue with TEAM's role in the impoundment. On 15 April 1994 the High Court struck out TEAM as a respondent in the proceedings, the applicant's dispute with TEAM being a private law matter.

34. On 15 June 1994 the applicant's managing director explained in evidence that rental payments due to JAT had been set off against the deposits initially paid to JAT and that future rental payments were to be paid into a blocked bank account supervised by the Turkish Central Bank.

35. On 21 June 1994 Mr Justice Murphy delivered the judgment of the High Court. The issue before him could, he believed, be simply described: was the Minister for Transport bound by Article 8 of EC Regulation 990/93 to impound the applicant's aircraft? He considered the Department of Transport's letter of 24 June 1993 to the applicant to be the most helpful explanation of the Minis-

ter's reasoning. He found that: "... it is common case that the transaction between JAT and [the applicant] was entirely bona fide. There is no question of JAT having any interest direct or indirect in [the applicant] or in the management, supervision or direction of the business of that company. ... It is, however, common case that [UNSC Resolutions] do not form part of Irish domestic law and, accordingly, would not of themselves justify the Minister in impounding the aircraft. The real significance of the [UNSC Resolutions], in so far as they relate to the present proceedings, is that [UNSC Resolution 820 (1993)] ... provided the genesis for Article 8 of [EC Regulation 990/93]. ..."

36. In interpreting EC Regulation 990/93, Mr Justice Murphy had regard to its purpose. He found the aircraft not to be one to which Article 8 applied as it was not an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the former FRY and that the decision of the Minister to impound was therefore ultra vires. However, the aircraft was, at that stage, the subject of an injunction obtained (in March 1994) by a creditor of JAT (SNECMA) restraining it from leaving the country. That injunction was later discharged on 11 April 1995.

F. THE SECOND JUDICIAL REVIEW PROCEEDINGS: THE HIGH COURT

37. Having corresponded with the applicant indicating that the Minister for Transport was investigating a further impoundment based on Article 1.1(e) of EC Regulation 990/90, the applicant was informed by letter of 5 August 1994 from the Department of Transport as follows: "The Minister has now considered the continuing position of the aircraft in the light of the recent ruling of the High Court and the provisions of the Council Regulations referred to. Arising out of the Minister's consideration, I am now directed to inform you that the Minister has ... directed that the aircraft ... be detained pursuant to Article 9 of [EC Regulation 990/93] as an aircraft which is suspected of having violated the provisions of that Regulation and particularly Article 1.1(e) and [EC Regulation] 1432/92. The aircraft will remain detained pending completion of the Minister's investigation of the suspected violation as required under Article 9 and Article 10 of [EC] Regulation 990/93."

Although not noted in that letter, the Minister's concern related to the applicant's setting off of JAT's financial obligations (certain insurance, maintenance and other liabilities) under the lease against the rental monies already paid by it into the blocked bank account.

38. On 23 September 1994 UNSC Resolution 943 (1994) was adopted. It temporarily suspended the sanctions as peace negotiations had begun but it did not apply to aircraft already impounded. It was implemented by EC Regulation 2472/94 on 10 October 1994.

39. In March 1995 the applicant was given leave to apply for judicial review of the Minister's decision to re-impound the aircraft. By judgment of 22 January 1996 the High Court quashed the Minister's decision to re-detain the aircraft. It noted that almost all of the monies which had been paid into the blocked account by the applicant had by then been used up (with the consent of the holding bank in Turkey) in order to discharge JAT's liabilities under the lease. The crucial question before the High Court was the Minister's delay in invoking Article 9 of EC Regulation 990/93 given that the applicant was an "innocent" party suffering heavy daily losses. The High Court found that the Minister had failed in his duty to investigate and decide such matters within a reasonable period of time, to conduct the investigations in accordance with fair procedures and to have proper regard to the rights of the applicant.

40. On 7 February 1996 the Irish Government appealed to the Supreme Court and applied for a stay on the High Court's order. On 9 February 1996 the Supreme Court refused the Minister's stay application. The overriding consideration in deciding to grant the stay or not was to find a balance which did not deny justice to either party. Noting the significant delay of the Minister in invoking Article 1.1(e) and the potentially minor damage to the State (monies owed for the maintenance and parking in Dublin airport) contrasted with the applicant's calamitous losses, the justice of the case was overwhelmingly in the latter's favour.

41. The aircraft was therefore free to leave. By letters dated 12 and 14 March 1996 the applicant, JAT and TEAM were informed that the Minister considered that he no longer had any legal responsibility for the aircraft.

G. THE FIRST JUDICIAL REVIEW PROCEEDINGS: THE EUROPEAN COURT OF JUSTICE ("ECJ")

42. On 8 August 1994 the Minister for Transport lodged an appeal in the Supreme Court against the High Court judgment of 21 June 1994. He took issue with the High Court's interpretation of EC Regulation 990/93 and requested a preliminary reference to the ECJ (Article 177, now Article 234, of the Treaty Establishing the European Community - "EC Treaty").

43. By order dated 12 February 1995 the Supreme Court referred the following question to the ECJ and adjourned the proceedings before it: "Is Article 8 of [EC Regulation 990/93] to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by [the FRY] where such aircraft has been leased by the owner for a term of four years from the 22 April 1992 to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from the said [FRY]?"

44. The parties made submissions to the ECJ. The applicant noted that it was ironic that, following UNSC Resolution 943/1994, JAT aircraft could fly whereas its aircraft remained grounded.

45. On 30 April 1996 Advocate General Jacobs ("the AG") delivered his opinion. Given the majority interest of JAT in the aircraft, Article 8 of EC Regulation 990/93 applied to it. The AG disagreed with the Irish High Court, considering that neither the aims nor the text of the relevant UNSC Resolutions regime provided any reason to depart from what he considered to be the clear wording of Article 8 of EC Regulation 990/93.

46. As to the question of the respect shown in that Regulation for fundamental rights and proportionality, the AG pointed out that: "It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights, the [ECJ] takes account of the constitutional traditions of the Member States and of international agreements, notably [the Convention], which has a special significance in that respect.

Article F(2) of the Treaty on European Union ... gives Treaty expression to the [ECJ's] case-law. ... In relation to the EC Treaty, it confirms and consolidates the [ECJ's] case-law underlining the paramount importance of respect for fundamental rights.

Respect for fundamental rights is thus a condition of the lawfulness of Community acts – in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. All Member States are in any event parties to the [Convention], even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in the [ECJ] and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention."

47. The AG noted that the applicant had invoked the right to peaceful enjoyment of property protected by the Convention and the right to pursue a commercial activity recognised as a fundamental right by the ECJ. Having considered *Sporrong and Lönnroth* v. *Sweden* (judgment of 23 September 1982, Series A no. 52), he defined the essential question as being whether the interference with the applicant's possession of the aircraft was a proportionate measure in the light of the aims of general interest which EC Regulation 990/93 sought to achieve. He had regard to the application of this test in *AGOSI* v. *the United Kingdom* (judgment of 24 October 1986, Series A no. 108) and in *Air Canada* v. *the United Kingdom* (judgment of 5 May 1995, Series A no. 316-A) and to a "similar approach" adopted by the ECJ in cases concerning the right to property or to pursue a commercial interest (including *Hauer* v. *Land Rheinland-Pfalz* Case 44/79 [1979] ECR 3727, §§ 17-30).

48. While there had been a severe interference with the applicant's interest in the lease, it was difficult to identify a stronger type of public interest than that of stopping a devastating civil war. While some property loss was inevitable for any sanctions required to be effective, if it had been demonstrated that the interference in question was wholly unreasonable in light of the aims sought

to be achieved, then the ECJ would intervene. However, he felt that neither the initial decision to impound nor the continued retention of the aircraft could be regarded as unreasonable.

49. Whether or not the financial impact of the sanctions were as outlined by the applicant, a general measure of the kind in question could not be set aside simply because of the financial consequences which the measure might have in a particular case. Given the strength of the public interest involved, the proportionality principle would not be infringed by any such losses.

50. The AG concluded that the contested decision did not: "... strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. That conclusion seems consistent with the case-law of [this Court] in general. Nor has [the applicant] suggested that there is any case-law under [the Convention] supporting its own conclusion. The position seems to be no different if one refers to the fundamental rights as they result from "the constitutional traditions common to the Member States" referred to in the case-law of [the ECJ] and in Article F(2) of the Treaty on European Union. In the [above-cited *Hauer* case, the ECJ] pointed out ... , referring specifically to the German Grundgesetz, the Irish constitution and the Italian constitution, that the constitutional rules and practices of the Member States permit the legislature to control the use of private property in accordance with the general interest. Again it has not been suggested that there is any case-law supporting the view that the contested decision infringed fundamental rights. The decision of the Irish High Court was based, as we have seen, on different grounds."

51. By letter of 19 July 1996 TEAM informed JAT that the aircraft was free to leave provided that debts owed to TEAM were discharged.

52. On 30 July 1996 the ECJ ruled that EC Regulation 990/93 applied to the type of aircraft referred to in the Supreme Court's question to it. The ECJ noted that the domestic proceedings showed that the aircraft lease had been entered into "in complete good faith" and was not intended to circumvent the sanctions against the FRY.

53. It did not accept the applicant's first argument that the EC Regulation 990/93 did not apply because of the control on a daily basis of the aircraft by a non-FRY innocent party. Having considered the wording of EC Regulation 990/93, its context and aims (including the text and aims of the UNSC Resolutions it implemented), it found nothing to support the distinction made by the applicant. Indeed the use of day-to-day operation and control as opposed to ownership as a criterion for applying the regulation would jeopardise the effectiveness of the sanctions.

54. The applicant's second argument was that the application of EC Regulation 990/93 would infringe its right to peaceful enjoyment of his possessions and its freedom to pursue a commercial activity because it would destroy and obliterate the business of a wholly innocent party when the FRY owners had already been punished by blocked bank accounts. The ECJ did not find this persuasive: "It is settled case-law that the fundamental rights invoked by [the applicant] are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community [see the above-cited Hauer case, Case 5/88 *Wachauf* v *Bundesamt fuer Ernaehrung und Forstwirtschaft* [1989] ECR 2609 and the above-cited *Germany* v *Council* case.)

Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.

The provisions of [EC Regulation 990/93] contribute in particular to the implementation at Community level of the sanctions against the [FRY] adopted, and later strengthened, by several resolutions of the [UN] Security Council. ...

It is in the light of those circumstances that the aim pursued by the sanctions assumes a special importance, which is, in particular, in terms of [EC Regulation 990/93] and more especially the eighth recital in the preamble thereto, to dissuade the [FRY] from "further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to co-operate in the restoration of peace in this Republic".

As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.

Article 8 of [EC Regulation 990/93] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest."

55. The answer to the Supreme Court's question was therefore: "Article 8 of [EC Regulation 990/93] concerning trade between the European Economic Community and the [FRY] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from the [FRY] and in which no person or undertaking based in or operating from the [FRY] has a majority or controlling interest"

56. On 6 August 1996 the Minister re-instated the impounding of the aircraft under Article 8 of EC Regulation 990/93.

H. THE FIRST AND SECOND JUDICIAL REVIEW PROCEEDINGS: JUDGMENTS OF THE SUPREME COURT

57. By notice of motion dated 29 October 1996 the applicant applied to the Supreme Court for, *inter alia*, an order determining the action "in the light of the decision of the [ECJ]" and for an order providing for the costs of the Supreme Court and ECJ proceedings. The grounding affidavit of the applicant of the same date recalled the applicant's bona fides, the benefit of having had the ECJ examine the Regulation for the first time, that ultimate responsibility for its predicament lay with the FRY authorities and that the operations of its company had been destroyed by the impoundment. It referred to EC Regulation 2815/95, noting that it did not allow aircraft already impounded to fly whereas those not previously impounded could do so. Since its aircraft was the only one impounded under that sanctions regime, no other lessee could have initiated the action it had in order to clarify the meaning of the relevant Regulation.

58. On 29 November 1996 the Supreme Court delivered its judgment allowing the appeal of the Minister for Transport from the order of the High Court of 21 June 1994. It noted that the sole issue in the case was whether the Minister had been bound by Article 8 of EC Regulation 990/93 to impound the aircraft. Having noted the response of the ECJ, the Supreme Court simply stated that it was bound by that decision and the Minister's appeal was allowed.

59. In May 1998 the Supreme Court allowed the appeal from the order of the High Court of 22 January 1996. Given the intervening rulings of the ECJ and of the Supreme Court (of July and November 1996, respectively), the appeal was moot since, as and from the date of the initial order of impoundment, the aircraft had been lawfully detained under Article 8 of EC Regulation 990/93. There was no order as to costs.

I. THE RETURN TO JAT OF THE AIRCRAFT

60. The applicant's leases on both aircraft had expired by May 1996 (paragraph 12 above). Further to the judgment of the Supreme Court of November 1996 (paragraph 58 above) and given the relaxation of the sanctions regime (67-71 below), JAT and the Minister for Transport reached an agreement in July 1997 concerning the latter's costs. JAT deposited IR£389,609.95 to an escrow account in the joint names of the Chief State Solicitor and its solicitors to cover all parking, maintenance, insurance and legal costs of the Minister for Transport associated with the impoundment. On 30 July 1997 the aircraft was returned to JAT.

II. THE SANCTIONS REGIME: THE RELEVANT PROVISIONS

A. SETTING UP THE SANCTIONS REGIME

61. In September 1991 the United Nations ("UN") Security Council adopted a Resolution (UNSC Resolution 713 (1991)) under Chapter VII of its Charter by which it expressed concern about the conflict in the former Yugoslavia and implemented a weapons and military embargo. UNSC Resolution 724 (1991), adopted in December 1991, established a Sanctions Committee to administer the relevant UNSC Resolutions.

62. UNSC Resolution 757 (1992) adopted on 30 May 1992 provided, in so far as relevant, as follows: "5. Decides that all States shall not make available to the authorities in the [FRY] or to any commercial, industrial or public utility undertaking in the [FRY], any funds, or any other financial or economic resources and shall prevent their nationals and any person within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the [FRY], except payments exclusively for strictly medical or humanitarian purposes and foodstuffs; ... 7. Decides that all States shall: (a) Deny any permission to any aircraft to take off from, land in or over-fly their territory if it is destined to land in or has taken off from the territory of the [FRY], unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the [Sanctions Committee]; (b) Prohibit, by their nationals or from their territory, the provision of engineering or maintenance servicing of aircraft registered in the [FRY] or operated by or on behalf of entities in the [FRY] or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft; ... 9. Decides that all States, and the authorities in the [FRY], shall take the necessary measures to ensure that no claim shall lie at the instance of the authorities in the [FRY], or of any person or body in [FRY], or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures imposed by this resolution and related resolutions;"

It was implemented by the European Community ("EC") by Council Regulation of June 1992 (EC Regulation 1432/92) which was, in turn implemented in Ireland by Statutory Instrument ("SI"): the European Communities (Prohibition of Trade with the Republics of Serbia and Montenegro) Regulations 1992 (SI No. 157 of 1992) made it an offence under Irish law from 25 June 1992 to act in breach of that EC Regulation.

63. UNSC Resolution 787 (1992), adopted in November 1992, further tightened the economic sanctions against the FRY. This Resolution was implemented by EC Regulation 3534/92 adopted in December 1992.

64. UNSC Resolution 820 (1993), adopted on 17 April 1993, provided, *inter alia*, as follows: "24. Decides that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] and that these vessels, freight vehicles, rolling stock or aircraft may be forfeited to the seizing State upon a determination that they have been in violation of resolutions ... 713 (1991), 757 (1992), 787 (1992) or the present resolution;"

65. This resolution was implemented by EC Regulation 990/93 which entered into force on 28 April 1993 once published in the Official Journal (O.J.L. 102/14 (1993) of that date (as specified in Article 13 of the Regulation) pursuant to Article 191(2) (now Article 254(2)) of the Treaty Establishing the European Community ("EC Treaty").

Article 1.1(e) and Articles 8-10 of that Regulation provided as follows: "1. As and from 26 April 1993, the following shall be prohibited: ... (e) the provision of non-financial services to any person or body for purposes of any business carried out in the Republics of Serbia and Montenegro. ... 8. All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States. Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners. 9. All vessels, freight vehicles, rolling stock,

aircraft and cargoes suspected of having violated, or being in violation of [EC Regulation 1432/92] or this Regulation shall be detained by the competent authorities of the Member States pending investigations. 10. Each Member State shall determine the sanctions to be imposed where the provisions of this [Regulation] are infringed.

Where it has been ascertained that vessels, freight vehicles, rolling stock, aircraft and cargoes have violated this Regulation, they may be forfeited to the Member State whose competent authorities have impounded or detained them."

66. On 4 June 1993 the Irish Minister for Tourism and Trade adopted the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (SI 144 of 1993). It provided, in so far as relevant, as follows: "3. A person shall not contravene a provision of [EC Regulation 990/93]. 4. A person who, on or after the 4th day of June, 1993, contravenes Regulation 3 of these Regulations shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both. 5. The Minister for Transport, Energy and Communications shall be the competent authority for the purpose of Articles 8 and 9 of the [EC Regulation 990/93] except in so far as the said Article 8 relates to vessels and the said Article 9 relates to cargoes. 6. (1) The powers conferred on the Minister for Transport, Energy and Communications by Articles 8 and 9 of the [EC Regulation 990/93] as the competent authority for the purposes of those Articles may be exercised by— (a) members of the Garda Síochána, (b) officers of customs and excise, (c) Airport Police, Fire Services Officers of Aer Rianta, ... , (d) Officers of the Minister for Transport ... duly authorised in writing by the Minister for Transport, Energy and Communications in that behalf. ... (3) A person shall not obstruct or interfere with a person specified in subparagraph (a), (b) or (c) of paragraph (1) of this Regulation, or a person authorised as aforesaid, in the exercise by him of any power aforesaid. (4) A person who, on or after the 4th day of June, 1993, contravenes subparagraph (3) of this Regulation shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 3 months or to both. 7. Where an offence under Regulation 4 or 6 of these Regulations is committed by a body corporate and is proved to have been so committed with the consent, connivance or approval of or to have been attributable to any neglect on the part of any person, being a director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity, that person as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he were guilty of the first-mentioned offence."

B. LIFTING THE SANCTIONS REGIME

67. UNSC Resolution 943 (1994) was adopted on 23 September 1994 and, in so far as relevant, read as follows: "(i) the restrictions imposed by paragraph 7 of [UNSC Resolution 757 (1992)], paragraph 24 of [UNSC Resolution 820 (1993)] with regard to aircraft which are not impounded at the date of adoption of this resolution, ... shall be suspended for an initial period of 100 days from the day following the receipt ... of a report from the Secretary-General."

This resolution was implemented by EC Regulation 2472/94 of 10 October 1994, Article 5 of which suspended the operation of Article 8 of EC Regulation 990/93 "with regard to aircraft ... which had not been impounded at 23 September 1994".

68. The suspension of UNSC Resolution 820 (1993) was extended further by periods of 100 days on numerous occasions in 1995, and these resolutions were each implemented by EC Regulations.

69. UNSC Resolution 820 (1993) was suspended indefinitely in 1995 by UNSC Resolution 1022 (1995). It was implemented by EC Regulation 2815/95 of 4 December 1995 which provided, *inter alia*, as follows: "1. [EC Regulation 990/93] is hereby suspended with regard to the [FRY]. 2. As long as [EC Regulation 990/93] remains suspended, all assets previously impounded pursuant to that Regulation may be released by Member States in accordance with the law, provided that any such assets that are subject to any claims, liens, judgments, or encumbrances, or which are the assets of any person, partnership, corporation or other entity found or deemed to be insolvent under

the law or the accounting principles prevailing in the relevant Member State, shall remain impounded until released in accordance with the applicable law."

70. UNSC Resolution 820 (1993) was definitively suspended and that suspension implemented by EC Regulation 462/96 from 27 February 1996. That regulation provides, in so far as relevant, as follows: "As long as [*inter alia*, EC Regulation 990/93] remain suspended, all funds and assets previously frozen or impounded pursuant to those Regulations may be released by Member States in accordance with law, provided that any such funds or assets that are subject to any claims, liens, judgments or encumbrances, ... shall remain frozen or impounded until released in accordance with the applicable law."

71. On 9 December 1996 EC Regulation 2382/96 repealed, *inter alia*, EC Regulation 990/93. On 2 March 2000 the European Communities (Revocation of Trade Sanctions concerning the Federal Republic of Yugoslavia (Serbia and Montenegro) and Certain Areas of the Republics of Croatia and Bosnia –Herzegovina) Regulations 2000 (S.I. No. 60 of 2000) repealed S.I. 144 of 1993.

III. RELEVANT EC LAW AND PRACTICE

72. This judgment concerns the provisions of European Community law ("EC law" or "Community law") of the "first pillar" of the European Union.

A. FUNDAMENTAL RIGHTS: CASE-LAW OF THE ECJ

73. While the founding treaty of the EC did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the Member States and by the guidelines supplied by international human rights treaties on which the Member States had collaborated or to which they were signatories. The Convention's provisions were first explicitly referred to in 1975 and by 1979 its special significance amongst international treaties on the protection of human rights had been recognised by the ECJ. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the EC legislation under its consideration had referred to the Convention) and latterly to this Court's jurisprudence, the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance for EC law.

74. In a judgment of 1991, the ECJ was able to describe the role of the Convention in EC law in the following terms: "41. ... as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories ... The [Convention] has special significance in that respect ... It follows that ...the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed. 42. As the Court has held ... it has no power to examine the compatibility with the [Convention] of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the [Convention]."

75. This statement has been often repeated by the ECJ notably in the Opinion of the Court on Accession by the Community to the Convention, in which case the ECJ notably opined that respect for human rights was "a condition of the lawfulness of Community acts".

76. In the *Kondova* case relied upon by the applicant, the ECJ ruled on the refusal by the United Kingdom of an establishment request of a Bulgarian national on the basis of a provision in an association agreement between the EC and Bulgaria: "Moreover, such measures [of the British Immigration authorities] must be adopted without prejudice to the obligation to respect that national's fundamental rights, such as the right to respect for his family life and the right to respect for his

property, which follow, for the Member State concerned, from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which that State may have acceded."

B. RELEVANT TREATY PROVISIONS

1. *Concerning fundamental rights*

77. The above noted case-law developments were reflected in certain treaty amendments. In the preamble to the Single European Act 1986, the Contracting Parties expressed their determination: "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms ..."

78. Article 6 (formerly Article F) of the Treaty on European Union of 1992 ("the TEU") reads as follows: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States; 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

79. The Treaty of Amsterdam 1997 required the ECJ, in so far as it had jurisdiction, to apply human rights standards to acts of Community institutions and gave the European Union the power to act against a Member State that had seriously and persistently violated the principles of the Article 6(1) of the TEU cited directly above.

80. The Charter of Fundamental Rights in the European Union, proclaimed in Nice on 7 December 2000 (not fully binding), states in its preamble that it: "reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Article 52(3) of the Charter provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

81. The Treaty establishing a Constitution for Europe, signed on 29 October 2004 (not in force), provides in its Article I-9 entitled "Fundamental Rights": "1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The above-described Charter of Fundamental Rights has been incorporated as Part II of this constitutional treaty.

2. *Other relevant provisions of the EC Treaty*

82. Article 5 (now Article 10) provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achieve-

ment of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

83. Article 189 (now Article 249), in so far as relevant, reads as follows: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. ..."

The description of a Regulation as being "binding in its entirety" and "directly applicable" in all Member States means that it takes effect in the internal legal orders of Member States without the need for domestic implementation.

84. Article 234 (now Article 307) reads as follows: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

C. THE EC CONTROL MECHANISMS

85. As regards the control exercised by the ECJ and national courts the ECJ has stated as follows: "39. Individuals are ... entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... . 40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts ... . Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid ..., to make a reference to the Court of Justice for a preliminary ruling on validity. 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. 42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act."

1. *Direct Actions before the ECJ*

(a) Actions against Community Institutions

86. Article 173 (now Article 230) provides Member States, the European Parliament, the Council and the Commission with a right to apply to the ECJ for judicial review of an EC instrument ("the annulment action"). Applications by the Court of Auditors and the European Central Bank are

more restricted and, while even more restricted, an individual (a natural or legal person) can also challenge "a decision addressed to that person or ... a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former" (Article 173(4), now Article 230(4)).

87. According to Article 175 (now Article 232) Member States and the Community institutions can also call, *inter alia*, the Council, the Commission and the European Parliament to account before the ECJ for a failure to perform their Treaty obligations. Article 184 (now Article 241) allows a plea of illegality of a Regulation (adopted jointly by the Parliament and the Council, by the Council, by the Commission or by the European Central Bank) to be made during proceedings already pending before the ECJ on the basis of another Article: a successful challenge will result in the ECJ declaring its inapplicability *inter partes* but not the annulment of the relevant provision.

88. Having legal personality of its own, the EC can be sued for damages in tort, described as its non-contractual liability. Its institutions will be considered liable for wrongful (illegal or invalid) acts or omissions by the institution (*fautes de service*) or its servants (*fautes personelles*) which have caused damage to the claimant (Articles 178 and 215, now Articles 235 and 288). Unlike actions under Articles 173, 175 and 184 (now Articles 230, 232 and 241), and subject to the various inherent limitations imposed by the elements of the action to be established, there are no personal or *locus standi* limitations on the right to bring such an action. It can therefore provide an independent cause of action15 before the ECJ to review the legality of an act or failure to act to those (including individuals) not having *locus standi* under Articles 173 or 175 but who have suffered damage.

(b) Actions against Member States

89. Under Article 169 (now Article 226) and Article 170 (now Article 227) both the Commission (in fulfilment of its role as "guardian of the Treaties") and a Member State are accorded, notably, the right to take proceedings against a Member State considered to have failed to fulfil its Treaty obligations. If the ECJ finds that a Member State has so failed, the State shall be required to take the necessary measures to comply with the judgment of the ECJ (Article 171, now Article 228). The Commission can also take proceedings against a Member State in other specific areas of Community regulation (such as State Aids - Article 93, now Article 88).

(c) Actions against individuals

90. There is no provision in the EC Treaty for a direct action before the ECJ against individuals. Individuals may be fined under certain provisions of EC law which fine may, in turn, be challenged before the ECJ.

2. *Indirect Actions before the national courts*

91. Where individuals seek to assert their Community rights before national courts or tribunals, they may do so in the context of any proceedings of national law, public or private, in which EC rights are relevant, in pursuit of any remedy, final or interim, under national law.

(a) Direct Effects

92. The "direct effect" of a provision of Community law means that it confers upon individuals rights and obligations upon which they can rely before the national courts. A provision with direct effect must not only be applied by the domestic courts but it will take precedence over conflicting domestic law pursuant to the principle of supremacy of EC law16. The conditions for acquiring direct effect are that the provision: "contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition make it ideally adapted to produce direct effects in the legal relationship between States and their subjects."

93. Certain EC Treaty provisions are considered to have direct effect, whether they impose a negative or positive obligation and certain have been found to have, as well as "vertical" effect (between the State and the individual), a horizontal effect (between individuals). Given the text of Article 189 (now Article 249), the provisions of Regulations are normally considered to have direct effect, both vertically and horizontally. Directives and Decisions can, in certain circumstances, have vertical direct effect though Recommendations and Opinions, having no binding force, cannot generally be invoked by individuals before national courts.

(b) The principles of indirect effect and State Liability

94. The rights an individual may claim under Community law are no longer confined to those under directly effective Community provisions: they now include rights based on the principles of indirect effect and State liability developed by the ECJ. According to the principle of "indirect effect" ("interprétation conforme") a Member State's obligations under Article 5 (now Article 10) require its authorities (including the judiciary) to interpret as far as possible national legislation in the light of the wording and purpose of a relevant Directive18.

95. The principle of State liability was first developed in the case of *Francovich* v. *Italy*. The ECJ found that, where a State had failed to implement a Directive (whether or not directly effective), it would be obliged to compensate individuals for resulting damage if three conditions were met: the directive conferred a right on individuals; the content of the right was clear from the provisions of the directive itself; and there was a causal link between the State's failure to fulfil its obligation and the damage suffered by the person affected. In 1997 the ECJ extended the notion of State liability to all domestic acts and omissions (legislative, executive and judicial) in breach of Community law provided the conditions for liability were fulfilled.

(c) Preliminary reference procedure

96. In order to assist national courts in correctly implementing EC law and maintaining its uniform application, Article 177 (now Article 234) provides national courts with the opportunity to consult the ECJ. In particular, Article 177 reads as follows: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community ...; ... Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

97. The Court described the nature of this preliminary reference procedure as follows: "30. ... the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate ... . 31. In the context of that cooperation, it is for the national court seized of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling ... ."

98. Article 177 distinguishes between domestic courts which have a discretion to refer and those courts of last instance for which referral is mandatory. However, according to the *CILFIT* judgment, both categories of court must first determine whether an ECJ ruling on the EC law matter is "necessary to enable it to give judgment", even if the literal meaning of Article 177 would suggest otherwise: "it follows from the relationship between Article 177(2) and (3) that the courts ... referred to in Article 177(3) have the same discretion as any other national court ... to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment."

The ECJ in *CILFIT* indicated that a court of final instance would not be obliged to make a reference to the ECJ if: the question of EC law was not relevant (namely, if the answer to the question of EC law, regardless of what it may be, could in no way affect the outcome of the case); the provision had already been interpreted by the ECJ, even though the questions at issue were not strictly identical; and the correct application of EC law was so obvious, as to leave no scope for reasonable doubt, not only to the national court but also to the courts of the other Member States and to the ECJ. This matter was to be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gave rise and the risk of divergences in judicial decisions within the Community.

99. Once the reference is made, the ECJ will rule on the question put to it and that ruling is binding on the national court. The ECJ has no power to decide the issue before the national court and cannot therefore apply the provision of EC law to the facts of the particular case in question24. The domestic court will decide on the appropriate remedy.

IV. OTHER RELEVANT LEGAL PROVISIONS

A. THE VIENNA CONVENTION ON THE LAW OF TREATIES 1969 ("the Vienna Convention 1969")

100. Article 31(1) is entitled "General rule of interpretation" and provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31(3) further provides that, as well as the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation together with any relevant rules of international law applicable in the relations between the parties shall be taken into account.

B. THE IRISH CONSTITUTION

101. Article 29 of the Irish Constitution, in so far as relevant, reads as follows: "1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. ... 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. 4 (10) ... No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

THE LAW

I. THE PRELIMINARY OBJECTIONS

102. The Government maintained that the applicant failed to exhaust domestic remedies because it had not taken an action for damages (in contract or tort) against TEAM or initiated a constitutional action against Ireland. In any event, the application should have been introduced within six months of the ECJ ruling (since the Supreme Court had no choice but to implement that ruling) and was an abuse of the right of petition (given that the applicant was not an "innocent" party, attempting as it did to mislead the domestic courts and this Court in a number of material respects). The European Commission added that the Supreme Court did not refer a question concerning EC Regulation 2472/94 to the ECJ because the applicant had not invoked the Regulation in the domestic action. Other than referring to the Chamber's admissibility decision, the applicant did not comment.

The Chamber considered, for reasons outlined in its decision, that it would have been unreasonable to require the applicant to have taken proceedings in tort, contract or under the Constitution instead of, or during, its action in judicial review. It had not, moreover, been demonstrated that such proceedings offered any real prospects of success thereafter. The final decision, for the purposes of Ar-

ticle 35 § 1 and the six-month time-limit, was that of the Supreme Court of November 1996 which applied the ECJ's ruling. Finally, the Chamber found that the parties' submissions about the applicant's *bona fides* made under Article 35 § 3 and under Article 1 of Protocol No. 1 were the same and, further, that that bona fides issue was so closely bound up with the merits of the complaint under the latter Article that it was appropriate to join it to the merits of the application.

103. The Grand Chamber is not precluded from deciding admissibility questions at the merits stage: the Court can dismiss applications it considers inadmissible "at any stage of the proceedings", so that even at the merits stage (and subject to Rule 55 of the Rules of Court) it may reconsider an admissibility decision where it concludes that the application should have been declared inadmissible for one of the reasons listed in Article 35 of the Convention (*Pisano* v. *Italy* [GC] (striking out), no. 36732/97, § 34, 24 October 2002 and *Odièvre* v. *France* [GC], no. 42326/98, §§ 21-23, ECHR 2003 III).

104. However, the Grand Chamber observes that the present admissibility objections are precisely the same as those made to, and dismissed by, the Chamber in its admissibility decision, and it sees no reason to depart from the Chamber's conclusions in those respects. In particular, the Government made no new legal submissions to the Grand Chamber as regards their exhaustion and timeliness objections. While they made additional factual submissions as regards the applicant's bona fides upon which its abuse of process claim is based, this does not affect in any respect the Chamber's view that the bona fides issue would fall to be examined, if at all, as part of the merits of the complaint under Article 1 of Protocol No. 1.

105. Without prejudice to the question of whether it is open to a third party admitted to a case following its admissibility to make a preliminary objection, the Grand Chamber does not consider that the above-noted comment of the European Commission warrants a conclusion that the applicant failed to exhaust domestic remedies. EC Regulation 2472/94 expressly excluded from its provisions aircraft already impounded under EC Regulation 990/93 and the applicant had already challenged, in the very domestic proceedings to which the European Commission referred, the lawfulness of the original impoundment under EC Regulation 990/93.

106. The Court therefore dismisses all preliminary objections before it.

II. SUBMISSIONS CONCERNING ARTICLE 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

107. The applicant maintained that the manner in which Ireland implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1. The Government disagreed as did the third parties with the exception (in part) of the Institut de Formation en Droits de l'Homme du Barreau de Paris. The Court considers it clearer to describe the submissions made to it in the order set out below.

A. THE GOVERNMENT

1. *Article 1 of the Convention*

108. The Convention must be interpreted in such a manner as to allow State parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international co-operation (Waite and *Kennedy* v. *Germany* [GC], no. 26083/94, § 72, ECHR 1999-I and *Beer and Regan* v. *Germany* [GC], no. 28934/95, § 62, 18 February 1999). It is not therefore contrary to the Convention to join international organisations and undertake other obligations once such organisations offer human rights' protection equivalent to the Convention. This principle was first outlined in the *"M. & Co."* case (see *M. & Co* v. *Germany*, no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138) and was then endorsed in the case of *Heinz* v. *the Contracting Parties also parties to the European Patent Convention* (no. 21090/92, Commission decision of 10 January 1994, DR 76-A, p. 125).

109. The critical point of distinction for the Government was whether the impugned State act amounted to an obligation or the exercise of a discretion. If, on the one hand, the State had been obliged as a result of its membership of an international organisation to act in a particular manner, the only matter requiring assessment was the equivalence of the human rights protection in the relevant organisation (the "*M. and Co. doctrine*" described above). If, on the other, the State could as a matter of law exercise independent discretion, this Court was competent. Contrary to the applicant's submission, the cases of *Matthews* (*Matthews* v. *the United Kingdom* [GC], no. 24833/94, ECHR 1999-I), *Cantoni* (*Cantoni* v. *France*, judgment of 15 November 1996, Reports 1996-V) and *Hornsby* (*Hornsby* v. *Greece*, judgment of 19 March 1997, Reports 1997-II) had no application to the present case, concerned as they were with discretionary decisions available to, and taken by, States.

110. Moreover, the Government considered that Ireland acted out of obligation and that the EC and the UN provided such equivalent protection.

As to the international obligations on the Irish State, the Government argued that it had complied with mandatory obligations derived from UNSC Resolution 820 (1993) and EC Regulation No. 990/93. As a matter of EC law, a regulation left no room for the independent exercise of discretion by the State. The direct effectiveness of EC Regulation 990/93 meant that SI 144 of 1993 had no bearing on the State's legal obligation to impound. The ECJ later conclusively confirmed the applicability of Article 8 of EC Regulation 990/93 and, thereby, the lawful basis for the impoundment. Even if the jurisdiction of the ECJ in a reference case could be considered limited, the ECJ authoritatively resolved the present domestic action.

Thereafter for the State to look behind the ECJ ruling, even with a view to its Convention compliance, would be contrary to its obligation of "loyal co-operation" (Article 5, now Article 10, of the EC Treaty – paragraph 82 above) and would undermine the special judicial co-operation between the national court and the ECJ envisaged by Article 177 (now Article 234) of the EC Treaty (paragraphs 96-99 above). As to the applicant's suggestion that the Supreme Court should have awarded compensation while applying the ECJ ruling, the Government considered that it was implicit in the opinion of the Advocate General ("AG"), in the ruling of the ECJ and in the second sentence of Article 8 of EC Regulation 990/93 that EC Regulation 990/93 did not envisage the payment of compensation. If the scheme envisaged was one of detention without compensation, it would be contrary to the principle of uniform application and supremacy of Community law for Member States to, nevertheless, consider making an award.

Finally, they found unconvincing the applicant's suggestion that the Supreme Court exercised discretion in not taking account of the intervening relaxation of the sanctions regime. If the initial impoundment was lawful (under Article 8 of the EC Regulation 990/93 as confirmed by the ECJ), by definition, the partial relaxation of the sanctions regime in October 1994 did not apply to the applicant's aircraft as it had been already lawfully impounded. The terms of EC Regulation 2472/94 were as mandatory and clear as those of EC Regulation 990/93. It was, indeed, for this reason that a second reference to the ECJ raising EC Regulation 2472/94 would have been possible but pointless.

111. As to the equivalence of the EC human rights protection, the Government pointed to, *inter alia*, Article 6 of the Treaty on European Union, the judicial remedies offered by the ECJ and the national courts, the reliance on Convention provisions and jurisprudence by the ECJ and the declarations of certain Community institutions. Moreover, the present applicant had the opportunity, unlike in the Matthews case, to fully ventilate its claim that its fundamental rights had been breached and the decision of the ECJ was based on a consideration of its property rights. As to the UN, Articles 1(3) and 55 of the UN Charter were recalled together with the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic and Social and Cultural Rights of 1966.

2. *Article 1 of Protocol No. 1 to the Convention*

112. The Government's primary argument was that Ireland's compliance with its international obligations constituted sufficient justification, of itself, for any interference with the applicant's property rights.

113. Alternatively, the impounding of the aircraft amounted to a lawful and proportionate control of use of the applicant's possessions in the public interest (*AGOSI* v. *the United Kingdom* judgment of 24 October 1986, Series A no. 108, § 51 and *Air Canada* v. *the United Kingdom* judgment of 5 May 1995, Series A no. 316-A, § 34). The margin of appreciation was broad given the strength of the two public interest objectives pursued: the principles of public international law, including *pacta sunt servanda*, pursuant to which the State discharged clear mandatory international obligations following the decisions of the relevant UN and EC bodies (the Sanctions Committee and the ECJ) and participating in an international effort to end a conflict.

114. The Government relied on their submissions in the context of Article 1 in order to argue that Article 1 of Protocol No. 1 did not require compensation or account to have been taken of the relaxation of the sanctions regime in October 1994. They also made detailed submissions challenging the applicant's bona fides, although they maintained that the applicant's innocence would not have rendered the impoundment inconsistent with Article 1 of Protocol No. 1. Finally, they responded to the applicant's detailed allegations concerning the position of TEAM and, in particular, explained that proceedings had not been issued against TEAM because that would have amounted to applying retrospectively the criminal liability for which SI 144 of 1993 had provided.

B. THE APPLICANT

1. *Article 1 of the Convention*

115. The applicant considered that the terms of EC Regulation 990/93 and the preliminary reference process admitted of State discretion for which Ireland was responsible under the Convention.

It agreed that if the substance of its grievance had resulted solely from Ireland's international obligations, this Court would have had no competence. In M. & Co. (and other cases relied upon by the Government) the complaint had been directed against acts of international organisations over the elaboration of which the Member State had no influence and in the execution of which the State had no discretion. Since the applicant was not challenging the provisions of EC Regulation 990/93 or the sanctions regime per se, the "equivalent protection" principle of the M. & Co. case was not relevant. On the contrary, the Irish State had been intimately involved in the adoption and application of EC Regulation 990/93 and had, at all material times, a real and reviewable discretion as to the means by which the result required by the EC Regulation could be achieved.

116. In particular, the applicant considered that the State had impounded the aircraft as a preventative step without a clear UN or EC obligation to do so. It was not obliged to appeal from the High Court judgment of June 1994. The Supreme Court was not required to refer a question to the ECJ (Case 283/81 *CILFIT* v. *Minister for Health* [1982] ECR 3415 and this Court's decision in *Moosbrugger* v. *Austria* (dec.), no. 44861/98, 25 January 2000). Thereafter, in referring the question it did to the ECJ and since the ECJ could only respond under Article 177 (now Article 234) to the interpretative (or validity) question raised, the Supreme Court had effectively chosen to exclude certain matters from the examination of the ECJ. Moreover, given the terms of Article 234 (now Article 307), the Supreme Court should have implemented the ECJ ruling in a Convention compatible manner whereas it had simply "rubber-stamped" that ruling: it should have considered, and made a further reference to the ECJ if necessary, certain additional matters prior to implementing the ruling of the ECJ. The matters thereby not considered by the Supreme Court and not put before the ECJ concerned, *inter alia*, whether impoundment expenses should be charged, whether compensation should be paid and the effect of the EC Regulation 2472/94 and the relaxation of the sanctions regime (paragraphs 67-71 above). The applicant noted that certain relevant matters were raised in an affidavit filed on its behalf in the Supreme Court following the ECJ ruling (paragraph 58 above) but that the Supreme Court ignored those points.

117. The applicant considered its position consistent with the Convention jurisprudence. More generally, while the Convention did not exclude the transfer of competences to international organisations, the State had to continue to secure Convention rights (see *T.I.* v. *the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III and the above-cited *M. & Co.*). The Convention organs had on numerous occasions examined the compatibility with the Convention of the discretion exercised by a State in applying EC law (see, *inter alia*, *Van de Hurk* v. *the Netherlands*, judgment of 19 April 1994, Series A no. 288; *Procola* v. *Luxembourg*, judgment of 28 September 1995, Series A no. 326; the above-cited *Cantoni* v. *France* and *Hornsby* v. *Greece* judgments; *Pafitis and Others* v. *Greece*, judgment of 26 February 1998, Reports 1998-I; *Matthews* v. *the United Kingdom*, [GC] no. 24833/94, ECHR 1999; *S.A. Dangeville* v. *France*, no. 36677/97, judgment of 16 April 2002; and *Société Colas Est and Others* v. *France*, no. 37971/97, ECHR 2002-III). The case-law of the ECJ itself supported the applicant's position (Case C-235/99 *R* v. *Secretary of State for the Home Department, ex parte Kondova* ([2001] ECR I-6427, § 90), the latter case being the first case in which, according to the applicant, the ECJ recognised that it could not claim to be the final arbiter of questions of human rights as Member States remained answerable to this Court. The applicant also relied on the *Pellegrini* v. *Italy* judgment (no. 30882/96, ECHR-2001 VIII) where the Court found a violation of Article 6 because the Italian courts did not satisfy themselves as to the fairness of proceedings before the Ecclesiastical Courts of the Rome Vicariate before enforcing a decision of those tribunals.

If the Court was to follow the Government's reliance on the above-cited decision of M. & Co. and judgments of *Waite and Kennedy* v. *Germany* and *Beer and Regan* v. *Germany*, then any Member State of the EC could, according to the applicant, escape its Convention responsibility once its courts referred a question and implemented an ECJ ruling. The percentage of domestic law sourced in the EC is significant and growing and the matters now covered by EC law are increasingly broad and sensitive: to accept that any State act implementing an EC obligation does not fall within the State's Convention responsibility would create an unacceptable lacuna of human rights protection in Europe.

118. In any event, the applicant argued that the EC did not offer "equivalent protection". The limited role of the ECJ under Article 177 (now Article 234) was outlined above: there was no inherent jurisdiction in the ECJ to consider whether matters such as the absence of compensation and discriminatory treatment of the applicant amounted to a breach of its property rights. Proceedings against a Member State for action or inaction allegedly in violation of Community law could only be initiated before the ECJ by the European Commission or another Member State and otherwise the individual had to take proceedings in the national courts. A party to such domestic proceedings had no right to an Article 177 (now Article 234) reference, that being a matter for the domestic court. As indicated in the above-cited *Kondova* case, if an EC provision was considered to infringe the Convention, the national courts and this Court, rather than the ECJ, would be the final arbiters.

119. For these reasons, the applicant maintained that the above-described exercise of discretion by the Irish authorities as regards the impoundment of its aircraft should be reviewed for its Convention compatibility by this Court.

2. *Article 1 of Protocol No. 1*

120. The applicant maintained that the interference with its possessions (the impoundment) amounted to a deprivation which could not be described as "temporary" given its impact. It was also unlawful since the Government had not produced any documentary evidence of the legal basis for the same and since the implementing SI No. 144 of 1993, indicating the authority competent to impound, was not adopted until after the impoundment.

121. Moreover, such an interference was unjustified because it was not in accordance with the "general principles of international law" within the meaning of Article 1 of Protocol No. 1 and because it left an innocent party to bear an individual and excessive burden as the Government had failed to strike a fair balance between the general interest (the international community's interest in putting an end to a war and the associated significant human rights violations and breaches of humanitarian law) and the individual damage (the significant economic loss of an innocent party).

In particular, the applicant considered that certain factors distinguished its case from *AGOSI* and *Air Canada.* It also considered unjustifiable the situation which pertained after the adoption of EC Regulation 2472/94 (its aircraft remained impounded while those of JAT circulated). Compensation was an important element in the overall justification for the applicant and its absence in a de facto deprivation situation generally amounted to a disproportionate interference especially since the aim of the sanctions regime could have been achieved while paying it compensation. Finally, the applicant made a number of allegations about the State's relationship with TEAM and argued, notably, that the Government's failure to prosecute TEAM (when, *inter alia*, the Sanctions Committee had recognised that TEAM had broken the sanctions regime) highlighted the unjustifiable nature of the applicant's position, a foreign company innocent of any wrongdoing. In this latter respect, the applicant reaffirmed its *bona fides*, responded in detail to the Government's allegations of bad faith and pointed out that all courts before which the case was examined confirmed its innocence.

C. THE THIRD PARTY SUBMISSIONS

1. *The European Commission*

(a) Article 1 of the Convention

122. The European Commission considered that the application concerned in substance a State's responsibility for Community acts: while a State retained some Convention responsibility after it had ceded powers to an international organisation, that responsibility was fulfilled once there was proper provision in that organisation's structure for effective protection of fundamental rights at a level at least "equivalent" to that of the Convention. The European Commission therefore supported the approach adopted in the *M. & Co.* case (cited above) and urged the Court to adopt this solution pending EC accession to the Convention. Thereafter, any Convention responsibility, over and above the need to establish equivalent protection, would only arise when the State exercised a discretion accorded to it by the international organisations.

123. The European Commission considered this approach to be consistent with the recent case-law of this Court. The reference in the above-cited *Matthews* judgment to a State's Convention responsibility continuing after a transfer of competence to the EC and to the Convention responsibility of the UK was consistent with the *M. & Co.* approach given the differing impugned measures at issue in both cases. The above-cited judgments of *Waite and Kennedy* and *Beer and Regan* fully confirmed the European Commission's position. The *Cantoni* case was clearly distinguishable as this Court had reviewed the discretion exercised by the French authorities to create criminal sanctions in implementing an EC Directive.

124. The reason for initially adopting this "equivalent protection" approach (facilitating State co-operation through international organisations) was equally, if not more, pertinent today. It was an approach which was especially important for the EC given its distinctive features of supra-nationality and the nature of EC law: to require a State to review for Convention compliance an act of the EC before implementing it (with the unilateral action and non-observance of EC law that would potentially entail) would pose an incalculable threat to the very foundations of the EC, a result not envisaged by the drafters of the Convention, supportive as they were of European co-operation and integration. Moreover, subjecting individual EC acts to Convention scrutiny would amount to making the EC a respondent in Convention proceedings without any of the procedural rights and safeguards of a Contracting State to the Convention. In short, the *M. & Co.* approach allowed the Convention to be applied in a manner which took account of the needs and realities of international relations and the unique features of the EC system.

125. In the opinion of the European Commission, the respondent State had no discretion under EC law. When a case involved an Article 177 (now Article 234) reference, this Court should distinguish between the respective roles of the national courts and the ECJ, so that if the impugned act was a direct result of the ECJ's ruling this Court should refrain from scrutinising it.

In the European Commission's view, Ireland was obliged (especially given the view of the Sanctions Committee) by its duty of loyal co-operation (Article 5, now Article 10, of the EC Treaty) to appeal the judgment of Mr Justice Murphy of the High Court to the Supreme Court in order to ensure effective implementation of EC Regulation 990/93; the Supreme Court, as the last instance court, was obliged under Article 177 (now Article 234) of the EC Treaty to make a reference to the ECJ since there was no doubt that the Government's appeal before it raised a serious and central question of interpretation of Community law; the Supreme Court asked the ECJ whether Article 8 of EC Regulation 990/93 applied to an aircraft such as that leased by the applicant and the ECJ ruled that it did having reviewed the fundamental rights aspects of the case so that, although the ECJ could not examine the particular facts of cases, the present impoundment was conclusively assessed and decided by the ECJ. The ruling of the ECJ was binding on the Supreme Court.

In such circumstances, the Supreme Court had no discretion to exercise and, consequently, its implementation of the ECJ ruling was not susceptible to this Court's review.

126. Moreover, the European Commission considered that "equivalent protection" was to be found in EC laws and structures. It outlined the developing recognition of the Convention provisions as a significant source of general principles of EC law which law governed the activities of the Community institutions and States and was implemented by the EC's judicial machinery, and it noted the relevant Treaty amendments reinforcing these case-law developments.

127. Finally, the European Commission considered that the above-cited *Kondova* ruling clearly supported its position that discretionary acts of the State remained fully subject to the Convention. The applicant's reliance on Article 234 (now Article 307) of the EC Treaty was also erroneous and the conclusions drawn therefrom inappropriate: in expressing the international law principles such as *pacta sunt servanda*, Article 234 (now Article 307) simply confirmed the starting point of the relevant Convention analysis namely, that a State cannot avoid its Convention responsibilities by ceding power to an international organisation.

(b) Article 1 of Protocol No. 1

128. The European Commission considered it undisputable that EC Regulation 990/93 constituted the legal basis for the impoundment. It rejected the applicant's suggestion that the impoundment was unlawful pending national secondary legislation and agreed with the Government that the implementing statutory instrument contained administrative competence and procedural provisions which had no bearing on the directly applicable nature of EC Regulation 990/93. For the reasons set out in the AG's opinion and the ECJ's ruling, the European Commission argued that the impoundment until October 1994 was proportionate and it did not find persuasive the applicant's argument that it was unjustified thereafter.

2. *The Italian Government*

129. As regards Article 1 of the Convention, the Italian Government considered that the case amounted to a challenge to the provisions of the relevant UNSC Resolution and EC Regulation and was, as such, incompatible. The Irish State was obliged to implement these instruments, it was obliged to address the relevant organs (the Sanctions Committee and the ECJ) and to comply with the rulings obtained: this warranted a conclusion of incompatibility *ratione personae*. As to the original handing over of sovereign power to the UN and EC, this Government also relied on the case of M. & Co. arguing that both the UN and the EC provided "equivalent protection": this warranted a conclusion of incompatibility *ratione materiae* or *personae*. Finally, any imposition of an obligation on a State to review its UN and EC obligations for Convention compatibility would undermine the legal systems of international organisations and, consequently, the international response to serious international crises.

130. On the merits of Article 1 of Protocol No. 1, they underlined the importance of the public interest objective pursued by the impoundment.

3. *The Government of the United Kingdom*

131. They considered that, since the complaint was against the EC, it was incompatible with the Convention provisions. To make one Member State responsible for Community acts would, not only be contrary to Convention jurisprudence, but would also subvert fundamental principles of international law (including the separate legal personality of international organisations) and be inconsistent with the obligations of Member States of the EC. The UK relied upon the above-cited case of *M. & Co.*, noting that human rights safeguards within the Community legal order had been further strengthened since the M. & Co. decision was adopted.

132. On the merits of the complaint under Article 1 of Protocol No. 1, this Government underlined the importance of the public interest at stake, considered that the margin of appreciation was therefore wide, and argued that, even if the applicant was an innocent party, this would not render the interference with its property rights disproportionate (see the above-cite *AGOSI* and *Air Canada* judgments).

4. *Institut de Formation en Droits de l'Homme du Barreau de Paris (the Institut)*

133. The Institut considered the case compatible with the provisions of the Convention. However, it was equally of the view that this would not prevent Member States from complying with their Community obligations or mean that the Court would have jurisdiction to examine EC provisions against the Convention. The application was compatible *ratione personae*, since the object of the case was not to challenge UN or the EC provisions but rather Ireland's implementation of them. It was compatible *ratione materiae* because Article 1 did not exclude a particular type of measure or any part of a Member State's jurisdiction from scrutiny. The Institut pointed, by way of illustration, to the matters assessed by the Court in a number of cases including those of *Cantoni, Matthews* and *Waite and Kennedy* (cited above). Since neither the UN nor the EC provided equivalent human rights protection (especially when seen from the point of view of individual access to that protection and the limitations of the preliminary reference procedure), the complaint had to be found compatible.

134. As to the merits of the complaint under Article 1 of Protocol No. 1, the Institut considered the initial deprivation of the aircraft to be entirely justified but left open the justifiability of the continued retention of the aircraft after October 1994.

III. THE COURT'S ASSESSMENT

A. ARTICLE 1 OF THE CONVENTION

135. The parties and third parties made substantial submissions under Article 1 of the Convention about the Irish State's Convention responsibility for the impoundment given its EC obligations. This Article provides that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

136. The text of Article 1 requires Member States to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction" (*Ilascu and Others* v. *Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-....). The notion of "jurisdiction" reflects the term's meaning in public international law (*Gentilhomme, Schaff-Benhadji and Zerouki* v. *France*, judgment of 14 May 2002, § 20; *Bankovic and Others* v. *Belgium* and 16 other Contracting States (dec.), no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze* v. *Georgia*, ECHR 2004 -..., § 137), so that a State's jurisdictional competence is considered primarily territorial (*Bankovic*, cited above, § 59), a jurisdiction presumed to be exercised throughout the State's territory (*Ilascu and Others*, cited above, § 312).

137. In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the

"jurisdiction" of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.

138. The Court is further of the view that the submissions referred to at paragraph 135 above concerning the scope of the responsibility of the respondent State go to the merits of the complaint under Article 1 of Protocol No. 1 and are therefore examined below.

B. ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

139. This Article reads as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

140. It was not disputed that there was an "interference" (the detention of the aircraft) with the applicant's "possessions" (the benefit of its lease of the aircraft) and the Court does not see any reason to conclude otherwise (see, for example, *Stretch* v. *the United Kingdom*, no. 44277/98, §§ 32-35, 24 June 2003).

1. *The rule applicable*

141. The parties did not, however, agree on whether that interference amounted to a deprivation of property (first paragraph of Article 1 of Protocol No. 1) or a control of use (its second paragraph). It is recalled that, in guaranteeing the right of property, this Article comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (the *AGOSI* case, at § 48).

142. The Court considers that the sanctions regime amounted to a control of the use of property considered to benefit the former FRY and that the impugned detention of the aircraft was a measure to enforce that regime. While the applicant lost the benefit of approximately three years of a four-year lease, that loss formed a constituent element of the above-described control on the use of property. It is therefore the second paragraph of Article 1 which is applicable in the present case (the *AGOSI* case, at §§ 50-51 and *Gasus Dosier-und Fördertechnik GmbH* v. *the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, § 59), the "general principles of international law" within the particular meaning of the first paragraph of Article 1 of Protocol No. 1 (and relied on by the applicant) not therefore requiring separate examination (*Gasus Dosier-und Fördertechnik GmbH*, §§ 66-74).

2. *The legal basis for the impugned interference*

143. The parties strongly disagreed as to whether the impoundment was at all times based on legal obligations on the Irish State flowing from Article 8 of EC Regulation 990/93.

For the purposes of its examination of this question, the Court recalls that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community judicial organs are better placed to interpret and apply EC law. In each instance, the Court's role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, *mutatis mutandis*, *Waite and Kennedy*, cited above, § 54, and *Streletz*, *Kessler* and *Krenz* v. *Germany* [GC], nos. 34044/96, 35532/97, 44801/98, § 49, ECHR 2001-II).

144. While the applicant alluded briefly to the Irish State's role in the EC Council (at paragraph 115 above), the Court notes that the applicant's essential standpoint was that it was not challenging the provisions of the Regulation itself but rather their implementation.

145. Once adopted, EC Regulation 990/93 was "generally applicable" and "binding in its entirety" (pursuant to Article 189, now Article 249, of the EC Treaty), so that it applied to all Member States none of whom could lawfully depart from any of its provisions. In addition, its "direct applicability" was not, and in the Court's view could not be, disputed. The Regulation became part of domestic law with effect from 28 April 1993 when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation (see, in general, paragraphs 65 and 83 above).

The later adoption of S.I. 144 of 1993 did not, as suggested by the applicant, have any bearing on the lawfulness of the impoundment: it simply regulated certain administrative matters (the identity of the competent authority and the sanction to be imposed for a breach of the Regulation) as foreseen by Articles 9 and 10 of the EC Regulation. While the applicant queried which body was competent for the purposes of the Regulation (paragraph 120 above), the Court considers it entirely foreseeable that a Minister for Transport would implement the impoundment powers contained in Article 8 of EC Regulation 990/93.

It is true that the "genesis" of EC Regulation 990/93 was a UNSC Resolution adopted under Chapter VII of the UN Charter (a point developed in some detail by the Government and certain third parties). While the Resolution was pertinent to the interpretation of the Regulation (see the opinion of the AG and the ruling of the ECJ, paragraphs 45-50 and 52-55 above), the Resolution did not form part of Irish domestic law (Mr Justice Murphy, at paragraph 35 above) and could not therefore have constituted a legal basis for the impoundment by the Minister for Transport of the aircraft.

Accordingly, the Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply was later confirmed, *inter alia*, by the ECJ (paragraphs 54-55 above).

146. Thereafter, the Court finds persuasive the European Commission's submission that the State's duty of loyal co-operation (Article 5, now Article 10, of the EC Treaty) required it to appeal the High Court judgment of June 1994 to the Supreme Court in order to clarify the interpretation of EC Regulation 990/93. This was the first time that Regulation had been applied and the High Court's interpretation differed from that of the Sanctions Committee, a body appointed by the UN to interpret the UNSC Resolution implemented by the EC Regulation.

147. The Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ, for the reasons set out below.

In the first place, there being no domestic judicial remedy against its decisions, the Supreme Court had to make the preliminary reference it did having regard to the terms of Article 177 (now Article 234) of the EC Treaty and the judgment of the ECJ in the CILFIT case (see paragraph 98 above): the answer to the interpretative question put to the ECJ was not clear (the conclusions of the Sanctions Committee and the Minister for Transport conflicted with those of the High Court); the question was of central importance to the case (see the High Court's description of the essential question in the case and its consequential judgment from which the Minister appealed to the Supreme Court, paragraphs 35-36 above); and there was no previous ruling by the ECJ on the point. This finding is not affected by the observation in the Court's decision in *Moosbrugger* v. *Austria* decision (cited and relied upon by the applicant above) that an individual does not per se have a right to a referral.

Secondly, the ECJ ruling was binding on the Supreme Court (paragraph 99 above).

Thirdly, the ruling of the ECJ effectively determined the domestic proceedings in the present case. Given the Supreme Court's question and the answer of the ECJ, the only conclusion open to the former was that EC Regulation 990/93 applied to the applicant's aircraft. It is moreover erroneous to suggest, as the applicant did, that the Supreme Court could have made certain orders additional to the ECJ ruling (including a second "clarifying" reference to the ECJ) as regards impoundment

expenses, compensation and the intervening relaxation of the sanctions regime. The applicant's motion and affidavit of October 1996 filed with the Supreme Court did not develop these matters in any detail or request that Court to make such supplemental orders. In any event, the applicant was not required to discharge the impoundment expenses.

That EC Regulation 990/93 did not admit of an award of compensation was implicit in the findings of the AG and the ECJ (each considered the application of the Regulation to be justified despite the hardship that that implied) and in the expenses provisions of the second sentence of Article 8 of the Regulation. Consequently, the notions of uniform application and supremacy of EC law (paragraphs 92 and 96 above) prevented the Supreme Court from making such an award. As noted at paragraph 105 above, EC Regulation 2472/94 relaxing the EC sanctions regime from October 1994 expressly excluded from its ambit aircraft already lawfully impounded and neither the ECJ nor the Supreme Court referred to this point in their respective ruling (of July 1996) and judgment (of November 1996).

148. For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

3. *Whether the impoundment was justified*

(a) The general approach to be adopted

149. Since the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the State enjoys a wide margin of appreciation with regard to the means chosen to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (the *AGOSI* case, § 52).

150. The Court considers it evident from its finding at paragraphs 145-148 immediately above, that the general interest pursued by the impugned action was compliance with legal obligations flowing from the Irish State's membership of the EC.

It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Al-Adsani* v. *the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (the above-cited cases of *Waite and Kennedy*, at §§ 63 and 72 and *Al-Adsani*, § 54. See also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the EC25. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (*mutatis mutandis*, *S.A. Dangeville* v. *France*, cited above, at §§ 47 and 55).

151. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity (the *M. & Co.* decision, at p. 144 and Matthews at § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs

as long as it is not a Contracting Party (see *CFDT* v. *European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay* v. *European Communities*, no. 13539/88, Commission decision of 19 January 1989; the above-cited *M. & Co.* case, at p. 144 and the above-cited *Matthews* judgment, at § 32).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*United Communist Party of Turkey and Others* v. *Turkey* judgment of 30 January 1998, Reports, 1998-I, § 29).

154. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co.* at p. 145 and *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (*mutatis mutandis*, the above-cited *Matthews* v. *the United Kingdom* judgment, at §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein* v. *Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited M. & Co. decision, at p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights *(Loizidou* v. *Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, § 75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided. The *Pellegrini* case is distinguishable: the State responsibility issue raised by the enforcement of a judgment not of a Contracting Party to the Convention (the above-cited *Drozd and Janousek* case, § 110) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty. The *Matthews* case can also be distinguished: the acts for which the United Kingdom was found responsible were "international instruments which were freely entered into" by it (§ 33 of that judgment). The *Kondova* judgment (paragraph 76 above), also relied on by the applicant, is consistent with a State's Convention responsibility for acts not required by international legal obligations.

158. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a

presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

(b) Was there a presumption of Convention compliance at the relevant time?

159. The Court has described (at paragraphs 73-81 above) the fundamental rights guarantees of the EC which govern Member States, Community institutions together with natural and legal persons ("individuals").

While the constituent EC treaty did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it and that the Convention had a "special significance" as a source of such rights. Respect for fundamental rights has become "a condition of the legality of Community acts" (paragraphs 73-75 above, together with the opinion of the AG in the present case at paragraphs 45-50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act 1986 and of the TEU referred to at paragraphs 77-78 above).

This evolution has continued thereafter. The Treaty of Amsterdam 1997 is referred to at paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80-81 above).

160. However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure observance of such rights.

161. The Court has referred (at paragraphs 86-90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232), to hear related pleas of illegality under Article 184 (now Article 241) and in cases against Member States for failure to fulfil Treaty obligations (Articles 169, 170 and 171, now Articles 226, 227 and 228).

162. It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to take an action against another individual.

163. It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a Member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (paragraph 88 above).

164. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of EC law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249) and Article 177 (the preliminary reference procedure, now Article 234). It was the development by the ECJ of important notions such as the supremacy of EC law, direct effect, indirect effect and State liability (paragraphs 92-95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights' guarantees.

The ECJ maintains its control on the application by national courts of EC law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described at paragraphs 96-99 above. While the ECJ's role is limited to responding to the interpretative or validity question referred by the domestic court, the response will often be determinative of the domestic proceedings (as, indeed, it was in the present case - see paragraph 147

above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. It is further recalled that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.

165. In such circumstances, the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see paragraph 156).

(c) Has that presumption been rebutted in the present case?

166. The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the AG), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court's view, therefore, it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.

4. *Conclusion under Article 1 of Protocol No. 1*

167. It follows that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the preliminary objections; and

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention;

[omissis]

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) the joint concurring opinion of Mr Rozakis, Mrs Tulkens, Mr Traja, Mrs Botoucharova, Mr Zagrebelsky et Mr Garlicki;

(b) the concurring opinion of Mr Ress.

[omissis]

Corte europea dei diritti dell'uomo, sent. 13 ottobre 2005, *Bracci* c. *Italia* (ric. n. 36822/02) ([1])

[omissis]

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

7. Le requérant est né en 1958 et est actuellement détenu au pénitencier de Viterbe.

A. LES INVESTIGATIONS PRELIMINAIRES ET LA CONDAMNATION DU REQUERANT EN PREMIERE INSTANCE

8. Le 27 février 1998, Y, une prostituée de nationalité russe, déclara à la police de Rome que, le 18 octobre 1997, elle avait été violée et dépouillée.

9. Le 10 mars 1998, X, une prostituée de nationalité ukrainienne déclara à la police de Rome avoir été dépouillée et obligée d'accomplir un coït oral sous la menace d'un couteau. La police saisit alors une jupe, sur laquelle, selon la version fournie par X, se trouvaient des traces de sperme de l'agresseur.

10. X et Y reconnurent le requérant en photographie et fournirent une description détaillée de son aspect physique. La photographie du requérant fut reconnue aussi par une troisième femme, qui avait appelé la police et accompagné Y au commissariat.

11. Le 11 mars 1998, le requérant fut interpellé par la police alors qu'il était en train de commettre un vol à main armée à l'encontre d'une autre prostituée. Dans sa tentative de fuite, il blessa deux agents de police et essaya à plusieurs reprises de faire sortir de route les voitures de la police qui le poursuivaient. Après une échauffourée, le requérant fut enfin arrêté.

12. Le 12 mars 1998, le parquet de Rome demanda le placement du requérant en détention provisoire. Une audience se tint devant le juge des investigations préliminaires (« le GIP ») de Rome le 13 mars 1998. A cette occasion, le requérant fut interrogé ; il se déclara innocent. Le GIP valida ensuite son arrestation et le plaça en détention provisoire.

13. Des poursuites pour tentative d'homicide, résistance à fonctionnaire public, port abusif d'arme, viol, coups et blessures, dégradation de la propriété d'autrui, séquestration de personne et vol à main armée furent entamées contre le requérant. Selon la thèse du parquet, les viols auraient été perpétrés à l'encontre de X et Y.

14. Le 7 avril 1998, le requérant fut interrogé par un représentant du parquet de Rome. A cette occasion, il nomma deux avocats de son choix, Mes A et B. Le requérant déclara que la nuit du 9 au 10 mars 1998, lorsque X aurait subi les violences dénoncées, il se trouvait chez sa compagne, W. Le 11 mai 1998, cette dernière fut interrogée par la police de Rome ; elle ne confirma pas la présence du requérant à son domicile à la date en question.

15. L'audience préliminaire eut lieu le 2 juin 1998. A cette occasion, le requérant demanda à être jugé selon la « procédure abrégée » (*giudizio abbreviato*), une démarche simplifiée selon laquelle le jugement est rendu sur la base des actes accomplis par le parquet pendant l'instruction (*allo stato degli atti*) et qui entraîne, en cas de condamnation, la réduction d'un tiers de la peine. Le parquet s'opposa à la demande du requérant et le juge de l'audience préliminaire (« le GUP ») fut contraint de l'écarter.

([1]) Testo, disponibile esclusivamente in francese, tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

16. Le requérant fut ensuite renvoyé en jugement devant le tribunal de Rome.

17. Lors des débats publics, le tribunal releva que X et Y étaient devenues introuvables, et, se fondant sur l'article 512 du code de procédure pénale (« le CPP »), décida d'utiliser, pour statuer sur le bien-fondé des accusations, les déclarations que ces deux personnes avaient faites à la police avant le procès.

18. Au cours des débats, les agents de police ayant effectué l'arrestation du requérant furent interrogés. Le requérant fut également examiné.

19. Par un jugement du 2 novembre 1998, le tribunal de Rome condamna le requérant à une peine de six ans d'emprisonnement. Il observa que sur la base des témoignages des agents de police et des certificats médicaux produits, il était établi que le jour de son arrestation le requérant était en train de commettre un vol à main armée et que sa conduite précédant l'interpellation comprenait les infractions de coups et blessures, dégradation des biens d'autrui et résistance à officiers publics. Par ailleurs, le requérant possédait sans permis des armes et avait avoué avoir volé la voiture qu'il conduisait. En revanche, compte tenu de circonstances, l'action du requérant à l'encontre des policiers ne pouvait être qualifiée de tentative d'homicide.

20. Le tribunal estima que le requérant était également responsable des vols et des abus sexuels subis par X et Y. A cet égard, le tribunal se référa à la version fournie par les deux victimes à la police, considérée précise et crédible. X et Y avaient en outre correctement décrit l'aspect physique du requérant et reconnu sans hésitation sa photographie. De plus, un agent de police ayant secouru X tout de suite après les faits avait témoigné que cette dernière était blessée à la tête et au bras, circonstance par ailleurs confirmée par les certificats de l'hôpital. Il fallait également tenir compte du fait que X avait indiqué que le requérant l'avait approchée à bord d'une voiture similaire à celle que le prévenu conduisait le jour de son arrestation, et qu'à l'intérieur de celle-ci la police avait trouvé et saisi un couteau. Enfin, lors des débats, il n'avait été produit aucun élément susceptible de démentir les affirmations de X et Y ou d'amener à croire que ces deux femmes auraient pu avoir un intérêt quelconque à accuser le requérant.

21. Le tribunal relaxa le requérant pour l'infraction de séquestration de personne, estimant que la conduite de l'intéressé ne renfermait pas tous les éléments objectifs et subjectifs de ce délit.

22. Le tribunal estima enfin que l'opposition du parquet à la demande du requérant d'adopter la procédure abrégée était injustifiée. Faisant application des principes dégagés par la Cour constitutionnelle dans son arrêt no 81 de 1991, il décida de réduire d'un tiers la peine infligée au requérant. Devant la Cour, le requérant a affirmé que, contrairement à ce qui ressort du jugement du tribunal de Rome, il n'a jamais demandé l'adoption de la procédure abrégée.

B. LES PROCEDURES D'APPEL ET DE CASSATION

23. Le requérant interjeta appel contre le jugement du tribunal de Rome, contestant la crédibilité de X et Y. Il observa en outre avoir toujours nié la version des faits fournie par X et considéra que le seul moyen pour en vérifier la véracité était d'examiner l'ADN du sperme trouvé sur la jupe saisie par la police. Le requérant demanda donc à être relaxé des chefs d'accusation concernant l'agression prétendument subie par X ou bien de rouvrir l'instruction pour procéder au test ADN.

24. Par un arrêt du 16 novembre 1999, la cour d'appel de Rome confirma le jugement de première instance. Elle observa que le requérant n'avait pas contesté l'utilisation des procès-verbaux des déclarations de X et Y, se bornant à soulever des doutes quant à leur crédibilité. Cependant, aucun élément ne permettait de revenir sur les conclusions du tribunal de Rome.

25. La cour d'appel rappela également que de nombreux et graves indices pesaient à la charge du requérant et estima que ceux-ci étaient suffisants pour établir la culpabilité du prévenu. Dans ces circonstances, il ne s'imposait pas de procéder au test ADN sollicité par la défense. En effet, il appartenait au juge d'apprécier, dans chaque cas d'espèce, l'utilité d'un tel moyen de preuve.

26. Le requérant se pourvut en cassation. Dans un mémoire du 3 février 2000, qu'il rédigea personnellement, le requérant attira l'attention de la Cour de cassation sur le fait qu'aucun test ADN n'avait été pratiqué et qu'il n'avait pas pu interroger les victimes présumées des infractions. A cet égard, il observa que, s'agissant de personnes de nationalité étrangère pratiquant la prostitution, il

était tout à fait prévisible que X et Y seraient devenues introuvables. Le parquet aurait donc dû demander de les interroger au cours d'une audience fixée avant les débats (*incidente probatorio*). Le requérant demanda enfin l'application des principes du procès équitable, tels qu'établis par l'article 111 de la Constitution. Il rappela qu'aux termes de cette disposition, la culpabilité de l'accusé ne pouvait pas être prouvée sur la base de déclarations faites par une personne qui s'était toujours librement et volontairement soustraite à une audition par l'accusé ou son défenseur.

27. Par un arrêt du 5 décembre 2000, la Cour de cassation débouta le requérant de son pourvoi. Elle observa que le requérant avait rédigé, personnellement et de façon difficilement lisible, les moyens à l'appui de ses doléances et qu'il contestait, pour l'essentiel, l'évaluation des preuves à sa charge. Cependant, la cour d'appel avait motivé de façon logique et correcte tous les points controversés.

C. LE RECOURS EN REVISION DU REQUERANT

28. Le 22 novembre 2001, le requérant demanda la révision de son procès. Il souligna avoir été condamné sur la base des déclarations de personnes qu'il n'avait jamais eu l'opportunité d'interroger et rappela que les autorités avaient refusé d'accomplir la seule vérification qui aurait pu exclure sa culpabilité, à savoir le test ADN. Le requérant demanda également la convocation de Mme M., un témoin qui aurait pu déclarer avoir été en sa compagnie au moment de l'agression à X.

29. Par une ordonnance du 5 mars 2002, la cour d'appel de Pérouse déclara le recours du requérant irrecevable pour défaut manifeste de fondement.

30. Le requérant se pourvut en cassation.

31. Par un arrêt du 5 février 2003, la Cour de cassation débouta le requérant de son pourvoi. Elle observa que le test ADN n'était pas une « preuve nouvelle », s'agissant, au contraire, d'un élément évalué – et estimé non pertinent – par les juges du fond. Quant à la demande de convoquer Mme M., le requérant avait omis de produire une déclaration écrite de ce témoin, et n'avait indiqué ni les raisons pour lesquelles son audition n'avait pas été demandée devant les juges du fond, ni les éléments pouvant amener à l'estimer crédible.

II. LE DROIT INTERNE PERTINENT

32. L'article 512 du CPP se lit ainsi : « Le juge, à la demande des parties, ordonne la lecture des actes accomplis par la police judiciaire, par le parquet et par le juge dans le cadre de l'audience préliminaire lorsque, pour des faits ou circonstances imprévisibles, leur réitération est devenue impossible. »

33. En 1999, le Parlement a décidé d'insérer le principe du procès équitable dans la Constitution elle-même (voir la loi constitutionnelle no 2 du 23 novembre 1999). L'article 111 de la Constitution, dans sa nouvelle formulation et dans ses parties pertinentes, se lit ainsi : « (...) Dans le cadre du procès pénal, la loi garantit que la personne accusée d'une infraction (...) a la faculté, devant le juge, d'interroger ou de faire interroger toute personne formulant des déclarations à charge (...). La culpabilité de l'accusé ne peut pas être prouvée sur la base de déclarations faites par une personne qui s'est toujours librement et volontairement soustraite à une audition par l'accusé ou son défenseur. La loi réglemente les cas où un examen contradictoire des moyens de preuve n'a pas lieu, avec le consentement de l'accusé ou en raison d'une impossibilité objective dûment prouvée ou encore en raison d'un comportement illicite dûment prouvé. »

34. Dans ses parties pertinentes, l'article 603 §§ 1 et 2 du CPP se lit ainsi : « 1. Lorsqu'une partie, dans ses moyens d'appel (...) a demandé une nouvelle production de preuves déjà produites au cours des débats de première instance ou la production de nouvelles preuves, le juge, s'il estime ne pas être en condition de trancher [l'affaire] sur la base du dossier (*se ritiene di non essere in grado di decidere allo stato degli atti*), ordonne la réouverture de l'instruction. 2. Si les nouvelles preuves sont survenues ou [ont été] découvertes après le procès de première instance, le juge ordonne la réouverture de l'instruction dans les limites prévues à l'article 495 § 1 [exclusion des preuves interdites par la loi, manifestement superflues ou sans intérêt pour la procédure]. »

EN DROIT

I. SUR L'EXCEPTION PRÉLIMINAIRE DU GOUVERNEMENT

35. Dans ses observations complémentaires sur le bien-fondé de la requête, présentées le 15 février 2005, le Gouvernement observe pour la première fois qu'en demandant l'adoption de la procédure abrégée, le requérant a renoncé, en contrepartie à une réduction de peine, à un examen contradictoire des moyens de preuve à charge, ainsi qu'à l'introduction de nouvelles preuves à décharge. Il est vrai que cette demande a initialement été écartée à cause de l'opposition du parquet ; cependant, le tribunal de Rome a estimé ladite opposition injustifiée et a réduit d'un tiers la peine infligée au requérant. Ainsi, ce dernier a été placé dans la même situation dans laquelle il se serait trouvé si sa demande d'adoption de la procédure abrégée avait été accueillie. Selon le Gouvernement, le requérant a été jugé selon les voies ordinaires, mais son procès se serait « reconverti » en procédure abrégée au moment du prononcé du jugement du tribunal de Rome. Le Gouvernement en déduit que le requérant, qui a bénéficié des avantages de la procédure abrégée, ne saurait se plaindre de l'impossibilité d'exercer les droits procéduraux qui sont exclus du fait de l'adoption de cette procédure.

36. Dans la mesure où les observations présentées par le Gouvernement sur ce point s'apparentent à une exception préliminaire tirée du défaut de la qualité de victime, la Cour rappelle qu'aux termes de l'article 55 de son règlement, si la Partie contractante défenderesse entend soulever une exception d'irrecevabilité, elle doit le faire dans les observations écrites ou orales sur la recevabilité de la requête présentées par elle (*K. et T.* c. *Finlande* [GC], no 25702/94, § 145, CEDH 2001-VII, et *N.C.* c. *Italie* [GC], no 24952/94, § 44, CEDH 2002-X). Or, dans ses observations écrites sur la recevabilité, le Gouvernement n'a pas soutenu que la demande du requérant d'adoption de la procédure abrégée s'analysait en une renonciation à un examen contradictoire des moyens de preuve. Par ailleurs, la Cour ne saurait déceler aucune circonstance exceptionnelle susceptible d'exonérer le Gouvernement de l'obligation de soulever ses exceptions préliminaires avant l'adoption de la décision de la Cour sur la recevabilité de la requête du 2 décembre 2004 (*Prokopovich* c. *Russie*, no 58255/00, § 29, 18 novembre 2004).

37. Par conséquent, à ce stade de la procédure le Gouvernement est forclos à formuler une exception préliminaire portant sur le défaut de la qualité de victime (voir, *mutatis mutandis*, *Mascolo* c. *Italie*, no 68792/01, § 46, 16 décembre 2004). Il s'ensuit que l'exception préliminaire du Gouvernement doit être rejetée.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 DE LA CONVENTION

38. Le requérant considère que la procédure pénale menée à son encontre n'a pas été équitable. Il invoque l'article 6 §§ 1, 2 et 3 de la Convention, qui, dans ses parties pertinentes, se lit comme suit : « 1. Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial (...) qui décidera (...) du bien-fondé de toute accusation en matière pénale dirigée contre elle. (...) 2. Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie. 3. Tout accusé a droit notamment à : (...) d) interroger ou faire interroger les témoins à charge et obtenir la convocation et l'interrogation des témoins à décharge dans les mêmes conditions que les témoins à charge ; (...). »

A. ARGUMENTS DES PARTIES

1. *Le requérant*

39. Le requérant allègue qu'il ressort des décisions des juridictions nationales que les juges l'ayant condamné n'étaient pas indépendants et impartiaux, et que sa culpabilité n'a pas été établie « légalement », mais sur la base d'hypothèses et indices. Le requérant affirme en outre qu'au cours de la procédure judiciaire le concernant, plusieurs erreurs ont été commises par les tribunaux internes, qui n'auraient ni correctement établi les faits, ni respecté les garanties procédurales offertes par

les dispositions nationales pertinentes. Le requérant se plaint en particulier de ne pas avoir été examiné par le GIP, de ne pas avoir pu interroger X et Y, ainsi que du fait qu'aucun test ADN n'a été effectué pour établir à qui appartenait le sperme trouvé sur la jupe de X. Le requérant conteste enfin la qualité de l'assistance juridique fournie en première instance par Me A, l'un des avocats de son choix.

40. Le requérant souligne qu'en première instance le test ADN avait été sollicité par le parquet et la défense avait donné son accord. Toutefois, le président du tribunal aurait déclaré la clôture de l'instruction sans expliquer pourquoi on ne procédait pas au test en question, qui aurait pourtant pu fournir la preuve certaine et irréfutable de l'innocence de l'accusé.

41. Le requérant considère que l'utilisation des déclarations de X et Y a été contraire au droit national, et que l'impossibilité d'obtenir la présence de ces témoins aux débats était tout à fait prévisible. Quant aux déclarations des agents de police, elles ne contiendraient pas d'éléments suffisants pour établir la culpabilité de l'accusé par rapport aux épisodes de viol et vol à main armée. Il en irait de même pour ce qui est des déclarations de X et Y, qui seraient peu précises et contradictoires.

2. *Le Gouvernement*

42. Le Gouvernement allègue que dans certaines circonstances, il est légitime de refuser d'interroger un témoin qui est disponible. A plus forte raison, on ne saurait interdire l'utilisation des déclarations d'un témoin dont la présence aux débats ne peut pas être obtenue pour des raisons objectives. Ceci serait confirmé par la jurisprudence de la Cour, qui, dans l'affaire *Ferrantelli et Santangelo* c. *Italie* (voir arrêt du 7 août 1996, Recueil des arrêts et décisions 1996-III), a conclu à la non-violation de l'article 6 de la Convention en relation à la production des procès-verbaux des interrogatoires d'un témoin décédé. De plus, l'utilisation de déclarations que l'accusé n'a jamais eu la possibilité de contester directement serait une pratique normale dans tout les cas de «purge» de contumace, un système adopté par des nombreux Etats.

43. En l'espèce, l'impossibilité de repérer X et Y constituait une anomalie, et était donc une circonstance imprévisible non imputable à l'Etat. Le fait que ces deux personnes étaient en situation irrégulière et que l'une d'entre elles avait été invitée à quitter l'Italie ne changerait rien à cette conclusion.

44. La production et l'utilisation des procès-verbaux des dépositions faites par X et Y à la police avaient une base légale en droit national, à savoir l'article 512 du CPP. Cette disposition introduit une dérogation à la règle générale selon laquelle tout témoignage doit être fait au cours des débats. Elle se justifierait par l'exigence d'établir les faits à la lumière des actes accomplis pendant l'instruction et ne pouvant plus été répétés pour cause de force majeure.

45. De l'avis du Gouvernement, l'article 512 du CPP garantit un juste équilibre entre la protection des droits de la défense et l'exigence de sauvegarder les preuves légitimement formées. En conclure autrement équivaudrait à accepter que l'efficacité de la lutte contre la criminalité puisse être conditionnée par le décès, la maladie ou la disparition d'un témoin. Par ailleurs, la liberté de mouvement d'un témoin ou d'une victime ne saurait être limitée pour assurer la présence de cette personne aux débats.

46. Le Gouvernement attire l'attention de la Cour sur la motivation du jugement du 2 novembre 1998, où le tribunal de Rome a estimé que les déclarations des deux victimes étaient précises et corroborées par de nombreux éléments, tels que les affirmations des agents de police, les certificats médicaux produits par le parquet et la circonstance qu'un couteau avait été trouvé à l'intérieur de la voiture conduite par le requérant. De plus, X et Y avaient décrit avec précision les traits du visage du requérant et reconnu sa photographie, et aux débats publics aucune élément susceptible de mettre en doute leur version n'a été produit. X et Y ne connaissaient pas le requérant, n'avaient aucune raison d'inimitié à son encontre et avaient fourni sa description avant son arrestation. Aussi une troisième femme avait reconnu le requérant et sa version, comme celles de X et Y, coïncidait avec les témoignages des agents de police. Par ailleurs, dix jours après la première plainte et au lendemain de la deuxième, le requérant a été surpris en flagrant délit alors qu'il essayait de commettre, aux dépenses d'une autre prostituée de la même zone, une agression entièrement semblable à celles

dont X et Y l'accusaient. La conduite du requérant au moment de son arrestation aurait confirmé sa culpabilité au-delà de tout doute raisonnable. Enfin, la description de la voiture utilisée pour commettre les infractions correspondait à celle volée par le requérant et l'alibi déclaré par ce dernier a été démenti par W.

47. A la lumière de ce qui précède, le Gouvernement considère que la condamnation du requérant ne s'est pas basée exclusivement sur les déclarations des victimes. A cet égard, il affirme que la Cour n'a pas pour tâche de se livrer à sa propre évaluation du poids respectif des divers éléments de preuve appréciés par les juges nationaux. Dès lors, elle ne saurait spéculer sur celle qui aurait été la décision de ces derniers s'ils n'avaient pas utilisé – ou, plutôt, s'ils avaient moins utilisé – les déclarations de X et Y.

48. Au demeurant, le Gouvernement relève que le requérant a bénéficié d'importantes garanties procédurales, ayant eu la possibilité d'interroger les agents de police, d'éclaircir les circonstances de la reconnaissance de sa photographie, d'examiner les procès-verbaux des déclarations des victimes et d'en contester le contenu. De plus, l'intéressé a pu présenter les preuves à décharge qu'il a estimées utiles pour sa défense, parmi lesquelles un alibi qui par la suite n'a pas été confirmé.

B. APPRECIATION DE LA COUR

49. Etant donné que les exigences du paragraphe 3 représentent des aspects particuliers du droit à un procès équitable garanti par le paragraphe 1 de l'article 6, la Cour examinera les doléances du requérant sous l'angle de ces deux textes combinés (voir, parmi beaucoup d'autres, *Van Geyseghem* c. *Belgique* [GC], no 26103/95, CEDH 1999-I, § 27).

50. Elle rappelle de surcroît qu'elle a pour tâche, aux termes de l'article 19 de la Convention, d'assurer le respect des engagements résultant de la Convention pour les Etats contractants. Il ne lui appartient pas, en particulier, de connaître des erreurs de fait ou de droit prétendument commises par une juridiction interne, sauf si et dans la mesure où elles pourraient avoir porté atteinte aux droits et libertés sauvegardés par la Convention. Si l'article 6 garantit le droit à un procès équitable, il ne réglemente pas pour autant l'admissibilité des preuves en tant que telle, matière qui relève au premier chef du droit interne (*Schenk* c. *Suisse*, arrêt du 12 juillet 1988, série A no 140, p. 29, §§ 45-46).

51. La Cour n'est donc pas compétente pour se prononcer sur le point de savoir si des dépositions de témoins ont été à bon droit admises comme preuves ou encore sur la culpabilité du requérant (voir, parmi beaucoup d'autres, *Lucà* c. *Italie*, no 33354/96, § 38, CEDH 2001-II, et *Khan* c. *Royaume-Uni*, no 35394/97, § 34, CEDH 2000-V). La mission confiée à la Cour par la Convention consiste uniquement à rechercher si la procédure considérée dans son ensemble, y compris le mode de présentation des moyens de preuve, a revêtu un caractère équitable et si les droits de la défense ont été respectés (*De Lorenzo* c. *Italie* (déc.), no 69264/01, 12 février 2004). Il ne lui incombe donc pas d'établir si les affirmations des témoins à charge étaient crédibles et suffisantes pour prononcer une condamnation, ou encore si en droit italien le GIP était contraint d'interroger le requérant. A ce dernier égard, il suffit de noter qu'au cours de la procédure judiciaire l'intéressé a eu d'amples occasions de présenter sa version des faits devant les juridictions du fond.

52. La Cour observe également que les craintes du requérant d'un manque d'indépendance et d'impartialité des juges nationaux se fondent uniquement sur le contenu des décisions judiciaires prononcées à son encontre. Elles ne sauraient dès lors passer pour objectivement justifiées. Dans la mesure où le requérant se plaint de la qualité de l'assistance juridique fournie par Me A, avocat de son choix, ses allégations sont dirigées contre un particulier. De plus, il n'a pas été démontré que la carence de l'avocat apparaissait manifeste ou que les autorités nationales en avaient été informées (*Rainer* c. *Italie* (déc.), no 4784/03, 20 janvier 2005, et, a contrario, *Daud* c. *Portugal*, arrêt du 21 avril 1998, Recueil des arrêts et décisions 1998-II, pp. 749-751, §§ 38-43), et le requérant a de toute manière bénéficié aussi de l'assistance d'un autre conseil, Me B.

53. Il reste à établir si les droits de la défense ont été enfreints par l'impossibilité d'interroger ou faire interroger X et Y aux débats et par le refus d'ordonner un test ADN sur le sperme trouvé sur la jupe de X.

1. *L'impossibilité d'interroger ou faire interroger X et Y*

54. La Cour rappelle que les éléments de preuve doivent en principe être produits devant l'accusé en audience publique, en vue d'un débat contradictoire. Ce principe ne va pas sans exceptions, mais on ne peut les accepter que sous réserve des droits de la défense ; en règle générale, les paragraphes 1 et 3 d) de l'article 6 commandent d'accorder à l'accusé une occasion adéquate et suffisante de contester un témoignage à charge et d'en interroger l'auteur, au moment de la déposition ou plus tard (*Lüdi* c. *Suisse*, arrêt du 15 juin 1992, série A no 238, p. 21, § 49, et *Van Mechelen et autres* c. *Pays-Bas*, arrêt du 23 avril 1997, Recueil 1997-III, p. 711, § 51).

55. En effet, comme la Cour l'a précisé à plusieurs reprises (voir, entre autres, *Isgrò* c. *Italie*, arrêt du 19 février 1991, série A no 194-A, p. 12, § 34, et *Lüdi* précité, p. 21, § 47), dans certaines circonstances il peut s'avérer nécessaire, pour les autorités judiciaires, d'avoir recours à des dépositions remontant à la phase de l'instruction préparatoire. Si l'accusé a eu une occasion adéquate et suffisante de contester pareilles dépositions, au moment où elles sont faites ou plus tard, leur utilisation ne se heurte pas en soi à l'article 6 §§ 1 et 3 d). Il s'ensuit, cependant, que les droits de la défense sont restreints de manière incompatible avec les garanties de l'article 6 lorsqu'une condamnation se fonde, uniquement ou dans une mesure déterminante, sur des dépositions faites par une personne que l'accusé n'a pu interroger ou faire interroger ni au stade de l'instruction ni pendant les débats (*Lucà* précité, § 40, *A.M.* c. *Italie*, no 37019/97, § 25, CEDH 1999-IX, et *Saïdi* c. *France*, arrêt du 20 septembre 1993, série A no 261-C, pp. 56-57, §§ 43-44).

56. En l'espèce, le requérant a été condamné, entre autres, pour deux épisodes distinctes de vol et abus sexuel, infractions commises, respectivement, à l'encontre de X et Y. Ces deux témoins ne se sont pas présentées aux débats, et, en application de l'article 512 du CPP, les déclarations qu'elles avaient faites à la police ont été lues et utilisées pour décider du bien-fondé des chefs d'accusation. Par conséquent, la défense n'a eu, à aucun stade de la procédure, la possibilité de l'interroger ou faire interroger les personnes qui accusaient le requérant par rapport aux deux épisodes incriminés.

57. La Cour relève qu'en ce qui concerne l'agression subie par X, les déclarations de la victime ne constituaient point le seul élément de preuve sur lequel les juges du fond ont appuyé la condamnation du requérant (voir, *mutatis mutandis* et parmi beaucoup d'autres, *Raniolo* c. *Italie* (déc.), no 62676/00, 21 mars 2002, *Sangiorgi* c. *Italie* (déc.), no 70981/01, 5 septembre 2002, *Sofri et autres* c. *Italie* (déc.), no 37235/97, CEDH 2003-VIII, *De Lorenzo*, décision précitée, et *Chifari* c. *Italie* (déc.), no 36037/02, 13 mai 2004). S'y ajoutèrent, en effet, le témoignage d'un policier ayant secouru la victime, la similitude entre la voiture décrite par X et celle conduite par le requérant et la saisie d'un couteau à l'intérieur de cette dernière. Lus en conjonction avec les affirmations de X, ces éléments ont amené le tribunal de Rome à estimer que le requérant était coupable des faits qui lui étaient reprochés (paragraphe 20 ci-dessus ; voir, *mutatis mutandis*, *Jerinò* c. *Italie* (déc.), no 27549/02, 7 juin 2005).

58. Dans ces conditions, la Cour ne saurait conclure que l'impossibilité d'interroger X a porté atteinte aux droits de la défense au point d'enfreindre les paragraphes 1 et 3 d) de l'article 6 (voir, *mutatis mutandis* et parmi beaucoup d'autres, *Artner* c. *Autriche*, arrêt du 28 août 1992, série A no 242-A, pp. 10-11, §§ 22-24, et *P.M.* c. *Italie* (déc.), no 43625/98, 8 mars 2001).

59. Il en va autrement en ce qui concerne les infractions commises à l'encontre de Y, par rapport auxquelles, pour conclure à la condamnation du requérant, les juridictions nationales se sont fondées exclusivement sur les déclarations faites par la victime avant le procès.

60. Dans ces conditions, on ne saurait conclure que le requérant a bénéficié d'une occasion adéquate et suffisante de contester les déclarations sur lesquelles sa condamnation pour l'agression contre Y s'est fondée (voir, *mutatis mutandis*, *Lucà* précité, §§ 43-45, *A.M.* c. *Italie* précité, §§ 26-28, et *P.S.* c. *Allemagne*, no 33900/96, §§ 30-32, 20 décembre 2001). Le fait que le droit national prévoit que, face à l'impossibilité de réitérer un acte accompli au cours des investigations préliminaires, les déclarations formulées avant les débats peuvent être lues et utilisées par le juge (paragraphe 32 ci-dessus), ne saurait priver l'inculpé du droit, que l'article 6 § 3 d) lui reconnaît, d'examiner ou de faire examiner de manière contradictoire tout élément de preuve substantiel à sa charge.

61. Pour le chef d'accusation concernant les infractions commises contre Y, le requérant n'a donc pas bénéficié d'un procès équitable ; dès lors, il y a eu violation de l'article 6 §§ 1 et 3 d) de la Convention.

2. *Le refus d'ordonner un test ADN*

62. Le requérant se plaint enfin du refus d'ordonner la production d'une preuve à décharge, à savoir un test ADN sur les traces de sperme trouvées sur la jupe de X. Il allègue que le test en question aurait pu démontrer que le sperme n'était pas le sien et qu'une autre personne avait agressé X. Cependant, la cour d'appel de Rome a estimé que cet acte d'instruction était sans intérêt pour la procédure (paragraphe 25 ci-dessus), et a fondé son opinion sur des arguments ponctuels et logiques.

63. En particulier, comme la Cour vient de le noter plus haut (paragraphe 57 ci-dessus), la condamnation du requérant pour le vol et l'abus sexuel perpétrés à l'encontre de X était fondée sur la version de la victime, corroborée par de nombreux et graves indices (voir, *mutatis mutandis*, *Korellis* c. *Chypre* (déc), no 60804/00, 3 décembre 2002). Par ailleurs, le tribunal de Rome avait eu l'occasion de souligner que rien ne permettait de croire que X avait un intérêt quelconque à fabriquer des fausses accusations contre le requérant (paragraphe 20 ci-dessus).

64. Enfin, il convient d'observer que le requérant n'a pas demandé l'accomplissement du test ADN en première instance, se bornant à solliciter cette preuve dans ses moyens d'appel. Cependant en droit italien lors de la procédure de deuxième instance la production de nouvelles preuves revêt un caractère exceptionnel, devant être ordonnée seulement si le juge estime ne pas être en mesure de trancher sur la base du dossier (paragraphe 34 ci-dessus ; voir *Crescente* c. *Italie* (déc.), no 16565/02, 7 décembre 2004, et, *mutatis mutandis*, *Pisano* c. *Italie*, no 36732/97, § 22, 27 juillet 2000). Or, pour les raisons indiquées ci-dessus, cette condition ne semblait pas remplie en l'espèce.

65. On peut regretter qu'un test ADN n'ait pas été accompli car ses résultats auraient pu soit confirmer la version de la victime, soit fournir au requérant des éléments substantiels pour entamer la crédibilité de cette version (voir, *mutatis mutandis*, *Sofri et autres* c. *Italie* (déc.), no 37235/97, CEDH 2003-VIII). Néanmoins, la Cour ne saurait conclure à l'existence, en l'espèce, de circonstances spéciales de nature à la convaincre que le refus d'accomplir l'acte d'instruction indiqué par le requérant était incompatible avec l'article 6 (voir, *mutatis mutandis*, *Araniti* c. *Italie* (déc.), no 48629/99, 15 mars 2001, *Raniolo* précitée, no 62676/00, 21 mars 2002, et *Sangiorgi* précitée).

3. *Conclusion*

66. Au vue de ce qui précède, la Cour conclut qu'il y a eu violation de l'article 6 §§ 1 et 3 d) de la Convention en raison de l'impossibilité d'interroger le témoin à charge Y, et qu'il n'y a pas eu violation de cette disposition quant aux autres doléances soulevées par le requérant.

III. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

67. Aux termes de l'article 41 de la Convention, « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

68. Le requérant demande à être mis en mesure de démonter son innocence, notamment par moyen d'un test ADN. A cette fin, il prie la Cour à mettre en place tous les moyens dont elle dispose pour pousser l'Etat italien à rouvrir son procès. Dans l'hypothèse malchanceuse où la jupe de X aurait été détruite et le test ADN deviendrait impossible, le requérant demande que la grâce lui soit octroyée.

69. Le requérant allègue avoir subi un préjudice moral important. Il estime avoir été condamné injustement pour des infractions graves, ce qui l'empêche d'obtenir des réductions de peine, des autorisations de sortie ou des mesures alternatives à la détention. Ceci l'a plongé dans un état de détresse physique et psychique, débouchant sur des tentatives de suicide. De plus, ses vicissitudes ju-

diciaires ont provoqué l'éloignement de sa fille. Le requérant n'avance aucune proposition chiffrée et s'en remet à la sagesse de la Cour.

70. Le Gouvernement observe que le requérant a été condamné pour plusieurs infractions, dont une partie n'était pas liée aux déclarations de X et Y, s'agissant au contraire de conduites constatées de visu par les agents de la police. Dans ces conditions, « il ne saurait (...) être question de la réouverture du procès, par ailleurs impossible en droit italien, du moins en l'état actuel de la législation».

71. La Cour rappelle qu'elle sera en mesure d'octroyer des sommes au titre de la satisfaction équitable prévue par l'article 41 lorsque la perte ou les dommages réclamés ont été causés par la violation constatée, l'Etat n'étant par contre pas censé verser des sommes pour les dommages qui ne lui sont pas imputables (*Perote Pellon* c. *Espagne*, no 45238/99, § 57, 25 juillet 2002).

72. En l'espèce, la Cour a constaté une violation de l'article 6 de la Convention uniquement en raison de l'impossibilité, pour le requérant, d'interroger le témoin à charge Y. Cette constatation n'implique pas nécessairement que la condamnation du requérant ait été mal fondée (voir, *mutatis mutandis*, *Hauschildt* c. *Danemark*, arrêt du 24 mai 1989, série A no 154, p. 24, § 57, et *Cianetti* c. *Italie*, no 55634/00, § 50, 22 avril 2004), d'autant plus que les autres griefs du requérant ont été écartés et que les déclarations de Y n'ont été déterminantes que pour établir la réalité de l'un des épisodes reprochés au requérant.

73. De plus, la Cour ne saurait spéculer sur le résultat auquel la procédure litigieuse aurait abouti si elle avait été conforme à l'article 6 §§ 1 et 3 d) de la Convention (*Lucà* précité, § 48). Dès lors, elle ne saurait déceler aucun lien de causalité direct entre la violation constatée dans le présent arrêt et le préjudice allégué par le requérant du fait de son incarcération et des répercussions négatives que ses vicissitudes judiciaires ont eues sur son état de santé et sur sa vie familiale.

74. La Cour estime que, dans les circonstances de l'espèce, le constat de violation constitue en soi une satisfaction équitable suffisante (*Craxi* c. *Italie*, no 34896/97, § 112, 5 décembre 2005).

75. Lorsque la Cour conclut que la condamnation d'un requérant a été prononcée au terme d'une procédure qui n'était pas équitable, elle estime qu'en principe le redressement le plus approprié serait de faire rejuger l'intéressé en temps utile et dans le respect des exigences de l'article 6 (voir, *mutatis mutandis*, *Somogyi* c. *Italie*, no 67972/01, § 86, 18 mai 2004, et *Gençel* c. *Turquie*, no 53431/99, § 27, 23 octobre 2003).

B. FRAIS ET DEPENS

76. Le requérant n'a pas demandé le remboursement des frais et dépenses encourus au niveau interne et pour la procédure européenne.

77. Par conséquent, la Cour décide de n'octroyer aucune somme à ce titre (*Craxi* c. *Italie (no 2)*, no 25337/94, § 92, 17 juillet 2003).

C. INTERETS MORATOIRES

78. La Cour juge approprié de baser le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Rejette* l'exception préliminaire du Gouvernement ;

2. *Dit* qu'il y a eu violation de l'article 6 §§ 1 et 3 d) de la Convention en raison de l'impossibilité, pour le requérant, d'interroger le témoin à charge Y ;

3. *Dit* qu'il n'y a pas eu violation de l'article 6 §§ 1 et 3 d) de la Convention quant aux autres griefs soulevés par le requérant ;

4. *Dit* que le constat d'une violation fournit en soi une satisfaction équitable suffisante pour le dommage moral subi par le requérant ;

5. *Rejette* la demande de satisfaction équitable pour le surplus.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 1° marzo 2006, *Sejdovic* c. *Italia* (ric. n. 56581/00) ([1])

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1972 and lives in Hamburg (Germany).

11. On 8 September 1992 a Mr S. was fatally injured by a shot fired at a travellers' encampment (*campo nomadi*) in Rome. The initial statements taken by the police from witnesses indicated that the applicant had been responsible for the killing.

12. On 15 October 1992 the Rome investigating judge made an order for the applicant's detention pending trial. However, the order could not be enforced as the applicant had become untraceable. As a result, the Italian authorities considered that he had deliberately sought to evade justice and on 14 November 1992 declared him to be a "fugitive" (*latitante*). The applicant was identified as Cloce (or Kroce) Sejdovic (or Sajdovic), probably born in Titograd on 5 August 1972, the son of Jusuf Sejdovic (or Sajdovic) and the brother of Zaim (ou Zain) Sejdovic (or Sajdovic).

13. As the Italian authorities had not managed to contact the applicant to invite him to choose his own defence counsel, they assigned him a lawyer, who was informed that his client and four other persons had been committed for trial on a specified date in the Rome Assize Court.

14. The lawyer took part in the trial, but the applicant was absent.

15. In a judgment of 2 July 1996, the text of which was deposited with the registry on 30 September 1996, the Rome Assize Court convicted the applicant of murder and illegally carrying a weapon and sentenced him to twenty-one years and eight months' imprisonment. One of the applicant's fellow defendants was sentenced to fifteen years and eight months' imprisonment for the same offences, while the other three were acquitted.

16. The applicant's lawyer was informed that the Assize Court's judgment had been deposited with the registry. He did not appeal. The applicant's conviction accordingly became final on 22 January 1997.

17. On 22 September 1999 the applicant was arrested in Hamburg by the German police under an arrest warrant issued by the Rome public prosecutor's office. On 30 September 1999 the Italian Minister of Justice requested the applicant's extradition. He added that, once he had been extradited to Italy, the applicant would be entitled to apply under Article 175 of the Code of Criminal Procedure ("the CCP") for leave to appeal out of time against the Rome Assize Court's judgment.

18. At the request of the German authorities, the Rome public prosecutor's office stated that it did not appear from the evidence that the applicant had been officially notified of the charges against him. The public prosecutor's office was unable to say whether the applicant had contacted the lawyer assigned to represent him. In any event, the lawyer had attended the trial and had played an active role in conducting his client's defence, having called a large number of witnesses. Furthermore, the Rome Assize Court had clearly established that the applicant, who had been identified by numerous witnesses as Mr S.'s killer, was guilty. In the opinion of the public prosecutor's office, the applicant had absconded immediately after Mr S.'s death precisely to avoid being arrested and tried. Lastly, the public prosecutor's office stated: "A person who is to be extradited may seek leave to appeal against the judgment. However, for a court to agree to re-examine the case it

([1]) Testo tratto dalla banca dati Hudoc - *http://cmiskp.echr.coe.int.*

has to be proved that the accused was wrongly deemed to be a 'fugitive'. To sum up, a new trial, even in the form of an appeal (during which new evidence may be submitted), is not granted automatically."

19. On 6 December 1999 the German authorities refused the Italian Government's extradition request on the ground that the requesting country's domestic legislation did not guarantee with sufficient certainty that the applicant would have the opportunity of having his trial reopened.

20. In the meantime, the applicant had been released on 22 November 1999. He has never lodged an objection to execution (*incidente d'esecuzione*) or an application for leave to appeal out of time (see "Relevant domestic law and practice" below) in Italy.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The validity of a conviction may be contested by means of an objection to execution under Article 670 § 1 of the CCP, the relevant parts of which provide: "Where the judge supervising enforcement establishes that a judgment is invalid or has not become enforceable, he shall, [after] assessing on the merits [*nel merito*] whether the safeguards in place for a convicted person deemed to be untraceable have been observed, ... suspend its enforcement, ordering, where necessary, that the person be released and that defects in the service of process be remedied. In such cases the time allowed for appealing shall begin to run again."

22. Article 175 §§ 2 and 3 of the CCP provides for the possibility of applying for leave to appeal out of time. The relevant parts of that provision were worded as follows at the time of the applicant's arrest: "In the event of conviction *in absentia* ..., the defendant may request the reopening of the time allowed for appeal against the judgment where he can establish that he had no effective knowledge [*effettiva conoscenza*] [of it] ... [and] on condition that no appeal has been lodged by his lawyer and there has been no negligence on his part or, in the case of a conviction in absentia having been served ... on his lawyer ..., that he did not deliberately refuse to take cognisance of the procedural steps.

A request for the reopening of the time allowed for appeal must be lodged within ten days of the date ... on which the defendant learned [of the judgment], failing which it shall be declared inadmissible."

23. When called upon to interpret this provision, the Court of Cassation has held that the refusal of an application for leave to appeal out of time cannot be justified by mere negligence or lack of interest on the defendant's part but that, on the contrary, there must have been "intentional conduct designed to avoid taking cognisance of the procedural steps" (see the First Section's judgment of 6 March 2000 (no. 1671) in the *Collini* case, and also the Court of Cassation's judgment no. 5808/1999). More specifically, where a judgment has been served on the accused in person, the accused must prove that he or she was unaware of it and that there has been no negligence on his or her part; however, where the judgment has been served on an absent defendant's lawyer, it is for the court to establish whether the defendant deliberately avoided taking cognisance of the relevant steps (see the Second Section's judgment of 29 January 2003 (no. 18107) in the *Bylyshi* case, where the Court of Cassation set aside an order in which the Genoa Court of Appeal had held that negligence could only be due to the wish not to receive any information, thereby treating negligent conduct as intentional without giving any arguments in support of that position).

24. In its judgment of 25 November 2004 (no. 48738) in the *Soldati* case, the Court of Cassation (First Section) observed that leave to appeal out of time could be granted on two conditions: if the accused had not had any knowledge of the proceedings and if he or she had not deliberately avoided taking cognisance of the procedural steps. It was for the convicted person to prove that the first condition was satisfied, whereas the burden of proof in respect of the second lay with the "representative of the prosecution or with the court". Accordingly, a lack of evidence as regards the second condition could only work to the defendant's advantage. The Court of Cassation accordingly held that before declaring defendants to be "fugitives", the authorities should not only search for them in a manner appropriate to the circumstances of the case but should also establish whether they had intentionally avoided complying with a measure ordered by the court, such as a measure

entailing deprivation of liberty (see the First Section's judgment of 23 February 2005 (no. 6987) in the case of *Flordelis and Pagnanelli*).

25. On 22 April 2005 Parliament approved Law no. 60/2005, by which Legislative Decree no. 17 of 21 February 2005 became statute. Law no. 60/2005 was published in Official Gazette (*Gazzetta ufficiale*) no. 94 of 23 April 2005. It came into force the following day.

26. Law no. 60/2005 amended Article 175 of the CCP. The new version of paragraph 2 reads as follows: "In the event of conviction in absentia ... the time allowed for appeal against the judgment shall be reopened, on an application by the defendant, unless he had effective knowledge [*effettiva conoscenza*] of the proceedings [against him] or of the judgment [*provvedimento*] and has deliberately refused to appear or to appeal against the judgment. The judicial authorities shall carry out all necessary checks to that end."

27. Law no. 60/2005 also added a paragraph 2 *bis* to Article 175 of the CCP, worded as follows: "An application referred to in paragraph 2 above must be lodged within thirty days of the date on which the defendant had effective knowledge of the judgment, failing which it shall be declared inadmissible. In the event of extradition from another country, the time allowed for making such an application shall run from the point at which the defendant is handed over [to the Italian authorities] ...".

III. RECOMMENDATION R(2000)2 OF THE COMMITTEE OF MINISTERS

28. In Recommendation R(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, the Committee of Ministers of the Council of Europe encouraged the Contracting Parties "to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of".

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

29. The Government objected, firstly, that domestic remedies had not been exhausted in that the applicant had not used the remedies provided for in Articles 175 and 670 of the CCP.

A. DECISION OF THE CHAMBER

30. In its decision of 11 September 2003 on admissibility the Chamber dismissed the Government's objection that the applicant had failed to use the remedy in Article 175 of the CCP, holding that in the particular circumstances of the case, an application for leave to appeal out of time would have had little prospect of success and there were objective obstacles to his using it.

B. THE PARTIES' SUBMISSIONS

1. *The Government*

31. The Government observed that in Italian law, persons who had been convicted in absentia had two remedies available. Firstly, they could lodge an objection to execution under Article 670 of

the CCP in order to contest the judgment's existence or validity. This remedy was not subject to any time-limit; however, there had to have been an irregularity in the proceedings capable of rendering the judgment void. The irregularity could concern, in particular, a breach of the rules on service of process and, more specifically, failure to observe the safeguards afforded to defendants deemed to be untraceable. If the objection was declared admissible, the court had to suspend the enforcement of the sentence. If it was allowed, the statutory period for appealing against the judgment was reopened. The applicant could have availed himself of this remedy if he had shown that the police had been negligent in their searches or that the safeguards for defendants deemed to be untraceable had not been observed.

32. The Government further noted that if the objection to execution was dismissed, the court still had to examine the application for leave to appeal out of time which persons convicted in absentia were entitled to lodge separately from or jointly with the objection. If such an application was granted, the time allowed for appealing was reopened and the defendant had the opportunity to submit any arguments in support of his or her case – in person or through counsel– before a court with jurisdiction to deal with all matters of fact and law. Unlike an objection to execution, an application for leave to appeal out of time did not require there to have been any formal or substantive irregularity in the proceedings, particularly as regards searches and service of process.

33. The Government submitted that the remedy provided for in Article 175 of the CCP, as in force at the material time, had been effective and accessible since it had been specifically intended to apply to cases where accused persons claimed to have had no knowledge of their conviction. It was true that an application for leave to appeal out of time had to be lodged within ten days. However, such a period, which had not been peculiar to Italian law, had been sufficient to allow persons on trial to exercise their right to defend themselves, as its starting-point had been fixed as the moment at which they had had "effective knowledge of the decision" (as the Court of Cassation had held on 3 July 1990 in the *Rizzo* case). Furthermore, the time-limit had not concerned the lodging of the appeal itself but merely the lodging of the application for leave to appeal out of time, a much less complex process.

34. Although the fact of not being an Italian national, together with linguistic and cultural difficulties, could make it harder to comply with a procedural requirement in the time allowed, national laws could not be expected to make all their time-limits flexible in order to adapt them to the infinite variety of factual circumstances in which defendants might find themselves.

35. The Government further pointed out that, in accordance with the Court's case-law, it could not be presumed that defendants had intended to escape trial where there had been manifest shortcomings in the efforts to trace them. Defendants should also have the opportunity to rebut any presumption to that effect without being unduly obstructed or having to bear an excessive burden of proof. The system laid down in Article 175 of the CCP had satisfied those requirements.

36. It followed from a grammatical analysis of paragraph 2 of Article 175 (as in force before the 2005 reform), supported by the case-law of the Court of Cassation which the Government produced to the Court (see paragraphs 23 and 24 above), that persons applying for leave to appeal out of time had been required to prove merely that they had not had effective knowledge of their conviction. Evidence of this had been very easy to provide since in most cases it resulted from the actual manner in which the conviction had been served. It had been sufficient for applicants to state – without having to supply proof – the reasons why they had not been informed of the judgment in time to lodge an appeal. The fact that they might have been aware of other procedural steps, or that the reasons they gave might have resulted from their own lack of diligence, had not meant that the application should be refused. Indeed, the time allowed for appealing could be reopened even where their ignorance of the judgment had been their own fault. In such cases leave to appeal out of time had been precluded only where their lawyer had already lodged an appeal (an exception which was not relevant to the present case).

37. In addressing the allegations submitted by the convicted person, the prosecuting authorities had been required to provide evidence (for assessment by the courts) that the person was a fugitive and had therefore consciously and deliberately avoided being served with the relevant documents. In other words, to ensure that an application for leave to appeal out of time was refused, they had

had to show that where the judgment had been served on the defendant's lawyer, the defendant's ignorance had not been merely negligent but wilful. In order to prove intentional fault on the part of the defendant, the prosecution had not been able to rely on mere presumptions.

2. *The applicant*

38. The applicant contested the Government's arguments. He submitted that he had not had any opportunity to have his case reopened and that he had not been informed of the existence of a domestic remedy. He had also been unaware that he had been deemed to be a "fugitive" and that criminal proceedings had been pending against him.

39. The applicant observed that he had never had any knowledge of the Rome Assize Court's judgment. The judgment had never been served on him, since at the time of his arrest in Germany he had simply been the subject of an international arrest warrant indicating that he had been sentenced to twenty-one years and eight months' imprisonment. It had, moreover, been impossible for him to prove that he had not known about the facts of the case or about the proceedings against him.

C. THE COURT'S ASSESSMENT

40. The Court observes that the Government's objection that domestic remedies have not been exhausted is based on two elements, namely the applicant's failure to use the remedies provided for in Articles 670 and 175 of the CCP.

41. In so far as the Government have cited the first of these provisions, the Court reiterates that under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see K. and *T.* v. *Finland* [GC], no. 25702/94, § 145, CEDH 2001-VII, and *N.C.* v. *Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). However, in their written observations on the admissibility of the application the Government did not argue that the applicant could have availed himself of the remedy in Article 670 of the CCP. Moreover, the Court cannot discern any exceptional circumstances that could have dispensed the Government from the obligation to raise their preliminary objection before the adoption of the Chamber's admissibility decision of 11 September 2003 (see *Prokopovich* v. *Russia*, no. 58255/00, § 29, 18 November 2004).

42. Consequently, the Government are estopped at this stage of the proceedings from raising the preliminary objection of failure to use the domestic remedy in Article 670 of the CCP (see, *mutatis mutandis*, *Bracci* v. *Italy*, no. 36822/02, §§ 35-37, 13 October 2005). It follows that the Government's preliminary objection must be dismissed in so far as it concerns the failure to lodge an objection to execution.

43. With regard to the remedy provided for in Article 175 of the CCP, the Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni* v. *France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Remli* v. *France*, 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 571, § 33). That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (see *Kudla* v. *Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others* v. *Turkey*, judgment of 16 September 1996, Reports 1996-IV, p. 1210, § 65).

44. In the context of machinery for the protection of human rights the rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time it requires in principle that the complaints intended to be made subsequently at international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many

other authorities, *Azinas* v. *Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Fressoz and Roire* v. *France* [GC], no. 29183/95, § 37, ECHR 1999-I).

45. However, the obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible (see *Sofri and Others* v. *Italy* (dec.), no. 37235/97, ECHR 2003-VIII). In particular, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Dalia* v. *France*, judgment of 19 February 1998, Reports 1998-I, pp. 87-88, § 38). In addition, according to the "generally recognised rules of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Aksoy* v. *Turkey*, judgment of 18 December 1996, Reports 1996-VI, p. 2276, § 52). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Sardinas Albo* v. *Italy* (dec.), no. 56271/00, ECHR 2004-I, and *Brusco* v. *Italy* (dec.), no. 69789/01, ECHR 2001-IX).

46. Lastly, Article 35 § 1 of the Convention provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68).

47. In the instant case the Court observes that if an application under Article 175 of the CCP for leave to appeal out of time is granted, the time allowed for appealing is reopened, so that persons who have been convicted in absentia at first instance are given the opportunity to substantiate their grounds of appeal in the light of the reasoning set out in the judgment against them and to submit the factual and legal arguments they consider necessary for their defence in the course of the appeal proceedings. However, in the particular circumstances of the instant case, in which the judgment delivered in absentia had been served on the applicant's officially assigned counsel, an application to that effect could be granted only if two conditions were satisfied: if the convicted person could establish that he had not had effective knowledge of the judgment and if he had not deliberately refused to take cognisance of the procedural steps.

48. While the applicant could have proved that he satisfied the first of these conditions purely because his conviction had not been served on him in person before the date on which it had become final, the position is different regarding the second condition. The applicant had become untraceable immediately after the killing of Mr S., which had taken place in the presence of eyewitnesses who had accused him of being responsible, and this could have led the Italian authorities to conclude that he had deliberately sought to escape trial.

49. Before the Court the Government attempted to show, on the basis of a grammatical analysis of the wording of Article 175 § 2 of the CCP in force at the time of the applicant's arrest, that the burden of proof in respect of the second condition did not rest with the convicted person. They argued that, on the contrary, it was for the prosecution to provide evidence, if any existed, from which it could be inferred that the accused had wilfully refused to take cognisance of the charges and the judgment. However, such an interpretation appears to be belied by the note from the Rome public prosecutor's office, which states: "for a court to agree to re-examine the case it has to be proved that the accused was wrongly deemed to be a 'fugitive'" (see paragraph 18 above).

50. It is true that the Government have provided the Grand Chamber with domestic case-law confirming their interpretation. However, it should be noted that only the judgment of the First Section of the Court of Cassation in the *Soldati* case explicitly states how the burden of proof is to be distributed in a situation similar to that of the applicant. That judgment, which does not cite any precedent on the issue, was not delivered until 25 November 2004, more than five years after the applicant was arrested in Germany (see paragraphs 17 and 24 above). Doubts may therefore arise as to the rule that would have been applied at the time when, it was submitted, the applicant should have used the remedy provided for in Article 175 of the CCP.

51. The Court considers that the uncertainty as to the distribution of the burden of proof in respect of the second condition is a factor to be taken into account in assessing the effectiveness of the remedy relied on by the Government. In the instant case the Court is not persuaded that, as a consequence of the above-mentioned uncertainty about the burden of proof, the applicant would not have encountered serious difficulty in providing convincing explanations, when requested to do so by the court or challenged by the prosecution, as to why, shortly after the killing of Mr S., he had left his home without leaving a contact address and travelled to Germany.

52. It follows that in the particular circumstances of the case an application for leave to appeal out of time would have had little prospect of success.

53. The Court considers it appropriate to examine in addition whether the remedy in question was accessible to the applicant in practice. It notes in this connection that he was arrested in Germany on 22 September 1999, slightly more than seven years after the killing of Mr S. (see paragraphs 11 and 17 above). It finds it reasonable to believe that, during his detention pending extradition, the applicant was informed of the reasons why he had been deprived of his liberty, and in particular of his conviction in Italy. Furthermore, on 22 March 2000, six months after being arrested, the applicant lodged an application in Strasbourg through his lawyer, in which he complained that he had been convicted in absentia. His lawyer has produced to the Court extracts from the Rome Assize Court's judgment of 2 July 1996.

54. It follows that the applicant could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, and that from that point on, in accordance with the third paragraph of Article 175 of the CCP, he had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction, which had officially become final, and of the short time available for attempting such a remedy. Nor should the Court overlook the difficulties which a person detained in a foreign country would probably have encountered in rapidly contacting a lawyer familiar with Italian law in order to enquire about the legal procedure for obtaining the reopening of his trial, while at the same time giving his counsel a precise account of the facts and detailed instructions.

55. In the final analysis, the Court considers that in the present case the remedy referred to by the Government was bound to fail and there were objective obstacles to its use by the applicant. It therefore finds that there were special circumstances dispensing the applicant from the obligation to avail himself of the remedy provided for in Article 175 § 2 of the CCP.

56. It follows that the second limb of the Government's preliminary objection, concerning the failure to apply for leave to appeal out of time, must likewise be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained that he had been convicted in absentia without having had the opportunity to present his defence before the Italian courts. He relied on Article 6 of the Convention, the relevant parts of which provide:"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. THE CHAMBER JUDGMENT

58. The Chamber found a violation of Article 6 of the Convention. It considered that the applicant, who had never been officially informed of the proceedings against him, could not be said to have unequivocally waived his right to appear at his trial. Furthermore, the domestic legislation had not afforded him with sufficient certainty the opportunity of appearing at a new trial. That possibility had been subject to the submission of evidence by the prosecuting authorities or by the convicted person regarding the circumstances in which he had been declared to be a fugitive, and had not satisfied the requirements of Article 6 of the Convention.

B. THE PARTIES' SUBMISSIONS

1. *The Government*

59. The Government observed that the Court had found a violation of Article 6 of the Convention in cases where a defendant's failure to appear at the trial had been governed by the former Code of Criminal Procedure (they cited *Colozza* v. *Italy*, judgment of 12 February 1985, Series A no. 89; *T.* v. *Italy*, judgment of 12 October 1992, Series A no. 245-C; and *F.C.B.* v. *Italy*, judgment of 28 August 1991, Series A no. 208-B). The new procedural rules introduced subsequently and the special circumstances of Mr Sejdovic's case, they argued, set it apart from those cases, in which there had been cause to doubt that the applicants had deliberately sought to evade justice, or that they had had the opportunity to take part in the trial, or grounds to believe that the authorities had been negligent in ascertaining the accused's whereabouts.

60. Under the former system an untraceable defendant had been deemed to be a fugitive, and if notice had been served in due form there had been no possibility of appealing out of time. Under the system introduced by the new CCP, however, the authorities had to conduct thorough searches for the accused at every stage of the proceedings, and the time allowed for appealing could be reopened even where there had been no irregularities in notification.

61. In the present case, notice of the procedural steps had been served on the applicant's lawyer because the applicant had been deemed to be a "fugitive" (*latitante*). Before designating him thus, the authorities had searched for him at the travellers' encampment where he was thought to be living.

62. In the Government's submission, the particular circumstances of the case showed that the applicant had deliberately sought to escape trial. A number of factors supported that conclusion: the applicant had been in a delicate position and it had clearly been in his interests not to appear at the trial; he had not advanced any plausible reason as to why, immediately after a killing for which he had been responsible according to eyewitnesses, he had suddenly moved from his usual place of residence without leaving an address or the slightest trace of his whereabouts; and before being arrested by the German police, he had never come forward and had never sought a retrial.

63. It followed from the judgment in *Medenica* v. *Switzerland* (no. 20491/92, ECHR 2001-VI) that the intention to escape trial extinguished the right of a person convicted in absentia to a new trial under the Convention. In that connection, the Government pointed out that the Court had endorsed the view of the Swiss authorities that Mr Medenica's trial *in absentia* had been lawful and that it had not been necessary to reopen the proceedings because his inability to appear had been his own fault and he had not provided any valid excuse for his absence. Furthermore, the presumption that a defendant had sought to evade justice was not irrebuttable. Convicted persons could always provide explanations by arguing that they had never been aware of the proceedings and consequently had not intended to abscond, or by citing a legitimate impediment. In such cases it was for the prosecution to seek to prove the contrary where appropriate, and for the judicial authorities to assess the relevance of the convicted person's explanations.

64. It was true that, unlike the applicant, Mr Medenica had been officially informed of the proceedings against him and of the date of his trial. The Chamber had inferred from this that the applicant could not be said to have intended to escape trial. Its conclusion had been based on the cases of *T.* and *F.C.B.* v. *Italy*, in which the Court had refused to attach any importance to the indirect

knowledge which the applicants had had or might have had of the proceedings against them and of the date of their trial. Although the Court's excessive formalism and severity in the above two cases were understandable in the light of the legislation in force in Italy at the material time, they were not acceptable today.

65. Admittedly, a purely formal notification (as in the present case, where the relevant documents had been served on the officially appointed lawyer) could not give rise to an irrebuttable statutory presumption that the accused had been aware of the proceedings. However, a presumption to the contrary was equally unjustified. That would amount to denying that the accused might be aware of the proceedings where there was evidence that they were guilty and had absconded (for example, where criminals escaped from police officers pursuing them immediately after the offence, or where defendants produced a written statement declaring their guilt, their contempt towards the victims and their intention to remain untraceable). In the Government's submission, the mere fact that an applicant had not been notified of the conviction did not in itself constitute sufficient proof that he or she had acted in good faith; further evidence of negligence on the part of the authorities was required.

66. It would therefore be advisable, they argued, to take a more balanced, common-sense approach consisting in assuming – at least provisionally – that the accused had absconded if such an inference was justified by the particular circumstances of the case, regard being had to logic and to ordinary experience, and seeking to substantiate this through concrete evidence. In particular, it was not contrary to the presumption of innocence to assume that persons accused of an offence had absconded where it proved impossible to ascertain their whereabouts immediately after the offence had been committed. Such an assumption was reinforced if they were subsequently found guilty on the basis of evidence adduced at the trial and did not provide any relevant explanation as to what had caused them to leave their home address. That was precisely what had happened in the applicant's case, in which the Rome Assize Court had carefully established the facts, basing its findings on statements by several eyewitnesses.

67. If convicted persons were acknowledged as having the "unconditional" right "in all cases" to a new trial when they had not been officially notified of the charges and the date of the hearing, the State would be denied the opportunity to adduce evidence of a simple fact: knowledge that a prosecution had been brought. That would, however, be contrary to the purpose of all judicial proceedings – namely establishing the truth – and would mean that justice was denied or the victims were caused additional anguish. There would also be paradoxical consequences: defendants who were quicker and more skilful at escaping would be at an advantage in relation to those who were caught unawares by an initial summons. If that were so, only the accused would have the power to review the validity of their own trial, and the guilty would be in a more favourable position than the innocent. Furthermore, people who had consciously sought to evade trial could claim a right "which logic and any sense of justice suggest[ed] should not be theirs": the right to clutter the courts' lists of cases and to inconvenience victims and witnesses at a later stage.

68. Nor should it be forgotten, the Government submitted, that in the cases of *Poitrimol* v. *France* (judgment of 23 November 1993, Series A no. 277-A), and *Lala* and *Pelladoah* v. *the Netherlands* (judgments of 22 September 1994, Series A nos. 297-A and 297-B) the Court had coupled the right to appear in court with a corresponding duty. It had accordingly accepted that unjustified absences could be discouraged and that States were entitled to impose on defendants the burden of justifying their absence and, subsequently, to assess the validity of such explanations. It was true that in the above cases the Court had held that the sanctions imposed on the defendants (the impossibility of being represented by counsel) had been disproportionate; however, it had implicitly accepted that Article 6 would not have been infringed if the restrictions on the absent defendants' rights had struck a fair balance.

69. In the cases cited above, the Court had also laid emphasis on the defence conducted by a lawyer. In particular, it had held that the "crucial" importance of defending the accused should prevail over the "capital" importance of their appearing at the trial. The active presence of a defence lawyer was therefore sufficient to restore the balance between the State's legitimate reaction to a defendant's unjustified absence and respect for the rights set forth in Article 6 of the Convention.

70. In the instant case the applicant had been represented in the Rome Assize Court by an officially appointed lawyer, who had conducted his defence effectively and adequately, having called a number of witnesses. The same lawyer had represented other defendants in the same proceedings, some of whom had been acquitted.

71. In any event, the Government submitted that Italian law had afforded the applicant a genuine possibility of appearing at a new trial. In this connection, two distinct scenarios were possible. If notice had not been served in accordance with the formal requirements, the proceedings were null and void and, by virtue of Articles 179 and 670 of the CCP, the judgment thus became unenforceable.

72. If, however, as in the present case, the summons had been served in accordance with domestic legislation, Article 175 of the CCP was applicable. In that connection, the Government reiterated the observations relating to their preliminary objection (see paragraphs 32 to 37 above) and pointed out that the applicant belonged to a population group with a traditionally nomadic culture, which might serve to explain why he had not been present at his home address.

73. In the Government's submission, the system provided for in Article 175 of the CCP and the evidentiary rules deriving from it did not in any way contravene the general principle that the burden of proof rested with the accuser and not with the accused. In the case of *John Murray* v. *the United Kingdom* (judgment of 8 February 1996, Reports 1996-I) the Court had considered that it was legitimate to require explanations from the accused and to draw inferences from their silence where the circumstances manifestly called for such explanations. If that was acceptable in relation to the merits of a charge, it should be all the more so when it came to establishing a fact – namely, whether the applicant's ignorance had been wilful – which was incidental and procedural in nature.

2. *The applicant*

74. The applicant argued that his right to a fair trial had been infringed in that he had not been informed of the accusations against him. He submitted that the defence conducted by his officially appointed lawyer could not be regarded as effective and adequate in view of the fact that, among the defendants whom the lawyer had represented, those who had been present had been acquitted and those who had not had been convicted. Furthermore, the applicant had not known that he was being represented by that lawyer. He had therefore had no reason to contact him or the Italian authorities. If he had known that he had been charged with a criminal offence, he could have made a fully informed choice as to his legal counsel.

75. The applicant alleged that the Italian authorities had proceeded on the assumption that he was guilty because he was absent. Since the proceedings against him had not complied with the Convention, however, his right to be presumed innocent had been infringed. Nor could it be inferred that he had sought to evade justice when he had not first been questioned. Such an inference by the authorities had been all the more unreasonable in that at the time of his arrest he had been lawfully resident in Germany with his family and his address had been officially registered with the police. In any event, the Government could not prove that he had fled in order to escape the proceedings against him.

76. The applicant lastly asserted that his identification by the Italian authorities had been imprecise and dubious and that the file on him had not contained either his photograph or his fingerprints.

C. *Third party*

77. The Government of the Slovak Republic observed that in the case of *Medenica* v. *Switzerland* the Court had held that there had been no violation of Article 6 of the Convention as the applicant had failed to show good cause for his absence and there had been no evidence to suggest that he had been absent for reasons beyond his control. Denying him the right to a retrial had therefore not been a disproportionate response.

78. If the right to a new trial were held to be automatic in the absence of official notification, those who had been informed of their prosecution would enjoy less extensive guarantees than those

who became untraceable immediately after committing the offence. Only in the former case would the Court authorise the domestic authorities to examine whether the convicted person had actually waived the safeguards of a fair trial. In the latter case they would be precluded from assessing, on the facts, the reasons why the defendant could not be traced. A defendant who had not been notified would always be treated as someone who was untraceable for reasons beyond his or her control and not as someone who had escaped trial after being informed that a prosecution had been brought.

79. In the Slovakian Government's submission, it was questionable whether that was in line with the precedent established in the *Colozza* judgment, in which the Court had pointed out that prohibiting all trials in absentia could paralyse the conduct of criminal proceedings in that it could lead, for example, to dispersal of the evidence, expiry of the time allowed for prosecution or a miscarriage of justice. Furthermore, the distinction outlined above meant that people would be treated in the same manner in different situations, and differently in similar situations, without any objective or reasonable justification. The consequences were therefore unfair. In that connection, the Slovakian Government observed that Mr *Medenica* would have enjoyed more rights if he had become untraceable immediately after the offence had been committed. Regard should also be had to the fact that sometimes people who were caught *in flagrante delicto* managed to escape.

80. In the Slovakian Government's submission, the authorities should always have the right, firstly, to examine in the particular circumstances of each case why it was impossible to ascertain the accused's whereabouts and, secondly, to rule that they had waived the safeguards of Article 6 or had sought to evade justice. In the latter case it should be legitimate to refuse them a new trial under domestic law, regard being had to the higher interests of the community and the achievement of the aims of prosecution. The Court's task would then be to ensure that the conclusions reached by the national authorities were not arbitrary or based on manifestly erroneous assumptions.

D. THE COURT'S ASSESSMENT

1. *General principles concerning trial in absentia*

(a) Right to take part in the hearing and to obtain a new trial

81. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza*, cited above, p. 14, § 27; *T.* v. *Italy*, cited above, p. 41, § 26; *F.C.B.* v. *Italy*, cited above, p. 21, § 33; and *Belziuk* v. *Poland*, judgment of 25 March 1998, Reports 1998-II, p. 570, § 37).

82. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself (see *Colozza*, cited above, p. 15, § 29; *Einhorn* v. *France* (dec.), no. 71555/01, § 33, ECHR 2001-XI; *Krombach* v. *France*, no. 29731/96, § 85, ECHR 2001-II; and *Somogyi* v. *Italy*, no. 67972/01, § 66, ECHR 2004-IV) or that he intended to escape trial (see *Medenica*, cited above, § 55).

83. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Somogyi*, cited above, § 67).

84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov* v. *Bulgaria*, no. 9808/02, § 56, 24 March 2005). Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein" (ibid., §§ 54-58).

85. The Court has also held that the reopening of the time allowed for appealing against a conviction in absentia, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (see *Jones* v. *the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

(b) Waiver of the right to appear at the trial

86. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska* v. *Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrimol* v. *France*, judgment of 23 November 1993, Series A no. 277-A, pp. 13-14, § 31). Furthermore, it must not run counter to any important public interest (see *Håkansson and Sturesson* v. *Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66).

87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive" (*latitante*), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see *Colozza*, cited above, pp. 14-15, § 28). It has also had occasion to point out that before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones*, cited above).

88. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure* (see *Colozza*, cited above, pp. 15-16, § 30). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (see *Medenica*, cited above, § 57).

(c) Right of a person charged with a criminal offence to be informed of the accusations against him

89. By paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This provision points to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (see *Kamasinski* v. *Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79).

90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi* v. *France* [GC], no. 25444/94, § 52, ECHR 1999-II).

(d) Representation by counsel of defendants tried *in absentia*

91. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol*, cited above, p. 14, § 34). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see *Mariani* v. *France*, no. 43640/98, § 40, 31 March 2005). It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala*, cited above, p. 13, § 33, and *Pelladoah*, cited above, pp. 34-35, § 40).

92. At the same time, it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses. The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel (see *Krombach*, cited above, §§ 84, 89 and 90; *Van Geyseghem* v. *Belgium* [GC], no. 26103/95, § 34, ECHR 1999-I; and *Poitrimol*, cited above, p. 15, § 35).

93. It is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity to do so (see *Van Geyseghem*, cited above, § 33; *Lala*, cited above, p. 14, § 34; and *Pelladoah*, cited above, p. 35, § 41).

94. While it confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta* v. *Switzerland*, judgment of 24 May 1991, Series A no. 205, p. 16, § 30). In this connection, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia* v. *Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 38, and *Artico* v. *Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

95. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed (see *Cuscani* v. *the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to their attention in some other way (see *Daud* v. *Portugal*, judgment of 21 April 1998, Reports 1998-II pp. 749-50, § 38).

2. *Application of the above principles in the present case*

96. The Court observes that in the instant case the Rome investigating judge made an order on 15 October 1992 for the applicant's detention pending trial. Since he had become untraceable, he was deemed to be a "fugitive" (*latitante*) (see paragraph 12 above). A lawyer was appointed to represent him and was notified of the various steps in the proceedings, including the applicant's conviction. The Government did not dispute that the applicant had been tried in absentia and that before his arrest he had not received any official information about the charges or the date of his trial.

97. Relying on the line of case-law developed in the *Medenica* v. *Switzerland* case, the Government argued, however, that the applicant had lost his entitlement to a new trial as he had sought to evade justice, or in other words that he had known or suspected that he was wanted by the police and had absconded.

98. The Court observes at the outset that the instant case differs from *Medenica* (cited above, § 59), in which the applicant had been informed in good time of the proceedings against him and of

the date of his trial. He also had the assistance of and was in contact with a lawyer of his own choosing. Lastly, the Court found that Mr Medenica's absence had been due to his own culpable conduct and agreed with the Swiss Federal Court that he had misled the American court by making equivocal and even knowingly inaccurate statements with the aim of securing a decision that would make it impossible for him to attend his trial (ibid., § 58). His position was therefore very different from that of the applicant in the instant case. In the particular circumstances of the present case the question arises whether, if official notice was not served on him, Mr Sejdovic may be regarded as having been sufficiently aware of his prosecution and the trial to be able to decide to waive his right to appear in court, or to evade justice.

99. In previous cases concerning convictions in absentia, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (see *T.* v. *Italy*, cited above, p. 42, § 28, and *Somogyi*, cited above, § 75). The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo* v. *Italy* (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.

100. In the Court's view, no such circumstances have been established in the instant case. The Government's argument is not based on any objective factors other than the applicant's absence from his usual place of residence, viewed in the light of the evidence against him; it assumes that the applicant was involved in, or indeed responsible for, the killing of Mr S. The Court is therefore unable to accept this argument, which also runs counter to the presumption of innocence. The establishment of the applicant's guilt according to law was the purpose of criminal proceedings which, at the time when the applicant was deemed to be a fugitive, were at the preliminary investigation stage.

101. In those circumstances, the Court considers that it has not been shown that the applicant had sufficient knowledge of his prosecution and of the charges against him. It is therefore unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court. It remains to be determined whether the domestic legislation afforded him with sufficient certainty the opportunity of appearing at a new trial.

102. In that connection, the Government referred, firstly, to the remedy provided for in Article 670 of the CCP. The Court observes at the outset that it has found that the Government are estopped from raising a preliminary objection of failure to exhaust domestic remedies on the basis of this provision (see paragraph 42 above). However, such a finding does not preclude the Court from taking the remedy referred to by the Government into consideration in its examination of the merits of the complaint (see, *mutatis mutandis*, *N.C.* v. *Italy*, cited above, §§ 42-47 and 53-58). It notes that in Italian law an objection to execution is admissible only where it is established that there has been an irregularity in the proceedings capable of rendering the judgment void, particularly with regard to the service of process on defendants who cannot be traced (see paragraphs 31 and 71 above). However, the Government themselves admitted that in the present case the summons had been served in accordance with domestic law (see paragraph 72 above). Use by the applicant of the remedy in Article 670 of the CCP would therefore have had no prospect of success.

103. In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time, the Court would simply reiterate the observations it set out in connection with the preliminary objection (see paragraphs 47-56 above). It notes again that the remedy provided for in Article 175 §§ 2 and 3 of the CCP, as in force at the time of the applicant's arrest and detention pending extradition, was bound to fail and there were objective obstacles to his using it. In particular, the applicant would have encountered serious difficulties in satisfying one of the legal precon-

ditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition (see paragraphs 49-51 above). Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected. The applicant might have been unable to provide convincing explanations, when requested to do so by the court or challenged by the prosecution, as to why, shortly after the killing of Mr S., he had left his home without leaving a contact address and travelled to Germany. Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 § 2 of the CCP (see paragraphs 53-55 above).

104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence. It has not been argued before the Court that the applicant had any other means of obtaining the reopening of the time allowed for appealing, or a new trial.

3. *Conclusion*

105. In the light of the foregoing, the Court considers that the applicant, who was tried in absentia and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights.

106. There has therefore been a violation of Article 6 of the Convention in the instant case.

107. This finding makes it unnecessary for the Court to examine the applicant's allegations that the defence conducted by his lawyer had been defective and that his identification by the Italian authorities had been imprecise and dubious.

III. ARTICLES 46 AND 41 OF THE CONVENTION

A. ARTICLE 46 OF THE CONVENTION

108. Article 46 provides: "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

1. *The Chamber judgment*

109. The Chamber held that the violation it had found had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the lack of an effective mechanism to secure the right of persons convicted in absentia – where they had not been informed effectively of the proceedings against them and had not unequivocally waived their right to appear at their trial – to obtain a fresh determination of the merits of the charge against them by a court which had heard them in accordance with the requirements of Article 6 of the Convention. It accordingly held that the respondent State had to secure the right in question, through appropriate measures, to the applicant and to other persons in a similar position.

2. *The Government's submissions*

110. The Government argued that if the Court remained persuaded that there had been a violation, it should conclude that the violation stemmed solely from reasons relating to the particular circum-

stances of the case (in other words, to the applicant's personal situation), without calling into question the entire Italian legislation on the subject.

111. They contended that the Italian system fully complied with the requirements of the Convention, as outlined by the Court, and with all the principles listed in Resolution (75) 11 of the Committee of Ministers of the Council of Europe on the criteria governing proceedings held in the absence of the accused. The system required every effort to be made to ensure that accused persons were aware of the proceedings against them, the nature of the charges, and the date and place of the essential steps in the proceedings. Furthermore, those convicted in absentia were afforded an ample opportunity – more so than in other European States – to appeal out of time if they could prove that they had not had any knowledge of the judgment. The only exception to that rule which was relevant in the present case occurred where it was established that convicted persons deemed to be untraceable or fugitives had deliberately sought to evade trial.

112. Furthermore, even supposing that the Italian system in force at the material time had been incompatible with the requirements of the Convention, any possible shortcomings had been remedied by the reform introduced by Law no. 60/2005.

113. In the event of the Court's finding a structural defect in the domestic legal system, the Government pointed out that the obligation to grant a new trial to a person convicted in absentia might make it impossible to gather all the evidence (in particular, witness statements) obtained during the first trial. In such circumstances, the national authorities would face two alternatives. They could either make use of evidence and statements obtained during the original trial (although this could entail an infringement of the accused's right not to be convicted on the basis of statements by persons whom he or she had never had the opportunity to examine), or acquit the accused in spite of the existence of sufficient evidence to satisfy the court beyond reasonable doubt of his or her guilt (which would amount to a potential breach of the positive obligation to protect other rights guaranteed by the Convention).

114. It would therefore be advisable, the Government contended, for the Court to clarify how the second trial was to proceed: was it sufficient to examine the defendant? Did the entire trial phase need to be repeated? Or were more balanced, intermediate solutions desirable? The Court would thus be able to give the respondent State clear and detailed indications as to how to ensure that its legislation or practice complied with the Convention.

115. The Government stated that they were not opposed in principle to the Court's giving fairly detailed indications of the general measures to be taken. However, the new practice pursued by the Court ran the risk of nullifying the principle that States were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis.

116. The Court's judgments were essentially declaratory in nature. The only exception to that rule was Article 41 of the Convention, which empowered the Court to impose what amounted to "sentences" on Contracting States. Article 46, however, did not contain any such provision but merely stated that the Court's final judgment was transmitted to the Committee of Ministers for supervision of its execution. The Committee of Ministers was therefore the only Council of Europe body empowered to say whether a general measure was necessary, adequate and sufficient.

117. In the Government's submission, this distribution of powers was confirmed by Article 16 of Protocol No. 14, which, in amending Article 46 of the Convention, introduced two new remedies: a request for interpretation and infringement proceedings. According to the explanatory report, the aim of the first of these was "to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment". As regards the second, it was stated that where the Court found a violation, it should refer the case to the Committee of Ministers "for consideration of the measures to be taken". Lastly, in Resolution Res(2004)3 the Committee of Ministers had invited the Court to identify any underlying systemic problems in its judgments, but not to indicate appropriate solutions as well. The distribution of powers between the Committee of Ministers and the Court as envisaged by the drafters of the Convention had therefore not been altered.

118. In any event, if the practice of indicating general measures were to be continued, it should at least become institutionalised in the Rules of Court or in the questions which the Court put to the parties, so that the parties could submit observations on whether a violation was "systemic".

3. *The Court's assessment*

119. The Court observes that under Article 46 of the Convention the Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, among other things, that a judgment in which the Court finds a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, *mutatis mutandis*, *Scozzari* and *Giunta* v. *Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

120. In the case of *Broniowski* v. *Poland* ([GC], no. 31443/96, §§ 188-194, ECHR 2004-V) the Court considered that where it found that a violation had originated in a systemic problem affecting a large number of people, general measures at national level could be called for in the execution of its judgments. This kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a "pilot-judgment procedure". The procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering them more rapid redress and, at the same time, easing the burden on the Court, which would otherwise have to take to judgment large numbers of applications similar in substance (see *Broniowski* v. *Poland* (friendly settlement) [GC], no. 31443/96, §§ 34-35, ECHR 2005-...).

121. The Court observes that in the present case the unjustified obstacle to the applicant's right to a fresh determination by a court of the merits of the charge against him appears to result from the wording of the provisions of the CCP in force at the material time on the conditions for applying for leave to appeal out of time. This might suggest that there was a defect in the Italian legal system such that anyone convicted in absentia who had not been effectively informed of the proceedings against them could be denied a retrial.

122. However, it should be borne in mind that after the applicant's trial had ended, various legislative reforms were implemented in Italy. In particular, Law no. 60/2005 amended Article 175 of the CCP. Under the new provisions, the time allowed for appealing against a judgment may be reopened at the convicted person's request. The only exception to this rule occurs where the accused had "effective knowledge" of the proceedings against them or of the judgment and have deliberately waived the right to appear in court or to appeal. In addition, the time available for persons in a similar position to the applicant to apply for leave to appeal out of time has been increased from ten to thirty days and now begins to run from the point at which the accused are handed over to the Italian authorities (see paragraphs 26-27 above).

123. It is true that these new provisions did not apply to the applicant or to anyone else in a similar position who had had effective knowledge of their conviction or had been handed over to the Italian authorities more than thirty days before the date on which Law no. 60/2005 came into force. The Court considers that it would be premature at this stage, in the absence of any domestic case-law concerning the application of the provisions of Law no. 60/2005, to examine whether the reforms outlined above have achieved the result required by the Convention.

124. The Court therefore considers it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment.

125. Furthermore, the Court observes that in Chamber judgments in cases against Turkey concerning the independence and impartiality of national security courts it has held that, in principle,

the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she requests one (see, among other authorities, *Gençel* v. *Turkey*, no. 53431/99, § 27, 23 October 2003, and *Tahir Duran* v. *Turkey*, no. 40997/98, § 23, 29 January 2004). It should also be noted that a similar position has been adopted in cases against Italy where the finding of a breach of the fairness requirements in Article 6 resulted from an infringement of the right to take part in the trial (see *Somogyi*, cited above, § 86, and *R.R.* v. *Italy*, no. 42191/02, § 76, 9 June 2005) or the right to examine prosecution witnesses (see *Bracci*, cited above, § 75). The Grand Chamber has endorsed the general approach adopted in the cases cited above (see *Öcalan* v. *Turkey* [GC], no. 46221/99, § 210, ECHR 2005-...).

126. The Court accordingly considers that where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see the principles set forth in Recommendation R(2000)2 of the Committee of Ministers, as outlined in paragraph 28 above). However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law as cited above (see *Öcalan*, loc. cit.).

127. In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack* v. *Belgium* (former Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (see *Lyons and Others* v. *the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).

B. ARTICLE 41 OF THE CONVENTION

128. Under Article 41 of the Convention, "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. *Damage*

129. The applicant observed that he had been detained in Germany with a view to extradition from 22 September to 22 November 1999, a period of 62 days. If the Italian authorities had attempted to contact him in Germany at his officially registered address, that deprivation of liberty would not have occurred. He submitted that redress for the damage and inconvenience caused by his detention should be afforded at a rate of 100 euros (EUR) per day, and accordingly claimed a total sum of EUR 6,200.

130. The Government observed that the applicant had not established any causal link between the violation of the Convention and the damage he alleged. As regards non-pecuniary damage, the finding of a violation would in itself provide sufficient just satisfaction.

131. The Court reiterates that it will award sums for just satisfaction under Article 41 where the loss or damage alleged has been caused by the violation it has found, but that the State is not expected to pay for damage not attributable to it (see *Perote Pellon* v. *Spain*, no. 45238/99, § 57, 25 July 2002, and *Bracci*, cited above, § 71).

132. In the instant case the Court has found a violation of Article 6 of the Convention in that the applicant, who had been convicted in absentia, was unable to have his trial reopened. It has not observed any shortcomings in the efforts to trace the applicant and is unable to find that the Italian authorities should be held responsible for his detention pending extradition. Furthermore, the appli-

cant has not cited any information that might have given the Italian authorities cause to suppose that he was in Germany.

133. Accordingly, the Court does not consider it appropriate to make an award to the applicant in respect of pecuniary damage. No causal link has been established between the violation it has found and the detention complained of by the applicant.

134. With regard to non-pecuniary damage, the Court considers that, in the circumstances of the case, the finding of a violation constitutes in itself sufficient just satisfaction (see *Brozicek* v. *Italy*, judgment of 19 December 1989, Series A no. 167, p. 20, § 48; *F.C.B.* v. *Italy*, cited above, p. 22, § 38; and *T.* v. *Italy*, cited above, p. 43, § 32).

2. *Costs and expenses*

135. The applicant sought the reimbursement of the costs incurred in the extradition proceedings in Germany, amounting to EUR 4,827.11. He further claimed EUR 7,747.94 in respect of the proceedings before the Court. In particular, he submitted that the sum of EUR 3,500.16 (comprising EUR 3,033.88 for fees and EUR 466.28 for translations) had been incurred in connection with the Chamber proceedings, and that the subsequent proceedings before the Grand Chamber, including his lawyers' participation in the hearing on 12 October 2005, had cost EUR 4,247.78.

136. The Government failed to see a causal link between the breach of the Convention and the costs incurred in Germany. With regard to those incurred in the Strasbourg proceedings, the Government left the matter to the Court's discretion, while emphasising that the applicant's case was a straightforward one. They further submitted that the amount claimed for the Grand Chamber proceedings was excessive, in view of the small amount of work that this phase had entailed for the applicant's counsel, who had not filed a memorial.

137. The Court notes that before applying to the Convention institutions, the applicant had to take part in extradition proceedings in Germany, during which the issue of the impossibility of reopening his trial was raised. It accordingly accepts that the applicant incurred expenses in respect of proceedings linked to the Convention violation. However, it considers the sums claimed for the proceedings in the German courts to be excessive (see, *mutatis mutandis*, *Sakkopoulos* v. *Greece*, no. 61828/00, § 59, 15 January 2004, and *Cianetti* v. *Italy*, no. 55634/00, § 56, 22 April 2004). Having regard to the information in its possession and to its relevant practice, the Court considers it reasonable to award the applicant the sum of EUR 2,500 under this head.

138. The Court likewise considers excessive the amount claimed in respect of the costs and expenses incurred in the proceedings before it (EUR 7,747.94) and decides to make an award of EUR 5,500 under this head. It should be pointed out in this connection that the applicant's counsel did not file written pleadings before the Grand Chamber (see paragraph 8 above). The total amount awarded to the applicant for costs and expenses is therefore EUR 8,000.

3. *Default interest*

139. 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 UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds* (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

[omissis]

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Mularoni is annexed to this judgment.

[omissis]

Corte europea dei diritti dell'uomo (GC), sent. 8 giugno 2006, *Sürmeli* c. *Germania* (n. 75529/01)

[omissis]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. BACKGROUND TO THE CASE

8. The applicant was born in 1962 and lives in Stade (Germany).

9. On 3 May 1982 he was involved in an accident with a cyclist on the way to school and sustained injuries including a broken left arm. On 22 May 1982 he left hospital. He subsequently entered into negotiations with the cyclist's liability insurers, who paid him a sum of approximately 12,500 euros (EUR) in respect of any damage he might have sustained. The accident insurers for Hanover City Council, the authority responsible for the applicant's school, paid him a temporary disability pension (*Verletzenrente*) until the end of 1983. They also paid him approximately EUR 51,000 in compensation.

10. The applicant subsequently instituted proceedings against the City Council's accident insurers, in the course of which a considerable number of expert reports and medical opinions were produced.

In a judgment of 16 November 1989 the Lower Saxony Social Court of Appeal (*Landessozialgericht*), which itself had asked experts in the fields of orthopaedic surgery, neurology and, at the applicant's request, hand surgery to produce reports on his medical problems, acknowledged that he had become 20% permanently disabled as a result of the accident and was entitled to a pension on that account with effect from 1 June 1984.

11. Since 1 July 1994, after falling on his left arm or hand in January 1993, the applicant has been in receipt of an occupational-disability pension of approximately EUR 800 per month.

12. The applicant instituted a second set of proceedings against Hanover City Council's accident insurers, seeking in particular the award of an increased pension. He submitted that the accident had caused him mental damage and a stomach disorder. In a judgment of 19 February 2001 the Social Court of Appeal dismissed the applicant's claim. It based its decision on two reports by experts in neuropsychiatry whom it had appointed during the proceedings, on a large number of other medical reports, some of which had been drawn up shortly after the accident, and on files from other administrative and judicial proceedings concerning the applicant.

B. PROCEEDINGS IN THE CIVIL COURTS

1. *The first phase of the civil proceedings*

13. On 18 September 1989, after the negotiations aimed at securing increased payments had failed, the applicant brought an action against the cyclist's insurance company in the Hanover Regional Court (*Landgericht*), in particular seeking damages and a monthly pension, among other claims. On 10 June 1991, after holding several hearings and taking evidence about the accident from four witnesses between July 1990 and March 1991, the Regional Court delivered a partial decision. It held that the applicant's liability for the accident was limited to 20% and that he was entitled to damages for the remaining 80%.

14. On 26 November 1992 the Celle Court of Appeal (*Oberlandesgericht*) dismissed an appeal by the applicant. On 29 January 1993 the applicant appealed on points of law. He twice requested

an extension of the time he had initially been allowed for filing his grounds of appeal. On 2 June 1993 the applicant's new representative applied for a third extension until 14 July 1993. On 14 December 1993 the Federal Court of Justice (*Bundesgerichtshof*) dismissed the appeal.

2. THE SECOND PHASE OF THE CIVIL PROCEEDINGS

(a) First phase, concerning in particular the appointment of an expert

15. In March 1994 the proceedings for the assessment of the damages and the pension resumed in the Hanover Regional Court. The applicant was represented by counsel. On 18 April 1994 the court held a hearing.

16. On 9 May 1994 it ordered an expert medical assessment. On 25 May 1994 the applicant applied for the three judges dealing with his case to withdraw, but his application was dismissed. On 19 July 1994 Hanover Medical School proposed a Professor B. to draw up the expert report that had been ordered. On 21 July 1994 the applicant appealed against the court's decision of 9 May 1994. On 2 August 1994 the Celle Court of Appeal dismissed his appeal.

17. On 15 September 1994 the court appointed Professor B. as the expert. Professor B. informed the court that it would be preferable for the report to be drawn up by a specialist in accident surgery and that it was likely to take at least one year to produce. On 2 December 1994, following a reminder from the court, the applicant agreed to the appointment of a surgical expert.

18. On 15 December 1994 a Professor T. was proposed. The applicant objected to his appointment on the ground that he was not a specialist hand surgeon (*Handchirurg*). On 6 February 1995 the court accordingly asked Professor B. to draw up the expert report. On 7 February 1995 the applicant informed the court that he agreed with the deadline set; he insisted, however, that there should not only be an expert assessment by a general surgeon but also one by a specialist hand surgeon. Professor B. informed the court that he was unable to draw up the report as requested because the fractures observed in the applicant's forearm did not come within his field of expertise but were a matter for a specialist in traumatology or an orthopaedic surgeon. On 20 February 1995 the defendant proposed appointing Professor T. On 24 April 1995, following a reminder from the court, the applicant suggested appointing Professor B. or, failing that, a Professor B.-G.

19. On 12 May 1995 the court appointed Professor T., who informed it that an additional assessment by a specialist hand surgeon was necessary and that it was likely to take at least one year to produce the report. On 28 July 1995 the court informed the applicant that Professor B. had refused to draw up the report and asked him whether Professor B.-G., whom he had suggested, had already drawn up an expert report on him. On 27 November 1995 the court informed the parties that Professor B.-G. had retired but that his successor, Professor P., would be appointed as expert. On 23 January 1996 Professor P. informed the court that it would take him nine to twelve months to draw up the report.

20. On 3 September 1996 the applicant informed the court that the accident had caused him severe depression, and asked it to order an expert psychiatric assessment.

21. On 10 June 1997 the court asked the expert how his report was progressing. The expert replied that the report would be ready in four to six weeks. On 22 August 1997 the court again contacted the expert. He initially replied that the report would be completed by the end of September but subsequently stated that, owing to an excessive workload, he would need a further month. Professor P.'s report was received at the court on 6 November 1997. The applicant criticised Professor P.'s work and requested that he submit an additional report. He also requested an expert assessment (*Schmerzgutachten*) of the pain he had felt since the accident. On 3 December 1997 the court granted the defendant company an extension of the time it had been allowed for filing observations on the report; it submitted its observations on 6 January 1998. On 27 April 1998 the applicant's representatives informed the court that as their client had been ill, they would not be able to submit their observations in reply until mid-May.

(b) Second phase: failure to negotiate an out-of-court settlement

22. On 31 August 1998 the applicant's representatives informed the court that the parties had not been able to reach a partial friendly settlement. They subsequently began fresh out-of-court negotiations on a friendly settlement, asking on three successive occasions for the deadline to be put back. On 5 May 1999 they informed the court that the negotiations had failed and asked for the proceedings to be resumed. The defendant stated that the failure of the negotiations had been due to the applicant's unreasonable demands.

23. On 27 May 1999 the president of the division dealing with the case asked the parties to inform him whether they still wished to submit observations. In a note of 8 September 1999 the reporting judge stated that the proceedings had not been able to progress more quickly owing to an excessive workload and to certain priority cases. In a note of 23 December 1999 he made a similar observation, referring to a number of periods of leave, in particular sick-leave, in addition to the reasons stated previously.

24. On 18 February 2000 the president of the division asked the parties to inform him whether they intended to submit any further observations. The applicant replied that negotiations on an out-of-court settlement could take until mid-May and that he reserved the right to submit further observations if they were unsuccessful. On 26 June 2000 he informed the court that the negotiations had failed and asked for an expert assessment of his total loss of earnings resulting from the accident. In support of that request, he submitted an expert psychiatric assessment that had been drawn up during the proceedings in the Social Court of Appeal (see paragraph 12 above). On 17 August 2000 the defendant informed the court that the negotiations had failed because the applicant had refused to make payment of the sum negotiated conditional on the findings of an expert assessment.

(c) Third phase: preparation of the case file and additional report

25. On 17 October 2000 the applicant requested the court to deliver a decision promptly, seeing that the proceedings had already taken eighteen years. In support of his request he submitted an expert psychiatric assessment of his state of health. In a note of 19 January 2001 the court pointed out to him that the proceedings had been pending only since 18 September 1989.

26. On 21 February 2001 the applicant revised his claim, which now concerned a lump sum of 702,122 German marks (DEM – approximately EUR 359,000) and a monthly pension of DEM 1,000. On 2 March 2001 the court assessed the value of the subject matter of the case at DEM 985,122.

27. On 17 April 2001 the applicant asked the court when it would be holding a hearing. On 15 May 2001 the court set the case down for hearing on 9 July 2001 and asked the applicant to provide information, concerning in particular his alleged loss of earnings. It was important to establish his likely career path had the accident not taken place and the extent to which the physical injury from which he was now suffering was the direct consequence of the accident.

28. On 9 July 2001, having obtained the parties' consent at the hearing, the court decided to admit in evidence the file from the proceedings in the Social Court of Appeal. The file could not be forwarded immediately because it was at the Federal Social Court (*Bundessozialgericht*).

29. On 14 August 2001, at the applicant's request, the court ordered Professor P. to supplement his expert report of 30 October 1997. He replied that it would take him at least ten months to do so.

30. On 20 September 2001 the court asked the applicant to give his consent in writing to its consulting the file in the possession of the Federal Social Court. Pointing out that he was undergoing treatment abroad which was expected to take until mid-November, the applicant asked for an extension of the time allowed for his reply. On 26 October 2001 the court told him that he had not provided sufficient evidence of the injury to his forearm and asked him to inform it whether he intended to pursue his request for an assessment by a specialist hand surgeon. The applicant asked for a further extension of the time allowed for his reply. On 18 December 2001 he stated that he did not agree to the use in evidence of the file from the proceedings in the social courts and requested a further extension with regard to the expert surgical assessment.

31. On 8 February 2002 the court ordered the applicant to submit a number of documents and asked Professor P. to draw up the additional report. In reply to two letters from the applicant it reminded him that he had requested the additional report himself. On 7 May 2002 the applicant submitted his observations, having twice requested further time to do so. On 24 May 2002 he personally informed the court by telephone that he no bnger required the additional report and only wanted an assessment of his pain, on the ground that he was suffering from neurosis caused by the proceedings (*Prozessneurose*).

32. On 28 May 2002 the court declared inadmissible an application for the judges to withdraw, which the applicant had lodged on 23 March 2002.

33. On 29 May 2002 the court asked the applicant's representatives for clarification as to the additional expert report. On 12 July 2002 they informed the court that their client no longer wished the report to be produced.

34. On 1 August 2002 the President of the Regional Court asked to be sent the file in the applicant's case.

35. On 16 September 2002 the court decided to appoint a Professor X to draw up an expert report concerning in particular the onset and cause of the pain suffered by the applicant. It also requested the applicant to provide certain items of information.

36. On 7 October 2002 the applicant again applied for the members of the court to withdraw. On 8 October 2002 he asked for an extension of the time allowed for submitting the information requested. On 22 October 2002 he objected to the expert who had been appointed, proposed another one (Dr J.), sought leave to consult the file and applied for a further extension of six weeks. On 29 October 2002 the court invited him to submit reasons for his objection to the expert, proposed other experts and gave him until 20 December 2002 to produce the information requested.

37. On 12 November 2002 the applicant personally informed the court by telephone that he was unable to inspect the file because he had broken his arm. On 18 November 2002 the defendant proposed an expert. The applicant expressed the view that the expert proposed, not being a specialist in the field, was not competent to carry out an assessment of his pain, and asked the court to deliver a partial decision.

38. On 5 December 2002 Dr J. informed the court that he would be unable to draw up a report before the end of 2003. On the same day the court appointed Professor X as expert and dismissed the applicant's reservations as to his professional credentials. It pointed out that it was unable to give a partial decision. The applicant objected that Professor X had already acted as expert, and requested that an "interdisciplinary" report be produced in addition to the report on his pain.

39. On 15 January 2003 the applicant applied for the reporting judge in his case to withdraw.

40. On 3 March 2003 the president of the division dealing with the case held discussions with the parties' representatives with a view to reaching a friendly settlement and scheduled a hearing to that end for 10 March 2003. At the hearing the applicant stated that he would not let Professor X examine him. The president asked him to stop telephoning the judges dealing with the case and stated that, with a view to speeding up the proceedings, he would not be so willing in future to accept requests to consult the file. On 2 May 2003 the court, in reply to a further request by the applicant, informed him that he could consult the file at the court's registry but that, to avoid delays in dealing with the case, the file would not be sent to the registry of the District Court in Stade, his place of residence.

41. On 16 May 2003 a division of the regional court dismissed three applications by the applicant for the reporting judge to withdraw.

42. On 4 June 2003 the applicant again sought leave to consult the case file at the registry of the Stade District Court.

(d) Fourth phase: appointment of a new expert

43. On 11 June 2003, after learning that the applicant had instituted disciplinary proceedings against Professor X, the court appointed Professor W. to replace him as expert. On 25 June 2003 the applicant left a message for the president of the division on his answering machine, expressing

his concerns about the choice of expert. The applicant's representatives also expressed reservations as to Professor W.'s credentials and proposed another expert. The president of the division informed the parties that Professor W. had stated that he was prepared to draw up the report, and indicated that he was standing by his choice of expert despite the applicant's reservations about him.

44. On 16 September 2003 Hamburg-Eppendorf University Hospital informed the court that the applicant's medical examination was scheduled for 23 October 2003. On 29 September 2003 Professor W. returned the file to the court and asked it to relieve him of his duties on the ground that the applicant had stated his opposition to the production of the report and had contacted the hospital's legal department to tell them so. On the same day the court sent the file back to Professor W., asking him to wait and see whether the applicant kept his appointment for the medical examination. On 29 October 2003 Professor W. informed the court that he had been able to examine the applicant and asked whether a further expert assessment on pain therapy could be produced by a Professor Y. On 21 November 2003 the court ordered a further examination of the applicant by Professor Y.

45. On 9 December 2003 Professor W.'s report was received at the court. The president of the division informed the expert that further explanations were necessary. On 26 February 2004 the hospital informed the court that a Dr M., from its psychiatric department, was prepared to examine the applicant. On 26 March 2004 Professor W. informed the court that he would be submitting his final conclusions in collaboration with Dr M. The applicant's representatives proposed another expert who, in their opinion, was better qualified to examine their client. On 24 May 2004 the court eventually appointed a Dr W. as expert. Dr W. replied that the case was a difficult and complex one requiring approximately 40 hours' work and that he would not be able to submit the report until October 2004. On 14 June 2004 the court decided to ask the parties to pay advances on the fees for the production of the expert report, but the applicant refused to do so. His representatives objected to the decision of 14 June 2004 but paid the advances as requested. On 28 June 2004 the court dismissed the objection.

46. On 19 July 2004 the court, in reply to a request by the applicant, decided not to supplement its decision of 16 September 2002 on the production of the expert report.

47. On 10 January 2005 Dr W.'s report was received at the court. It was forwarded to the parties on 21 February 2005. On 8 March 2005 the applicant's representatives requested an examination of their client by a different expert.

48. On 5 April 2005 the court's registry asked to be sent the file.

49. On 14 April 2005 the applicant submitted an expert report he had himself commissioned from a Dr K.

(e) Fifth phase: the Regional Court's judgment

50. On 6 October 2005 the court held a hearing at which Professor W. gave evidence and Dr W. and Dr K. were present.

51. In a judgment of 31 October 2005 the court awarded the applicant a total of EUR 20,451.68 for non-pecuniary damage. Taking into account the payments already made after the accident, the defendant was required to pay the outstanding sum of EUR 12,015.36 under this head and EUR 417.93 for loss of earnings. The court dismissed the remainder of the applicant's claim and ordered him to pay 97% of his costs.

Relying on the expert reports ordered in the course of the proceedings, on the judgments of the Social Court of Appeal and on various other expert reports and medical opinions produced in separate proceedings, the court outlined the injuries sustained by the applicant in the accident and examined whether any other forms of damage, such as chronic pain and mental disorders, were attributable to the accident as he claimed them to be. It concluded that there was not a sufficiently established link between the accident and most of the damage alleged. In assessing non-pecuniary damage, the court had regard to the circumstances of the accident, the subsequent conduct of the parties and the relevant case-law of the Celle Court of Appeal. It pointed out that the length of the proceedings could be taken into account only in small measure because the defendant could not be held respon-

sible for the fact that the applicant had not brought his claim until seven years after the accident, making it more difficult to adduce evidence, that he had refused to allow the file from the proceedings in the Social Court of Appeal to be used in evidence and that he had objected on several occasions to the choice of experts appointed.

52. The applicant subsequently applied to the Celle Court of Appeal for legal aid in order to appeal against the judgment.

C. PROCEEDINGS CONCERNING THE LENGTH OF THE PROCEEDINGS

1. *Proceedings in the Federal Constitutional Court*

(a) The first set of proceedings

53. On 14 March 2001 the applicant lodged a constitutional complaint with the Federal Constitutional Court, stating: "The proceedings at first instance before the Hanover Regional Court in case no. 20 O 186/89 have lasted since 1989 and have irreparably destroyed my existence. I am lodging a constitutional complaint on account of an infringement of Article 2 § 1 and Article 20 § 2 of the Basic Law because the excessive length of the proceedings is no longer compatible with the rule of law and I request the court to find a breach of the law and of Article 839 of the Civil Code in that Article 139 of the Code of Civil Procedure has not been complied with. Evidence: Hanover Regional Court, no. 20 O 186/89. Information: no. 1 BvR 352/2000. Please inform me if you need any other documents."

On 23 March 2001 the Federal Constitutional Court requested information on the state of the proceedings from the Regional Court, which informed it on 22 May 2001 that it had scheduled a hearing for 9 July 2001. On 22 June 2001 it sent the applicant the Regional Court's reply.

54. On 5 and 11 August 2001 the applicant filed additional observations.

55. On 16 August 2001 the Federal Constitutional Court, sitting as a panel of three judges, decided not to examine the applicant's complaint (no. 1 BvR 1212/01). The decision, in which no reasons were given, stated: "The complaint is not accepted for adjudication. No appeal lies against this decision."

(b) The second set of proceedings

56. On 26 May 2002 the applicant again complained to the Federal Constitutional Court about the length of the proceedings. His complaint, which referred to his previous one, was worded as follows: "I, the undersigned, Mr Sürmeli, residing at ..., hereby lodge a constitutional complaint on account of a breach of the rule of law (*Rechtsstaatsprinzip*) by the Hanover Regional Court (no. 20 O 186/89), because the proceedings in that court continue to be delayed."

57. On 27 June 2002 the Federal Constitutional Court, sitting as a panel of three judges, decided not to examine this new complaint (no. 1 BvR 1068/02. In its decision it stated: "Since the requirements of section 93a(2) of the Federal Constitutional Court Act have not been satisfied, the constitutional complaint cannot be accepted for adjudication. It does not raise any issue of fundamental significance (*grundsätzliche Bedeutung*). Nor is there any need to examine the complaint for the purpose of safeguarding the constitutional rights which the complainant alleges to have been infringed, since it does not have sufficient prospects of success. The complaint lacks substance in that it cannot be ascertained from the complainant's observations whether the length of the proceedings [in the Hanover Regional Court] has exceeded a reasonable time. In accordance with the third sentence of section 93d(1) of the Federal Constitutional Court Act, no further reasons for this decision are necessary. No appeal lies against the decision."

58. On 27 July 2005 the registry of the Federal Constitutional Court informed the applicant that it was not possible to reopen the proceedings.

2. *Action for damages against the State*

59. On 23 May 2002 the applicant applied to the Hanover Regional Court for legal aid in order to bring an action for damages against the State on account of the excessive length of the proceedings in issue.

60. On 14 May 2003 the Regional Court refused his application on the ground that the delays in the proceedings had not been attributable to the justice system but were due to the courts' excessive workload. It added that the applicant had not provided sufficient details of the damage allegedly sustained.

61. On 21 July 2003 the Celle Court of Appeal upheld that decision, basing its conclusion, in particular, on the Government's observations in the present case before the Third Section of the Court, which the applicant had produced in the proceedings before it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. FEDERAL CONSTITUTIONAL COURT ACT

62. The relevant provisions of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) of 12 December 1985, in its version of 11 August 1993, read as follows:

Section 90 – "1. Any person who claims that one of his basic rights or one of his rights under Article 20 § 4 and Articles 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a complaint of unconstitutionality with the Federal Constitutional Court. 2. If legal action against the violation is admissible [*zulässig*], the complaint of unconstitutionality may not be lodged until all remedies have been exhausted. However, the Federal Constitutional Court may decide immediately on a complaint of unconstitutionality lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant ..."

Section 93a - "1. A complaint of unconstitutionality shall require acceptance prior to a decision.

2. It is to be accepted (a) if it raises a constitutional issue of general interest; or (b) if this is advisable for securing the rights mentioned in section 90(1); or also in the event that the denial of a decision on the matter would entail a particularly serious disadvantage (*besonders schwerer Nachteil*) for the complainant."

The third sentence of section 93d(1) provides that no reasons need be given for a decision by a panel of three judges not to accept a constitutional complaint for adjudication.

Section 95 – "1. If the complaint of unconstitutionality is upheld, the decision shall state which provision of the Basic Law has been infringed and by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission complained of will infringe the Basic Law. 2. If a complaint of unconstitutionality against a decision is upheld, the Federal Constitutional Court shall quash the decision [and] in the cases contemplated in the first sentence of section 90(2) above it shall refer the matter back to a competent court ..."

B. PROVISIONS ON THE STATE'S LIABILITY

63. Article 34 of the Basic Law (*Grundgesetz*) provides: "Where a person, in the exercise of a public office entrusted to him, breaches an official duty (*Amtspflicht*) towards a third party, liability shall in principle rest with the State or the public authority in whose service the person is engaged. An action by the State for indemnity shall remain possible in the event of intentional wrongdoing or gross negligence. The possibility of bringing an action for damages or indemnity in the ordinary civil courts shall remain open."

64. Article 839 of the Civil Code (*Bürgerliches Gesetzbuch*) provides: "1. A public servant who wilfully or negligently commits a breach of his official duties towards a third party shall afford redress for any damage arising in consequence. If the public servant merely acted negligently, he may be held liable only if the injured party is unable to obtain redress by other means. 2. A public servant who commits a breach of his official duties when adjudicating on an action may not be held

liable for any damage sustained unless the breach of duty constitutes a criminal offence. This provision shall not apply where the breach of official duties consists in a refusal to discharge a function or a delay in performing it contrary to professional duty. 3. The obligation to afford redress shall not arise where the injured party has wilfully or negligently omitted to avoid the damage by means of a legal remedy."

By Article 253 of the Civil Code, in the version in force until 31 July 2002, compensation for non-pecuniary damage could be awarded only if it was provided for by law. In this connection, Article 847 § 1, which was in force until 31 July 2002, provided for compensation only in the event of physical injury or deprivation of liberty. The new Article 253 § 2 of the Civil Code, as in force since 1 August 2002, has not introduced any amendments relevant to the matters in issue in the instant case.

C. CASE-LAW OF THE DOMESTIC COURTS CONCERNING THE LENGTH OF CIVIL PROCEEDINGS

1. *Constitutional complaint as a remedy for expediting proceedings*

(a) General principles

65. According to the settled case-law of the Federal Constitutional Court, Article 2 § 1 of the Basic Law, in conjunction with the principle of the rule of law as enshrined in Article 20 § 3 of the Basic Law, guarantees effective protection by the law. The rule of law dictates that, in the interests of legal certainty, legal disputes must be settled within a reasonable time (*angemessene Zeit*). In view of the variety of types of proceedings, there are no absolute criteria for determining the point at which the length of proceedings becomes excessive. Regard must be had to all the circumstances of the case, what is at stake for the parties, the complexity of the case and the conduct of the parties and any other persons (experts or others) acting independently of the court. The longer the proceedings as a whole or at one particular level of jurisdiction, the more pressing the obligation on the court to take steps to expedite or conclude them (see, among other authorities, the decisions of 20 April 1982, no. 2 BvL 26/81, published in the Reports of Judgments and Decisions of the Federal Constitutional Court, volume 60, p. 253 (at p. 269), and of 2 March 1993, no. 1 BvR 249/92, Reports, volume 88, p. 118 (at p. 124)).

(b) Consequences of a finding that the length of proceedings is unreasonable

(i) Finding of an infringement

66. Where the Federal Constitutional Court considers that the length of pending proceedings has been excessive, it holds that there has been an infringement of the Basic Law and requests the court dealing with the case to expedite or conclude the proceedings.

For example, in its decision of 20 July 2000 (no. 1 BvR 352/00 – see *Grässer* v. *Germany* (dec.), no. 66491/00, 16 September 2004), concerning the length of proceedings that had lasted 26 years, it held: "... In view of the exceptional fact that the proceedings had already lasted 15 years by the time the case reached the Court of Appeal, that court should not simply have treated it as an ordinary complex case. On the contrary, it should have ... used all available means to expedite the proceedings. If necessary, it should also have sought ways of lightening its own workload.

It is not for the Federal Constitutional Court to order the courts to take specific measures to expedite proceedings, that being a matter for assessment by the court dealing with the case. The decision [as to the measures required] cannot be taken in the abstract but must have regard to the specific circumstances of the case and to the reasons for the length of the proceedings. The fact that the Court of Appeal was dependent on the collaboration of an expert in the instant case was not an obstacle to expediting the proceedings. By way of example, when selecting the expert the Court of Appeal should have taken account of the particular need to speed up its examination of the case and, to the extent that it had a choice between several similarly qualified experts, should have attached decisive weight to the time that appeared necessary to draw up the expert report. The court

must keep track of the production of the report by setting deadlines. If there are any matters requiring the involvement of several experts, organisational arrangements calculated to allow the experts to work simultaneously, such as making a copy of the file, should be made wherever possible.

... The legal analysis of the case and the assessment of the evidence relevant for establishing the facts are tasks entrusted to the judges. A review of their findings is only possible in the context of an appeal. In the absence of any specific evidence it is not necessary to assess whether the Federal Constitutional Court may intervene at an earlier stage of the proceedings in exceptional cases, for example where the court's manner of proceeding is arbitrary in that it is not based on any objective reasons. ...

Seeing that the Court of Appeal has not yet given judgment, the Federal Constitutional Court must confine itself (*muss sich beschränken*) to a finding of unconstitutionality pursuant to section 95(1) of the Federal Constitutional Court Act. The Court of Appeal is now required, in the light of the above findings, to take effective steps to ensure that the proceedings can be expedited and concluded as quickly as possible. ..."

Similar reasoning was adopted in decisions of 17 November 1999 (no. 1 BvR 1708/99), concerning civil proceedings that had lasted fifteen years, and 6 May 1997 (no. 1 BvR 711/96), concerning a case that had been pending before a family court for six and a half years.

In its decision of 6 December 2004 (no. 1 BvR 1977/04), concerning civil proceedings pending in the Frankfurt am Main Regional Court since 1989, the Federal Constitutional Court reached the following conclusions:

"In view of the exceptional amount of time the proceedings have already taken, the Regional Court can no longer simply treat this as an ordinary complex case. The longer the proceedings, the more pressing the obligation on the court to seek to expedite and conclude them. In such circumstances, the court is obliged to take all steps available to it to speed up the proceedings. Where necessary, the reporting judge must ask to be relieved of other duties within the court ...

In accordance with section 95(1) of the Federal Constitutional Court Act, the Federal Constitutional Court is confined to making a finding of unconstitutionality [of the length of the proceedings]. The Regional Court is now required, in the light of the above findings, to take effective steps to ensure that the proceedings can be concluded promptly."

(ii) Decisions in which constitutional complaints have been dismissed

67. In certain decisions the Federal Constitutional Court, while declining to examine a constitutional complaint lodged with it, has given particular indications to the court complained of. For example, in a decision of 18 January 2000 (no. 1 BvR 2115/98, unreported) it requested the regional court concerned to expedite the proceedings, which had been pending for almost nine years, and to give a final decision promptly (see *Herbolzheimer* v. *Germany*, no. 57249/00, § 38, 31 July 2003). Similar reasoning was adopted in a decision of 26 April 1999 (no. 1 BvR 467/99) concerning the length of civil proceedings lasting seven years at one level of jurisdiction, and in a decision of 27 July 2004 (no. 1 BvR 1196/04) concerning civil proceedings that had been pending for three years, in which the Federal Constitutional Court stated that it was assuming that the hearing scheduled for the end of 2004 would be held on the appointed date.

In a decision of 15 December 2003 (no. 1 BvR 1345/03), concerning proceedings which had been pending in the Administrative Court for two years but in which the complainant had reason to believe that his case would not be dealt with until late 2005, the Federal Constitutional Court observed that, according to what was at stake for the parties, a case could call for priority treatment and an exemption from the rule on examining applications in the order in which they were lodged.

(iii) Remittal of a case to the appropriate court

68. In a number of cases the Federal Constitutional Court, after finding the length of proceedings to be unconstitutional, has set aside the appellate court's refusal to grant the complainant's request to expedite the proceedings and has remitted the case to the same court.

For example, in a decision of 11 December 2000 (no. 1 BvR 661/00) it set aside a judgment in which a court of appeal had dismissed a special complaint alleging inaction on the part of a family court, and remitted the case to the court of appeal on the ground that there had been a violation of the right to a decision within a reasonable time and that it was not inconceivable that the court of appeal might have reached a different conclusion if it had taken account of the length of the proceedings. The same reasons were given in a decision of 25 November 2003 (no. 1 BvR 834/03). Similar findings were reached in decisions of 14 October 2003 (no. 1 BvR 901/03), concerning a period of five and a half years for an application for legal aid, and 28 August 2000 (no. 1 BvR 2328/96), concerning administrative proceedings that had been pending for ten years.

In case no. 1 BvR 383/00 (decision of 26 March 2001), concerning a constitutional complaint about the length of proceedings that had ended, the Labour Court of Appeal had taken eighteen months to draft its judgment and the Federal Labour Court had considered that, notwithstanding the fact that, by law, judgments were to be drafted within a period of five months from the date on which they were delivered in public, there were no grounds for allowing the appeal on points of law in the case before it. The Federal Constitutional Court, holding that there had been an infringement of the Basic Law, considered that such cases could be referred to it as soon as the five-month period had elapsed and remitted the case to a different division of the Labour Court of Appeal. Similar reasoning was adopted in a decision of 27 April 2005 (no. 1 BvR 2674/04).

(iv) Other consequences

69. In some cases complainants have declared their constitutional complaint to have lost its purpose where, after the complaint has been lodged, the court in question has taken action by scheduling a hearing or giving a decision. In such cases the Federal Constitutional Court has merely had to rule on costs.

In case no. 2 BvR 2189/99 (decision of 26 May 2000) the tax court before which proceedings had been pending for eight years held a hearing after the applicant had complained to the Federal Constitutional Court of their excessive length. He consequently withdrew his complaint and was refunded the legal costs incurred in lodging it in so far as it related to the length of the proceedings. However, in so far as he had challenged statutory provisions, he was required to await the outcome of the proceedings in the tax court. Similar reasoning was adopted in case no. 1 BvR 165/01 (decision of 4 July 2001), concerning proceedings in the social courts.

2. *Special complaint in respect of inaction as a remedy for expediting proceedings*

(a) Case-law of the Federal Constitutional Court

70. In a decision of 30 April 2003 (no. 1 PBvU 1/02), adopted by a majority of ten votes to six, the Federal Constitutional Court, sitting as a full court, called upon the legislature to create a remedy in respect of infringements of the right to be heard by a court. The final part of the decision contains the following passage:

"To redress certain deficiencies in the system of judicial protection, the courts have allowed the creation of special remedies partly outside the scope of written law. These remedies do not satisfy the requirements of constitutional law regarding the transparency of legal remedies (*Rechtsmittelklarheit*). Remedies must be provided for in the written legal order and the conditions for their use must be visible to citizens."

In the Federal Constitutional Court's view, the principle of the transparency of legal remedies resulted from the principle of legal certainty (*Rechtssicherheit*), which was an integral part of the rule of law. Citizens had to be in a position to assess whether a remedy could be used and, if so, under what conditions.

"The current system of special remedies in respect of violations of the right to be heard by a court does not comply with this principle of transparency. Doubts thus exist as to whether a special remedy has to be used first or whether a complaint should be lodged immediately with the Federal Constitutional Court. To avoid forfeiting their rights of appeal, litigants often avail themselves of

both remedies at the same time. Such constraints provide a clear illustration of the shortcomings of special remedies in terms of the rule of law. At the same time they create an unnecessary burden for citizens and the courts.

The shortcomings referred to above preclude the Federal Constitutional Court from making the admissibility of a constitutional complaint contingent on the use of such special remedies. They are not among the remedies that must be used for the purposes of the first sentence of section 90(2) of the Federal Constitutional Court Act. In so far as such an approach has hitherto been adopted by the Federal Constitutional Court, it can no longer be pursued. ..."

In a decision of 19 January 2004 (no. 2 BvR 1904/03) the Federal Constitutional Court nevertheless declined to examine a constitutional complaint by a prisoner concerning the length of proceedings before a court responsible for the execution of sentences, holding that the complainant should first have lodged a complaint alleging inaction. After observing that some courts accepted such a remedy only where the lack of activity could be deemed to amount to a final rejection of the initial application, the Federal Constitutional Court pointed out that other courts applied less stringent criteria. It concluded:

"This remedy was not bound to fail in advance. The complainant could have been expected to attempt it. He should first have sought judicial protection from the appropriate courts, even if the admissibility of a remedy was the subject of dispute in the case-law and among legal writers and there was consequently some doubt as to whether the court in question would accept it or not."

In case no. 2 BvR 1610/03 (decision of 29 March 2005) the division of the Hamburg Regional Court responsible for supervising the execution of sentences had remained inactive despite several requests to expedite the proceedings and despite a decision in which the Hamburg Court of Appeal had held that their length was unlawful. The Federal Constitutional Court declared the constitutional complaint admissible in so far as it concerned the court's inaction but dismissed it in so far as it concerned the impossibility for the Court of Appeal to give a ruling in place of the Regional Court in order to put an end to the lack of activity. The Regional Court's persistent inaction did not show that the legislative framework failed to satisfy the requirements of Article 19 § 4 of the Basic Law. Besides the possibility of a finding by the appellate court that such inaction was unlawful, there were other remedies for restoring the proper administration of justice, namely an appeal to a higher authority and an action for damages against the State.

(b) Case-law of the civil courts

71. The special remedy of a complaint alleging inaction (*ausserordentliche Untätigkeitsbeschwerde*) has been recognised according to varying criteria by a number of courts of appeal. While some have accepted it where there have been significant delays, others have limited its application to cases in which the court's inactivity cannot be objectively justified and amounts to a denial of justice. Decisions falling into the latter category include those delivered by the Celle Court of Appeal on 17 March 1975 (no. 7 W 22/75, in which the remedy was found to be admissible only if the court's decision amounted to a denial of justice) and 5 March 1985 (no. 2 W 16/85, in which the remedy was found to be admissible in respect of an unjustified delay by the lower court in dealing with an application for legal aid). The Federal Court of Justice, for its part, has to date left open the question whether, in exceptional cases and with due regard to constitutional law, a special complaint may be allowed in respect of arbitrary inaction that could be construed as a denial of justice on the part of a lower court (see the decisions of 21 November 1994 (no. AnwZ (B) 41/94) and 13 January 2003 (no. VI ZB 74/02)).

72. The Government have cited several decisions in which a court of appeal has allowed a special complaint alleging inaction and has called on the lower court to continue its examination of the case (decisions of the Cologne Court of Appeal (23 June 1981, no. 4 WF 93/81), the Hamburg Court of Appeal (3 May 1989, no. 2 UF 24/89), the Saarbrücken Court of Appeal (18 April 1997, no. 8 W 279/96) and the Bamberg Court of Appeal (20 February 2003, no. 7 WF 35/03)) or have referred the case back to it (the Zweibrücken Court of Appeal's decision of 15 November 2004 (no. 4 W 155/04)). More recent decisions have clarified the consequences of a complaint alleging inaction. For example, in two decisions of 24 July 2003 (nos. 16 WF 50/03 et 51/03) the Karlsruhe

Court of Appeal allowed such a remedy not only where there had been unjustifiable inactivity amounting to a denial of justice, but also where the delay complained of was likely to be prejudicial to a parent claiming parental responsibility, or to the child's well-being. It observed that it could not take the place of the family court, even if this was the most efficient manner of proceeding. Nor could it impose a procedural timetable on the lower court, since unforeseen circumstances might arise. The action it could take was limited to calling on the court to expedite the proceedings as much as possible. However, to give more substance to its order, it set the court deadlines for dealing with an objection to an expert, for giving the expert six weeks in which to produce his report or, otherwise, appointing a new one, for interviewing the parents and child and for arranging a hearing. The Naumburg Court of Appeal delivered a similar decision on the same subject on 20 December 2004 (no. 14 WF 234/04). In other cases courts of appeal have given decisions in place of the lower courts on account of the delays observed and in so far as the case was ready for decision (decisions of the Zweibrücken Court of Appeal (10 September 2002, no. 4 W 65/02), the Naumburg Court of Appeal (19 July 2004, no. 14 WF 38/04) and the Cologne Labour Court of Appeal (9 June 2004, no. 3 Ta 185/04)).

3. *Action for damages as a remedy*

(a) Case-law of the Federal Constitutional Court

73. The Government have not produced any decisions of the Federal Constitutional Court on this subject.

In a decision of 26 February 1999 (no. 1 BvR 2142/97, unreported – see *Mianowicz* v. *Germany*, no. 42505/98, § 40, 18 October 2001) the Federal Constitutional Court refused to examine a constitutional complaint on the following grounds, *inter alia*: "... The constitutional complaint is inadmissible in so far as the complainant is asking the Federal Constitutional Court to award him damages for the excessive length of the proceedings in issue. If a complainant seeks compensation for pecuniary or non-pecuniary damage sustained by him as a result of an infringement of his fundamental rights, he must first exhaust the remedies available in the civil courts. It is for those courts to assess, where appropriate, the extent to which the provisions on the State's liability (Article 34 of the Basic Law) and those deriving from the European Convention on Human Rights as incorporated in domestic law form a basis for awarding compensation for the excessive length of proceedings ..."

In a decision of 12 March 2004 (no. 1 BvR 1870/01, unreported) the Federal Constitutional Court confirmed that position: "In so far as the constitutional complaint concerns the Labour Court of Appeal's decision of 18 May 2001 and that court's alleged inaction, it has become inadmissible because the Court of Appeal has in the meantime given judgment. The complainant is not entitled to seek an *ex post facto* finding of a violation of the Basic Law on account of the excessive length of the proceedings. There is no statutory basis in constitutional law for applying to have a court decision set aside because of the excessive length of the proceedings, or for seeking damages on that account. Setting aside the Labour Court of Appeal's judgment of 3 December 2002 would not remedy the violation of the Basic Law resulting from the excessive length of the proceedings but would simply delay them further ..."

(b) Case-law of the civil courts

74. The Government cited a judgment delivered by the Munich I Regional Court on 12 January 2005 (no. 9 O 17286/03). The case concerned an action for damages in which the claimant alleged that the Bavaria Administrative Court of Appeal had remained inactive for a period of four years and seven months. He had lodged a special complaint with the Federal Administrative Court alleging inaction on that account. Shortly afterwards, the Administrative Court of Appeal made an interlocutory order in the proceedings, with the result that the complainant informed the Federal Administrative Court that his complaint alleging inaction had lost its purpose and that his claim now related solely to the reimbursement of his legal fees. The president of a division of the Federal Administrative Court replied that as no official proceedings had been instituted before it – the com-

plaint alleging inaction being a special remedy – it was unnecessary to rule on the question of costs. The Regional Court granted the claimant approximately EUR 1,400 in damages for the legal fees incurred within the limits of the applicable rates. The court further noted that the claimant had satisfied the conditions in Article 839 § 3 of the Civil Code by having appealed to a higher authority before bringing his action before it.

The Karlsruhe Regional Court, however, awarded compensation in a decision of 9 November 2001 (no. 3 O 192/01) for damage sustained as a result of the length of proceedings in the Saarland Court of Appeal after the Federal Constitutional Court had found their length to be unlawful (decision of 20 July 2000, no. 1 BvR 352/00 – see paragraph 66 above). It pointed out that State liability was not precluded by the "judicial privilege" enshrined in the first sentence of Article 839 § 2 of the Civil Code, since that rule did not apply in the event of inaction on the court's part. The decision has not become final (see the Court's decision in *Grässer*, cited above).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

75. The Government objected that domestic remedies had not been exhausted in respect of the complaint under Article 6 § 1 of the Convention. Firstly, the applicant had not yet applied to the Federal Constitutional Court at the time of his application to the Court; secondly, he had not made a valid application to the Federal Constitutional Court. His constitutional complaints had been inadmissible as they had not contained sufficient grounds. Neither his initial observations of 14 March 2001, amounting to eight lines, nor his additional observations of 5 and 11 August 2001 had allowed the Federal Constitutional Court to assess whether the length of the proceedings in the Regional Court had been excessive. The same was true of his second constitutional complaint.

76. The applicant asserted that his complaints had contained sufficient grounds. The conditions applied by the Federal Constitutional Court with regard to the statement of grounds were excessively formal and impossible to satisfy without legal assistance. However, the applicant had not had sufficient financial resources to instruct a lawyer. The Federal Constitutional Court had, moreover, contacted the Regional Court for information on the state of the proceedings and had therefore been perfectly aware of the subject matter of the constitutional complaint.

77. The Court notes that there are two limbs to the Government's objection of failure to exhaust domestic remedies. However, it is unnecessary to rule on either of them if it is found that, as the applicant maintained, a constitutional complaint to the Federal Constitutional Court was in any event bound to fail as it is not a remedy capable of affording redress for his complaint under Article 6 § 1 of the Convention.

78. The Court observes that in its admissibility decision in the present case the Chamber joined to the merits the objection that domestic remedies had not been exhausted, on the ground that the question was closely linked to that of the existence of an effective remedy within the meaning of Article 13 of the Convention. It will therefore examine the Government's objection under that Article, having regard to the close affinity between Article 35 § 1 and Article 13 of the Convention (see *Kudla* v. *Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

79. The applicant complained of the lack of any remedies in the German legal system enabling him to complain of the length of the proceedings in the Hanover Regional Court. He alleged a violation of Article 13 of the Convention, which provides: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. THE PARTIES' SUBMISSIONS

1. *The Government*

80. The Government asserted that the applicant had had four remedies available in respect of the length of the proceedings in the Regional Court: a constitutional complaint, an appeal to a higher authority, a special complaint alleging inaction and an action for damages.

(a) Constitutional complaint

81. The Government observed that the Court had held that a constitutional complaint to the Federal Constitutional Court was a remedy that had to be used for the purposes of Article 35 § 1 of the Convention where a complaint concerned a court's inaction or the length of civil proceedings (they cited *Thieme* v. *Germany* (dec.), no. 38365/97, 15 November 2001, and *Teuschler* v. *Germany* (dec.), no. 7636/99, 4 October 2001).

82. They pointed out that according to the settled case-law of the Federal Constitutional Court, Article 2 § 1 of the Basic Law taken together with Article 20 § 3 guaranteed the right to have legal disputes settled within a reasonable time. In view of the variety of types of proceedings, there were no absolute criteria for determining the point at which the length of proceedings became excessive. Consideration had to be given to all the circumstances of the case, what was at stake for the parties, the complexity of the case and the conduct of the parties and of any other person, such as an expert, who acted independently of the court. The longer the proceedings as a whole or at one particular level of jurisdiction, the more pressing the obligation on the court to take steps to expedite or conclude them.

83. As to the means by which the Federal Constitutional Court was able to influence the length of pending proceedings, the Government admitted that that court generally confined itself, in accordance with section 95(1) of the Federal Constitutional Court Act, to holding that there had been an infringement of the Basic Law. However, it not only requested the court dealing with the case to expedite or conclude the proceedings (here they cited the decision of 17 November 1999 referred to in paragraph 66 above) but also gave indications as to how the proceedings could be expedited, as was evidenced by its decision of 20 July 2000 (ibid.). By virtue of section 31(1) of the Federal Constitutional Court Act, its decisions were binding on all domestic courts and authorities and did not concern only the courts that had dealt with the proceedings to which the constitutional complaint related and the parties to them. The Federal Constitutional Court could also proceed in this manner even where it declared the constitutional complaint inadmissible (they cited the decision of 27 July 2004 referred to in paragraph 67 above).

84. Furthermore, the mere fact that notice of a constitutional complaint satisfying the admissibility criteria was given to the Federal Government or the government of the Land in which the court in question was situated had the effect of speeding up the proceedings. Similarly, there were cases in which complainants had declared that their constitutional complaint had lost its purpose as a result of a procedural step taken in the meantime by the court concerned, the costs of bringing the complaint being borne by the State (they cited the decision of 26 May 2000 referred to in paragraph 69 above). Furthermore, the fact that the Federal Constitutional Court's decisions were often published and discussed in the legal press exerted additional pressure on the courts concerned.

85. Lastly, contrary to what the applicant maintained, the Federal Constitutional Court had urged the legislature to create a statutory remedy only in respect of a violation of the right to be heard by a court, without addressing the question whether it was also necessary to introduce a remedy in respect of the excessive length of proceedings.

86. At the hearing the Government requested the Court, in the event of its finding that a constitutional complaint was not an effective remedy within the meaning of Article 13, to hold that it was nevertheless a remedy that had to be used for the purposes of the exhaustion requirement in Article 35 § 1. Otherwise, the Court would be leaving the way open for litigants to complain to it directly about the length of domestic proceedings without first having to go through the Federal Constitutional Court, which performed a filter function in that regard. That neither could nor should be the

aim of Article 13 and such a finding would lead to an increase in the number of cases before the Court.

(b) Appeal to a higher authority

87. The Government observed that under section 26(2) of the German Judges Act (*Deutsches Richtergesetz*) it was possible to expedite pending proceedings by means of an appeal to a higher authority.

(c) Special complaint alleging inaction

88. The Government submitted that while it was true that a special complaint alleging inaction had no statutory basis in German law, it was nevertheless recognised by a large number of courts of appeal. It was for the complainant to show that a court had been responsible for an unjustifiable delay in the proceedings amounting to a denial of justice. In such cases the court of appeal could order the resumption of the proceedings. Refusal by the judge in question to comply with the order could constitute grounds for a request that he or she withdraw. In some cases the court of appeal had taken over the examination of the case itself and had given a ruling in place of the lower court responsible for the slow pace of the proceedings. The Government conceded that to date the Federal Court of Justice had left open the question whether a complaint alleging inaction should be recognised and that no decisions had been given on the subject by the Celle Court of Appeal, which would have had jurisdiction had the applicant lodged such a complaint on account of the length of the proceedings in the Regional Court.

(d) Action for damages

89. The Government argued that it was possible to obtain damages for the excessive length of proceedings by means of an action to establish the State's liability. Where delays amounted to a breach of a judge's official duties, there could be an entitlement to compensation for the damage sustained. This was so where the judge wrongfully refused to conduct proceedings or delayed them, particularly in the event of a total lack of activity. On account of the principle of judicial independence, the entitlement generally applied only in cases of flagrant abuse (*krasse Missbrauchsfälle*). Compensation could be awarded for non-pecuniary damage where, for example, a person's physical well-being or health had been harmed. It was for the civil courts to rule on the award of compensation, there being no need for a prior finding by the Federal Constitutional Court that the length of the proceedings was unconstitutional. The Government cited a recent decision delivered by the Munich Regional Court on 12 January 2005 (see paragraph 74 above) in which the claimant had been refunded the legal costs necessarily incurred in lodging a complaint about the excessive length of proceedings before an administrative court of appeal. They further noted that the proceedings brought by the applicant in the Hanover Regional Court in 2002 had not concerned the State's liability for the excessive length of the proceedings but solely an application for legal aid.

(e) Creation of a new remedy

90. While asserting that existing remedies satisfied the requirements of Article 13 of the Convention, the Government informed the Court of a bill to introduce a remedy in the form of a complaint alleging inaction, along the lines of the Austrian model. This remedy would make it possible to lodge a complaint about the unjustified length of proceedings with the court concerned. If the court did not take the necessary steps to expedite the proceedings, the appellate court would be able to set it an appropriate deadline for taking such steps.

91. At the hearing the Government conceded that the current position in the German legal system was not satisfactory. At present, complaints about the excessive length of civil proceedings could not be lodged with the appellate courts, which were closer to the proceedings both geographically and in terms of their subject matter, but had to be raised before the Federal Constitutional Court, whose primary task was to rule on important issues of constitutional law. The Gov-

ernment insisted, however, that they did not consider that state of affairs to constitute a human-rights violation.

2. *The applicant*

92. The applicant asserted that none of the remedies advocated by the Government would in practice have made it possible to expedite the proceedings in the Regional Court.

93. With regard to the remedy of a constitutional complaint, the applicant submitted that the Federal Constitutional Court did not have the means to ensure that pending civil proceedings were effectively expedited. It was limited to declaring their length unconstitutional, a finding that, in view of the principle of judicial independence, had no effect on the court concerned. The binding nature of decisions of the Federal Constitutional Court related only to the application and interpretation of the law and not to the manner in which proceedings should be conducted. The pressure allegedly exerted by publication of a decision finding a breach of the right to a hearing within a reasonable time was insufficient and purely a matter of speculation, and could not in any event be seriously taken into consideration in examining the effectiveness of a constitutional complaint. Such published decisions, moreover, had had no impact on the conduct of the proceedings in the Regional Court in his case. For a remedy to be considered effective, it had to be capable of improving the position of the person concerned, for example by setting deadlines, as was possible under section 91 of the Austrian Courts Act (*Gerichtsorganisationsgesetz*). Such a system made it easier for litigants to prove, where the deadline was not met, that the court had delayed the proceedings and to obtain compensation.

94. As regards an appeal to a higher authority, the applicant submitted that that remedy did not satisfy the criteria of effectiveness for the purposes of Article 13 of the Convention.

95. As regards the remedy of a special complaint alleging inaction, the applicant observed that it had no statutory basis in domestic law and had been recognised only by certain courts of appeal, the Celle Court of Appeal not being among them. It accordingly could not be regarded as effective within the meaning of Article 13 of the Convention. Even supposing that such a remedy was capable of affording redress for the excessive length of proceedings, it should at the very least be available in a consistent manner at national level. However, the Federal Court of Justice, the supreme judicial body responsible for ensuring consistency of case-law at federal level, had accepted it only in the event of a flagrant denial of justice. The applicant inferred from this that such a remedy did not have any prospect of succeeding unless there had been a total lack of activity on the part of the court in question. In his case, however, the Regional Court had taken a whole succession of procedural decisions, which were precisely what had caused the delays. The principle of judicial independence likewise generally constituted an obstacle to the intervention of a higher court in pending proceedings. Furthermore, the three decisions cited by the Government in which courts of appeal had taken over the examination of the case because of the excessive length of the proceedings in the lower court were recent and two of them had concerned family law, a field in which particular diligence and promptness were called for.

96. As regards the remedy of an action for damages, the applicant pointed out that he had applied to the Hanover Regional Court for legal aid with a view to suing the Land of Lower Saxony on account of the delays that had occurred. In view of his insufficient financial resources and the requirement for him to be represented by counsel, he had not been able to bring an action directly against the State but had first had to apply for legal aid. His application had been refused at first instance and subsequently by the Celle Court of Appeal on the grounds that there had been no unjustified delays in the proceedings and that he had not provided sufficient details of the damage he had allegedly sustained. The applicant submitted in conclusion that this remedy was ineffective because the courts concerned had taken fourteen months to rule on the matter. Furthermore, it would at best have resulted in a finding that the State was liable, without expediting the proceedings. In any event, the civil courts could not award any compensation for non-pecuniary damage but only for pecuniary damage.

B. THE COURT'S ASSESSMENT

1. *General principles*

97. Under Article 1 of the Convention, which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention", the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *Scordino* v. *Italy (no. 1)* [GC], no. 36813/97, § 140, ECHR 2006-..., and *Cocchiarella* v. *Italy* [GC], no. 64886/01, § 38, ECHR 2006-...).

98. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. It is therefore necessary to determine in each case whether the means available to litigants in domestic law are "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudla*, cited above, §§ 157-58).

99. Remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are "effective" within the meaning of Article 13 of the Convention if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred. A remedy is therefore effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Mifsud* v. *France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII).

100. However, as the Court has recently emphasised, the best solution in absolute terms is indisputably, as in many spheres, prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation (see *Scordino*, cited above, §§ 183 and 186, and *Cocchiarella*, cited above, §§ 74 and 77).

101. Where a domestic legal system has made provision for bringing an action against the State, the Court has pointed out that such an action must remain an effective, sufficient and accessible remedy in respect of the excessive length of judicial proceedings and that its sufficiency may be affected by excessive delays and depend on the level of compensation (see *Paulino Tomás* v. *Portugal* (dec.), no. 58698/00, ECHR 2003-VIII, and *Doran* v. *Ireland*, no. 50389/99, § 57, ECHR 2003-X).

2. *Application of these principles in the instant case*

102. The Court considers, without anticipating the examination of whether the reasonable-time requirement in Article 6 § 1 of the Convention was complied with, that the applicant's complaint concerning the length of the proceedings in the Regional Court is on its face "arguable", seeing that the proceedings in issue have lasted more than sixteen years (see, *mutatis mutandis*, *Öneryildiz* v. *Turkey* [GC], no. 48939/99, § 151, ECHR 2004-XI). This complaint has, moreover, been declared admissible by the Chamber.

(a) Constitutional complaint

103. The Court observes that, having regard to the Federal Constitutional Court's case-law acknowledging the existence of a constitutional right to expeditious proceedings (see the Commission's decisions in *X* v. *Germany*, no. 8499/79, 7 October 1980, Decisions and Reports (DR) 21, p. 176, and *Reisz* v. *Germany*, no. 32013/96, 20 October 1997, DR 91-A, p. 53, which refer to *König* v. *Germany*, judgment of 28 June 1978, Series A no. 27, pp. 21-22, §§ 61 and 64), the Convention institutions have previously taken the view that a constitutional complaint to the Federal Constitutional Court was an effective remedy in respect of complaints concerning the length of proceedings (see the Commission's decisions in *X* v. *Germany*, cited above; *W.* v. *Germany*, no. 10785/84, 18 July 1986, DR 48, p. 102; and *Reisz*, cited above; and also the Court's decisions in *Teuschler* and *Thieme*, both cited above).

104. However, in the light of the continuing accumulation of applications in which the only or the principal allegation was that of a failure to ensure a hearing within a reasonable time, in breach of Article 6 § 1, the Court adopted a different approach in the *Kudla* case (cited above, §§ 148-49), in which it drew attention to the important danger that existed for the rule of law within national legal orders when excessive delays in the administration of justice occurred in respect of which litigants had no domestic remedy, and observed that it was henceforth necessary, notwithstanding a finding of a violation of Article 6 § 1 for failure to comply with the reasonable-time requirement, to carry out a separate examination of any such complaints under Article 13.

The Court has subsequently undertaken a closer examination of the effectiveness, within the meaning of Article 13 of the Convention, of remedies in a number of Contracting States in respect of the length of proceedings (see, among other authorities, *Belinger* v. *Slovenia* (dec.), no. 42320/98, 2 October 2001; *Andrášik and Others* v. *Slovakia* (dec.), nos. 57984/00, 60226/00, 60237/00, 60242/00, 60679/00, 60680/00 and 68563/01, ECHR 2002-IX; *Slavicek* v. *Croatia* (dec.), no. 20862/02, ECHR 2002-VII; *Fernández-Molina González and Others* v. *Spain* (dec.), no. 64359/01, ECHR 2002-IX; *Doran*, cited above; *Hartman* v. *the Czech Republic*, no. 53341/99, ECHR 2003-VIII; *Paulino Tomás*, cited above; *Kormacheva* v. *Russia*, no. 53084/99, 29 January 2004; *Bako* v. *Slovakia* (dec.), no. 60227/00, 15 March 2005; *Charzynski* v. *Poland* (dec.), no. 15212/03, ECHR 2005-V; and *Lukenda* v. *Slovenia*, no. 23032/02, ECHR 2005-X).

105. The Court observes that the right to expeditious proceedings is guaranteed by the German Basic Law and that a violation of this right may be alleged before the Federal Constitutional Court. Where that court finds that proceedings have taken an excessive time, it declares their length unconstitutional and requests the court concerned to expedite or conclude them. Like the Czech Constitutional Court (see *Hartman*, cited above, §§ 67-68) but unlike other constitutional and supreme courts in Europe (see, for example, *Andrášik and Others*, *Slavicek* and *Fernández-Molina González and Others*, all cited above, and *Kunz* v. *Switzerland* (dec.), no. 623/02, 21 June 2005), the German Federal Constitutional Court is not empowered to set deadlines for the lower court or to order other measures to speed up the proceedings in issue; nor is it able to award compensation. In the Government's submission, a finding of unconstitutionality, on account of its *erga omnes* effect and the publicity enjoyed by the Federal Constitutional Court's decisions, is sufficient to ensure that the proceedings are effectively expedited, especially as the Federal Constitutional Court may, where appropriate, give detailed indications as to how the proceedings could be expedited, as evidenced by its decision of 20 July 2000 (see paragraph 66 above). The Court notes that that decision, in which the Federal Constitutional Court did indeed give fairly detailed indications of the means whereby the Court of Appeal could speed up the proceedings, remains exceptional and cannot therefore be said to be representative. Furthermore, as regards the effect *in concreto* of the Federal Constitutional Court's decisions, the decision in question referred to that court's settled case-law to the effect that it was not its task to order the courts to take specific measures to expedite proceedings, that being a matter for assessment by the court dealing with the case. In other cases the Federal Constitutional Court has given somewhat vague indications, such as its statement that it was assuming that the hearing scheduled by the lower court would take place or its observation that some cases called for priority treatment on account of what was at stake for the parties (see paragraph 67 above). In certain cases, in which the constitutional complaint concerned the refusal of an appellate court to allow a complaint alleging inaction on account of the length of proceedings in the

court below, the Federal Constitutional Court has set aside the refusal and remitted the case to the appellate court.

106. Accordingly, the only means available for the Federal Constitutional Court to ensure that pending proceedings are expedited is to declare that their length is in breach of the Basic Law and to call upon the court concerned to take the steps necessary for their progress or conclusion. In this connection, it is worth noting that the Federal Constitutional Court itself acknowledges the limited scope of its powers in declaring the length of proceedings to be unconstitutional (see paragraph 66 above). While accepting that the proceedings may well be conducted more quickly where the court in question complies immediately with the Federal Constitutional Court's order, the Court notes that the Government have not provided any indication of the potential or actual impact of the Federal Constitutional Court's decisions on the processing of cases in which there have been delays. It observes that in a case against Germany currently pending before it, in which such an order had been given by the Federal Constitutional Court, the proceedings complained of ended sixteen months later in the court in question and two years and nine months later in the Court of Appeal (see *Grässer*, cited above). In another case dealt with by the Court, in which the Federal Constitutional Court had ordered the proceedings to be expedited while not finding their length to be unconstitutional, the lower court took a further period of more than ten months to complete its examination, and the proceedings as a whole ended two and a half years after the Federal Constitutional Court's order (see *Herbolzheimer*, cited above, §§ 31-38). In that case, concerning proceedings that had lasted nine years and eight months, the Court, moreover, found a violation of Article 6 § 1 of the Convention, whereas the Federal Constitutional Court had declared the constitutional complaint inadmissible, finding that the length of the proceedings (almost nine years by that stage) had not yet reached an intolerable level (see paragraph 67 above).

107. Lastly, as regards the public pressure referred to by the Government, the Court is not persuaded that this is a factor likely to expedite proceedings in an individual case.

108. Having regard to the above considerations, the Court finds that the Government have not shown that a constitutional complaint is capable of affording redress for the excessive length of pending civil proceedings. Accordingly, even assuming that the constitutional complaints lodged by the applicant, who was not represented by counsel before the Federal Constitutional Court, did not satisfy the admissibility criteria, he was not required to raise before that court his complaint about the length of the proceedings in his case.

(b) Appeal to a higher authority

109. The Court notes that the Government have not advanced any relevant reasons to warrant the conclusion that an appeal to a higher authority, as provided for in section 26(2) of the German Judges Act, would have been capable of expediting the proceedings in the Regional Court. It observes, moreover, that it has found on a number of occasions that such appeals are not an effective remedy within the meaning of Article 13 in that they do not generally give litigants a personal right to compel the State to exercise its supervisory powers (see *Kuchar and Štis* v. *the Czech Republic* (dec.), no. 37527/97, 23 May 2000; *Horvat* v. *Croatia*, no. 1585/99, § 47, ECHR 2001-VIII; and *Lukenda*, cited above, §§ 61-63).

(c) Special complaint alleging inaction

110. The Court notes that the special remedy of a complaint alleging inaction has no statutory basis in domestic law. Although a considerable number of courts of appeal have accepted it in principle, the admissibility criteria for it are variable and depend on the circumstances of the particular case. The Federal Court of Justice has yet to give a ruling on the admissibility of such a remedy. As regards the consequences where such a complaint has been declared admissible, the Court notes that the Government have merely stated, citing four cases in support of their position, that the appellate court may order the continuation of the proceedings before the lower court, without giving any further details about the content of such orders or their effect on the proceedings in issue. As regards the fact that certain courts of appeal have chosen to give detailed indications of ways of speeding up the proceedings or have themselves given a decision in place of the lower court (see

paragraph 72 above), the Court observes that only four such courts have delivered decisions to that effect, none of them before the application in the present case was lodged in November 1999, whereas the effectiveness of a particular remedy is normally assessed with reference to the date of the application (see, for example, *Baumann* v. *France*, no. 33592/96, § 47, 22 May 2001; *Nogolica* v. *Croatia* (dec.), no. 77784/01, ECHR 2002-VIII; and *Marien* v. *Belgium* (dec.), no. 46046/99, 24 June 2004). Moreover, the somewhat general nature of the findings reached by the full Federal Constitutional Court (see paragraph 70 above) tends to suggest, although the decision in question solely concerned the right to be heard by a court, that an unwritten remedy with variable admissibility criteria is likely to be problematic in terms of constitutional law.

111. In their observations the parties agreed that the Celle Court of Appeal, which would have had jurisdiction had the applicant brought a complaint alleging inaction on account of the length of the proceedings in the Regional Court, has yet to give a ruling on the admissibility of such a complaint. Having regard to the uncertainty about the admissibility criteria for a special complaint alleging inaction and to the practical effect of such a complaint on the proceedings in the instant case, the Court considers that no particular relevance should be attached to the fact that the Celle Court of Appeal has not ruled out this remedy in principle (see paragraph 71 above). It further notes that the Federal Constitutional Court did not declare the applicant's constitutional complaints inadmissible for failure to exhaust domestic remedies within the meaning of the first sentence of section 90 (2) of the Federal Constitutional Court Act (see paragraph 62 above).

112. Accordingly, a special complaint alleging inaction cannot be regarded as an effective remedy in the instant case.

(d) Action for damages

113. Lastly, as regards the remedy of an action for damages, the Court notes that the Government have cited only one judgment, delivered recently by the Munich Regional Court, which held that the inaction observed in proceedings in the administrative courts amounted to a breach of judicial duties. However, a single final judicial decision – given, moreover, at first instance – is not sufficient to satisfy the Court that there was an effective remedy available in theory and in practice (see *Rezette* v. *Luxembourg*, no. 73983/01, § 27, 13 July 2004; *Marien*, cited above; and *Gama da Costa* v. *Portugal*, no. 12659/87, Commission decision of 5 March 1990, DR 65, p. 136). Furthermore, the applicant's application to the civil courts for legal aid in order to bring an action for damages was refused on the ground, *inter alia*, that there had not been any unjustified delays in the proceedings. In any event, even if the relevant courts were to conclude that there had been a breach of judicial duties on account of delays rendering proceedings excessively long, they would not be able to make any award in respect of non-pecuniary damage, whereas, as the Court has previously observed, in cases concerning the length of civil proceedings the applicants above all sustain damage under that head (see *Hartman*, cited above, § 68, and *Lukenda*, cited above, § 59; see also *Scordino*, cited above, § 204, and *Cocchiarella*, cited above, § 95). The decision of the Munich Regional Court (cited in paragraph 74 above) is a telling example of this shortcoming, since the applicant in that case obtained only partial reimbursement of the legal costs he had necessarily incurred in lodging the complaint alleging inaction.

114. Accordingly, an action for damages was not a remedy capable of affording the applicant adequate redress for the length of the proceedings.

(e) Conclusion

115. In conclusion, none of the four remedies advocated by the Government can be considered effective within the meaning of Article 13 of the Convention. As regards the effectiveness of these remedies in the aggregate, the Court notes that the Government have neither alleged nor shown that a combination of two or more of them would satisfy the requirements of Article 13. It is therefore unnecessary to rule on this question.

116. Accordingly, the applicant did not have an effective remedy within the meaning of Article 13 of the Convention which could have expedited the proceedings in the Regional Court or provided

adequate redress for delays that had already occurred. There has therefore been a violation of this Article and the Government's objection of failure to exhaust domestic remedies must be dismissed.

117. As regards the possible introduction in the German legal system of a new remedy in respect of inaction, the Court refers to its findings in relation to Article 46 of the Convention (see paragraph 138 below).

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

118. The applicant complained of the length of the proceedings in the Hanover Regional Court. He relied on Article 6 § 1, the relevant part of which provides: "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

119. The Court notes that the proceedings in issue began on 18 September 1989, when the applicant applied to the Regional Court, and are still pending. They have therefore lasted more than sixteen years and seven months to date.

A. THE PARTIES' SUBMISSIONS

1. *The Government*

120. The Government conceded that the length of the proceedings in issue was considerable but argued that this was due to the complexity of the case and, above all, to the applicant's conduct.

121. The complexity of the case stemmed, in their submission, from the need to carry out a number of expert medical assessments. The fact that the applicant had fallen a further time on his hand or left arm on 4 January 1993 had made it even more difficult to assess the precise after-effects of his accident in 1982.

122. The main reason for the delays observed had been the applicant's conduct. He had repeatedly filed lengthy submissions, had twice revised his initial claim, had asked on seventeen occasions for additional time to submit his observations, had twice requested a stay of the proceedings with a view to negotiating a friendly settlement, had several times objected to the judges and experts involved in his case and had requested several expert assessments. The Government asserted that although representation by counsel was compulsory, the Regional Court had been obliged to take into account the observations submitted by the applicant personally because, for example, an application for a judge to withdraw could be lodged without the intervention of a lawyer. They pointed out that German civil procedure was governed by the principle that the procedural initiative lay with the parties. Delays amounting to a total of fifteen months during the first phase of the proceedings and four years and ten months during the second were attributable to the applicant. Furthermore, he had not instituted proceedings in the Regional Court until seven years after the accident, a fact that had complicated the domestic courts' task. In conclusion, the applicant had contributed so much to the length of the proceedings that he could not validly complain about it to the Court.

123. The Government admitted that the Regional Court could perhaps have conducted the proceedings more quickly if it had paid less regard to the applicant's objections to the choice of experts appointed. They emphasised, however, that it had been necessary to take great care in selecting the experts in order to ensure that they had the necessary medical expertise to obtain conclusive findings as to the extent to which the 1982 accident had been the cause of the applicant's fragile state of health. The Government stated that it had taken three years in total to produce the expert reports. They added that, having been informed that out-of-court negotiations between the parties were in progress, the Regional Court had had valid reasons for awaiting their outcome before resuming the proceedings.

124. As to what was at stake in the case, the Government observed that it had not called for special treatment. Following his accident in 1982, the applicant had successfully completed a training course in information technology and had worked for several years. It was only as a result of his

accidents in 1990, 1991 and 1993 that he had had to stop working and was now in receipt of an occupational-disability pension.

2. *The applicant*

125. The applicant disputed the Government's submissions, contending that the case had not been particularly complex, especially as the Regional Court had already delivered a partial decision in 1991. He gave a detailed breakdown of periods of inaction totalling 34 months in the proceedings. In particular, the Regional Court had taken a long time to appoint an expert who ultimately had not had the necessary expertise in the fields of hand surgery and the causes of pain.

126. The applicant pointed out that the Regional Court had remained in charge of the conduct of the proceedings and had not been obliged to take into account the numerous observations and requests he had submitted personally since, as the court had informed him at the start of the proceedings, representation by counsel was compulsory before it. The applicant pointed out that the reason why he had contacted the Regional Court so frequently was that he had been frustrated at the length of the proceedings. He further noted that the Regional Court had given judgment a few days prior to the hearing in his case before the Court, a fact that showed that it had been quite capable of concluding the proceedings.

127. As to what was at stake in the case, at the hearing before the Court the applicant emphasised that the outcome of the proceedings was very important for him and his future. In its partial decision of 1991 the Regional Court had held that he was entitled to an award for 80% of the damage he had sustained. He had therefore been entitled to expect a substantial amount of compensation, serving as a financial basis for his future plans.

B. *The Court's assessment*

128. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see *Frydlender* v. *France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

129. It further refers to its settled case-law to the effect that even in legal systems applying the principle that the procedural initiative lies with the parties (*Parteimaxime*), as the German Code of Civil Procedure does, the parties' attitude does not dispense the courts from ensuring the expeditious trial required by Article 6 § 1 (see *Guincho* v. *Portugal*, judgment of 10 July 1984, Series A no. 81, p. 14, § 32; *Capuano* v. *Italy*, judgment of 25 June 1987, Series A no. 119, p. 11, § 25; *Unión Alimentaria Sanders S.A.* v. *Spain*, judgment of 7 July 1989, Series A no. 157, p. 157, § 35; *Duclos* v. *France*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2180, § 55; *Pafitis and Others* v. *Greece*, judgment of 26 February 1998, Reports 1998-I, p. 458, § 93; *H.T.* v. *Germany*, no. 38073/97, § 35, 11 October 2001; *Berlin* v. *Luxembourg*, no. 44978/98, § 58, 15 July 2003; and *McMullen* v. *Ireland*, no. 42297/98, § 38, 29 July 2004). The same applies where the cooperation of an expert is necessary during the proceedings (see *Scopelliti* v. *Italy*, judgment of 23 November 1993, Series A no. 278, p. 9, §§ 23 and 25; *Martins Moreira* v. *Portugal*, judgment of 26 October 1988, Series A no. 143, p. 21, § 60; and *Herbolzheimer*, cited above, §§ 45 and 48).

It lastly reiterates that Article 6 § 1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to hear cases within a reasonable time (see *Scordino*, cited above, § 183; *Cocchiarella*, cited above, § 74; *Duclos*, cited above, p. 2181, § 55; *Muti* v. *Italy*, judgment of 23 March 1994, Series A no. 281-C, p. 57, § 15; *Caillot* v. *France*, no. 36932/97, § 27, 4 June 1999; *Herbolzheimer*, cited above, § 48; and Doran, cited above, § 47).

130. The Court considers that the case was not of a particularly complex nature. It can, however, accept that its complexity increased from a procedural standpoint when it became necessary, after the applicant had fallen on his arm a further time in January 1993, to seek the opinion of several

medical experts as to whether and to what extent the 1982 accident had caused him physical and mental damage.

131. With regard to the applicant's conduct, the Court notes that he repeatedly asked for extensions of the time he had been given and on four occasions applied for one or more of the Regional Court judges dealing with his case to withdraw. He also requested additional expert opinions on several occasions and objected to three experts, going so far as to seek the institution of disciplinary proceedings against at least one of them. Furthermore, although he was represented by counsel, he frequently contacted the Regional Court personally, either in writing or by telephone. In addition, he ultimately withdrew his consent, which he had given orally at the hearing of 9 July 2001 in the Regional Court, for the evidence before the Social Court of Appeal to be added to the case file. To that extent, therefore, the applicant contributed to the delays observed. He cannot, on the other hand, be criticised for taking advantage of certain remedies available to him under German law, although the national authorities cannot be held responsible for the resulting increase in the length of the proceedings.

132. With regard to the conduct of the Regional Court, the Court accepts that a certain amount of time was necessary for the production of expert reports. It considers, however, that, even taking into account the fact that the Regional Court had to choose the necessary experts carefully in order to obtain conclusive findings, the overall time it took to do so exceeded a reasonable length. Furthermore, on several occasions during the proceedings the parties exchanged observations without any particular steps being taken by the Regional Court. It should also be noted that although representation by counsel was compulsory, the applicant was able to submit a large number of requests personally. In the Government's submission, the Regional Court was required to take them into consideration because, for example, an application for a judge to withdraw can be lodged without the intervention of a lawyer. However, the delays caused by the four applications to that effect cannot in themselves account for the length of the proceedings. The Court considers that the Government have not adequately shown that the Regional Court did not have sufficient means available to prevent the applicant from filing so many personal observations, seeing that most of them did not concern objections to judges.

133. As to what was at stake for the parties in the dispute, the Court observes that the proceedings concerned a claim for damages and for a pension in respect of the damage resulting from the accident and that they accordingly did not belong to a category that by its nature calls for special expedition (such as custody of children (see *Niederböster* v. *Germany*, no. 39547/98, § 33, ECHR 2003-IV), civil status and capacity (see *Mikulic* v. *Croatia*, no. 53176/99, § 44, ECHR 2002-I) or labour disputes (see *Frydlender*, cited above, § 45)). It further notes that the cyclist's and Hanover City Council's insurance companies have paid the applicant various amounts in respect of non-pecuniary and pecuniary damage. Nevertheless, it cannot ignore the fact that the court action brought by the applicant in September 1989 has, after more than sixteen and a half years, still not given rise to a final judicial decision.

134. The Court accordingly concludes that, notwithstanding the applicant's conduct and all the circumstances relied on by the Government, the length of the proceedings has exceeded a reasonable time for the purposes of Article 6 § 1 of the Convention. There has therefore been a violation of that provision.

IV. ARTICLES 46 AND 41 OF THE CONVENTION

A. ARTICLE 46 OF THE CONVENTION

135. Article 46 of the Convention provides: "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

136. The Court's above findings suggest that the remedies available in the German legal system do not afford litigants an effective means of complaining of the length of pending civil proceedings and therefore do not comply with the Convention.

137. The Court reiterates that, in accordance with Article 46 of the Convention, a finding of a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Broniowski* v. *Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).

138. The Court has taken due note of the bill, tabled shortly before the parliamentary elections of 18 September 2005, to introduce in German written law a new remedy in respect of inaction. According to the Government, this remedy, the creation of which was felt to be necessary in the light of the Court's judgment in *Kudla*, will ease the Federal Constitutional Court's caseload in that complaints about the length of proceedings will in future have to be submitted to the court dealing with the case or, if that court refuses to take steps to expedite the proceedings, to an appellate court.

The Court considers in this connection that the Government, in opting for a preventive remedy, have taken the approach most in keeping with the spirit of the protection system set up by the Convention since the new remedy will deal with the root cause of the length-of-proceedings problem and appears more likely to offer litigants adequate protection than compensatory remedies, which merely allow action to be taken *a posteriori* (see *Scordino*, cited above, § 183, and *Cocchiarella*, cited above, § 74).

139. The Court welcomes this initiative, finding no reason to conclude that it has been abandoned, and encourages the speedy enactment of a law containing the proposals set out in the bill in question. It therefore considers it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment (see *Sejdovic* v. *Italy* [GC], no. 56581/00, §§ 121-124, ECHR 2006-...).

B. ARTICLE 41 OF THE CONVENTION

140. Under Article 41 of the Convention, "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. *Damage*

141. The applicant claimed EUR 826,328, plus 7% interest, for loss of earnings. Referring to his training in information technology, he submitted that he would have been able to earn EUR 35,000 per annum as a systems analyst. He further claimed EUR 17,500,000, plus 7% interest, for loss of profit (*lucrum cessans*) in relation to marketing schemes for a number of products aimed at the Turkish market which he stated that he had been unable to carry out in the absence of a judgment by the Regional Court. The award by the Regional Court of the compensation sought would have allowed him to fund those projects. The applicant claimed a further sum of EUR 170,000 in respect of the interest payable, in his submission, on the amount to which he was entitled in order to avoid depreciation over time. Lastly, in respect of non-pecuniary damage, the applicant sought EUR 300,000 on account of his accident in 1982 and EUR 100,000 for the excessive length of the proceedings in the Regional Court, which he claimed had caused him permanent stress and severe depression. He had lost all confidence in the German authorities, which were persecuting him on account of the compensation claims he had brought in the domestic courts and had instituted criminal proceedings against him.

142. The Government contended that if the Court were to find a violation of the Convention, that would in itself constitute sufficient just satisfaction.

They argued that the applicant's claims were excessive and contrary to the purpose of Article 41. In their submission, there was no causal link between the alleged violations of Article 6 § 1 and Article 13 of the Convention and any of the pecuniary damage alleged by the applicant, who was in fact seeking to be treated as though the domestic courts had found in his favour and had allowed his claims for compensation in full.

143. As regards non-pecuniary damage, the Government submitted that the amount claimed by the applicant was excessive and that the Court should adhere to its case-law on the subject.

144. The Court observes that the pecuniary damage alleged was not caused either by the length of the proceedings in the Regional Court or by the lack of an effective remedy in that regard. In particular, it cannot speculate as to what the outcome of the proceedings would have been had they satisfied the requirements of Article 6 § 1, as to their length, and Article 13 of the Convention (see *Bayrak* v. *Germany*, no. 27937/95, § 38, 20 December 2001; *Perote Pellon* v. *Spain*, no. 45238/99, § 58, 25 July 2002; and *Storck* v. *Germany*, no. 61603/00, § 176, ECHR 2005-V). It points out that the question whether the Hanover Regional Court's conclusions were well-founded is not part of the subject matter of this application. Accordingly, it considers that no award can be made to the applicant under this head.

145. With regard to non-pecuniary damage, the Court considers, contrary to the Government, that the finding of a violation of Article 6 § 1 and Article 13 of the Convention would not constitute sufficient just satisfaction for the damage sustained by the applicant. However, it considers that the sum claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, and having regard to the nature of the Convention violations it has found, the Court awards the applicant EUR 10,000 under this head.

2. *Costs and expenses*

146. The applicant sought EUR 3,929.69 in respect of the domestic proceedings, comprising EUR 717.80 for the expert report of 6 November 1997 (see paragraph 21 above); EUR 711.89 for legal fees incurred in bringing the action for damages against the State; and a lump sum of EUR 2,500 for sundry expenses (telecommunications and correspondence with his lawyers and the Regional Court, travel and photocopying).

In respect of the proceedings before the Court he sought EUR 6,208.20, an amount corresponding to his lawyer's fees, his lawyer's expenses in connection with attending the hearing, and translation costs.

The applicant further claimed EUR 300 for the costs he had incurred in attending the hearing before the Court and a lump sum of EUR 150 for correspondence and sundry expenses.

147. The Government objected to the reimbursement of the costs relating to the expert report, which would have been incurred in any event, irrespective of the length of the proceedings. They also submitted that the legal fees relating to the action for damages against the State had been incurred not because of the length of the proceedings but because the application for legal aid in order to bring the action had been ill-founded.

148. With regard to the sums claimed in respect of the costs of the proceedings in the domestic courts, the Court considers that they are justified with the exception of the sum claimed in connection with the expert report, which does not relate to the violations it has found, and the lump sums of EUR 2,500 and EUR 150, which have not been substantiated. However, seeing that in length-of-proceedings cases the protracted examination of a case beyond a "reasonable time" involves an increase in the applicant's costs (see *Bouilly* v. *France*, no. 38952/97, § 33, 7 December 1999, and *Maurer* v. *Austria*, no. 50110/99, § 27, 17 January 2002), it does not find it unreasonable to make an award of EUR 250 under this head. It therefore awards a total of EUR 961.89 for the costs relating to the proceedings in Germany.

149. With regard to the costs incurred in the proceedings before it, the Court awards EUR 6,208.20 less the sums already received under this head in legal aid (EUR 2,497.20), making a total of EUR 3,711. It points out that the applicant's travel expenses for attending the hearing were covered by the award of legal aid.

3. *Default interest*

150. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 13 of the Convention;

2. *Dismisses* in consequence the Government's preliminary objection;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* (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 4,672.89 (four thousand six hundred and seventy-two euros and eighty-nine 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* the remainder of the applicant's claim for just satisfaction.

[omissis]

Cassazione (sez. I civ.), sent. 8 agosto 2002 n. 11987, *Adamo*

Le sentenze della corte europea dei diritti dell'uomo in tema di interpretazione dell'art. 6, paragrafo 1, della convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali non hanno efficacia direttamente vincolante per il giudice italiano; nondimeno, i criteri in esse elaborati per la valutazione della ragionevole durata del processo vanno tenuti presenti ai fini dell'interpretazione della l. 24 marzo 2001, n. 89, in forza del rinvio operato dall'art. 2, 1º comma, di detta legge all'art. 6, paragrafo 1, della convenzione.

L'obbligazione avente ad oggetto l'equa riparazione per la non ragionevole durata del processo non è obbligazione ex delicto, *ma* ex lege, *riconducibile, nel quadro delle fonti di cui all'art. 1173 c.c., agli altri atti o fatti idonei a produrla secondo l'ordinamento giuridico.*

La natura indennitaria dell'equa riparazione di cui alla l. 24 marzo 2001, n. 89 non comporta alcun automatismo attributivo in favore del soggetto che lamenti la violazione del diritto alla ragionevole durata del processo, atteso che il mancato rispetto del termine ragionevole del processo non lede un diritto fondamentale della persona la cui inviolabilità sia garantita da norme costituzionali immediatamente precettive e la cui violazione non possa rimanere senza la minima sanzione risarcitoria, costituendo perciò danno evento di per sé risarcibile; ai fini del riconoscimento dell'equa riparazione occorre pertanto dimostrare che, per effetto della eccessiva durata del giudizio, lesiva del diritto ad una durata ragionevole dello stesso, il soggetto abbia subito un danno, patrimoniale o non patrimoniale.

Ai sensi della l. 24 marzo 2001, n. 89, il danno indennizzabile è correlato al solo periodo eccedente la durata ragionevole della procedura.

In tema di equa riparazione per il mancato rispetto del termine ragionevole del processo, la prova del danno non patrimoniale o morale può essere in concreto agevolata dal ricorso a presunzioni e a ragionamenti inferenziali, che trovano fondamento nella conoscenza, in base ad elementari e comuni nozioni di psicologia, degli effetti che la pendenza di un processo civile, penale o amministrativo provoca nell'uomo medio.

SVOLGIMENTO DEL PROCESSO E MOTIVI DELLA DECISIONE

1. Agostino Adamo ed altri 59 dipendenti della Ferrovia Alifana - Napoli hanno impugnato per cassazione il decreto in data 6 novembre 2001 della Corte di Appello di Roma, che ha respinto il ricorso da loro proposto per ottenere l'"equa riparazione" del danno che assumevano conseguente all'ingiustificato protrarsi - oltre il termine di "ragionevole durata" di cui all'art. 2 della c.d. legge Pinto (n. 89/2001) - dei giudizi da essi rispettivamente promossi (nel novembre - dicembre 1994), per l'ottenimento di differenze salariali, innanzi al TAR Campania: giudizi conclusisi nel maggio 1999 (con sentenze di rigetto non appellate e così divenute definitive).

Si è costituita la Presidenza del Consiglio dei Ministri.

2. Preliminarmente va respinta l'eccezione di inammissibilità del ricorso formulata in udienza dal Procuratore generale.

L'irritualità della correlativa notifica, all'uopo denunciata, per essere stata essa effettuata nei confronti del Ministro della Giustizia in luogo che del Presidente del Consiglio dei Ministri (spiegabile anche in ragione dell'errata intestazione della sentenza di appello, di cui si dirà) è stata, infatti, comunque, sanata dall'intervenuta costituzione in giudizio della Presidenza del Consiglio con piena accettazione del contraddittorio.

3. Nel merito, viene in discussione il complessivo *decisum* della Corte romana. La quale - pur ritenuta, in premessa, "una concreta violazione del termine di ragionevole durata del processo, attesa la natura esclusivamente documentale e la relativa complessità della controversia" - ha poi, comunque, respinto le domande dei sessanta istanti per insussistenza del danno lamentato, con condanna dei medesimi alla rifusione delle spese di lite in favore del Ministro della Giustizia.

4. Con i quattro motivi dell'odierna impugnazione, la difesa dei ricorrenti, nel criticare le riferite statuizioni (di rigetto e di condanna), rispettivamente, ora denuncia:

4.1. Irritualità della pronuncia nel suo complesso - o "quantomeno relativamente alla condanna alle spese", ulteriormente (questa in particolare) viziata per violazione dell'art. 92 cpc - per avere il Collegio di Appello individuato *sua sponte* il loro contraddittore nel Ministro della Giustizia, in luogo del Presidente del Consiglio evocato in causa;

4.2 . violazione del giudicato esterno costituito dalla sentenza della Corte di Strasburgo (dell'8 febbraio 2000 in causa *Zeoli* c. *Italia*) di condanna dello Stato a risarcire altri dipendenti della stessa Ferrovia per l'eccessiva durata dei giudizi innanzi al TAR in cui questi avevano proposto, con analogo esito negativo, l'identica questione giuridica trattata, con tempi del pari non ragionevoli, nei successivi processi da cui ora deriverebbe il rivendicato diritto a riparazione;

4.3. carenza di motivazione in ordine ai profili della "complessità" della controversia (apoditticamente ritenuta "relativa" mentre sarebbe stata insussistente) e del termine di "ragionevole durata" (del pari immotivatamente fissato in misura superiore a quella individuata dalla giurisprudenza della Corte di Strasburgo);

4.4. violazione, infine, dell'art. 2 l. n. 89/01 cit. e dell'art. 111 Costituzione, per il denegato (a torto) automatismo del danno non patrimoniale a fronte di rilevate (come nella specie) violazioni del diritto alla ragionevole durata del processo.

5. La prima complessa doglianza è, per ogni aspetto, inammissibile. I riferimenti in decreto al Ministro della Giustizia - invece che al Presidente del Consiglio (effettivo legittimato passivo ex art. 3 n. 3 L. n. 89/01) concretamente chiamato in causa e in questa costituitosi con il ministero dell'Avvocatura delle Stato - si risolvono, infatti, all'evidenza, in un mero errore materiale o in un errore comunque di fatto percettivo, suscettibile come tale di correzione, ex art. 287, ovvero di revocazione, ex art. 395 n. 4 cpc, davanti allo stesso Giudice che lo ha pronunziato, ma non di sindacato in questa sede di legittimità (cfr. *ex plurimis*, Cass. nn. 6319, 8256/2000).

Mentre - per il profilo in particolare della statuizione sulle spese - la mancata (integrale o parziale) compensazione delle stesse, in considerazione della "non soccombenza" degli attori sulla questione della durata non ragionevole dei giudizi, quale sostanzialmente si lamenta, esprime un giudizio di fatto riservato alla discrezionalità del giudice del merito ed è in quanto tale, a sua volta non denunciabile in Cassazione.

6. Non fondata è, poi, la successiva seconda censura, di asserita violazione di "giudicato" della Corte di Strasburgo.

E ciò per l'erroneità, in radice, della premessa, da cui quella critica muove, del carattere "direttamente vincolante per il giudice interno" della decisione della predetta Corte Europea.

Ancorché debba riconoscersi alla giurisprudenza della Corte di Strasburgo, quanto ai criteri da essa elaborati per la valutazione della ragionevole durata del processo, valore di precedente, di cui non si può non tener conto, ai fini della interpretazione del contenuto dell'art. 2 l. 89/01 - nella misura in cui questo richiama l'art. 6 della Convenzione EDU, cui quella giurisprudenza propriamente si riferisce - ciò però che deve escludersi è, infatti, l'asserito vincolo diretto che dalla sentenza CEDU deriverebbe per il Giudice italiano.

Diversamente dalle sentenze della Corte di Giustizia europea di Lussemburgo - che al pari dei regolamenti del Consiglio CE, hanno (per i profili dell'interpretazione della normativa comunitaria) diretta efficacia nell'ordinamento interno ai sensi dell'art. 189 del Trattato CEE (cfr. Corte Cost. n. 113/85 in relazione a n. 170/84) e, se pronunciate in sede di rinvio pregiudiziale, vincolano espres-

samente il giudice rimettente - per le sentenze della Corte EDU non sussistono, nel quadro delle fonti, analoghi meccanismi normativi che ne prevedano la diretta vincolatività per il giudice interno.

Dal che, quindi, a maggior ragione, l'impossibilità di attribuire, nel nostro ordinamento, a dette sentenze l'efficacia del "giudicato", di cui all'art. 2909 cc., come preteso dai ricorrenti.

7. Va esaminato, a questo punto, l'ultimo motivo del ricorso, che reca censure - alla denegata esistenza di prova dell'*an* del danno - le quali involgono questioni logicamente e giuridicamente preliminari rispetto a quelle (sostanzialmente) attinenti al quantum, di cui al precedente terzo motivo.

Sostengono, dunque, con il riferito quarto mezzo, i ricorrenti che abbia errato il Collegio Romano, nel postulare in via di principio - e nel ritenere di fatto nella specie insussistente - la prova del danno, mentre avrebbe dovuto, viceversa, riconoscere che, nel quadro della fattispecie di responsabilità introdotta dal legislatore del 2001, una volta accertata la violazione del diritto alla ragionevole durata del processo, il danno sarebbe *in re ipsa*, quantomeno per il profilo dell'*an*. La prospettazione dei ricorrenti, seppure suggestiva, non può, però, condividersi.

7.1. Il problema va risolto, per altro, fuori dello schema dell'illecito aquiliano, nel quale la dimostrazione del danno sarebbe *de plano* a carico di chi ne pretende il risarcimento (art. 2043 c.c.). E ciò perché, ad avviso del Collegio all'equa riparazione, di cui all'art. 2 l. 89/01, va riconosciuta più propriamente natura indennitaria e non risarcitoria.

Orientano in questo senso, infatti, già sul piano testuale, i significativi richiami all'equità e al limite delle risorse disponibili, la totale assenza di riferimenti, invece, all'elemento soggettivo, della responsabilità (al presupposto indefettibile, cioè, dell'illecito aquiliano) e l'uso stesso del termine indennizzo (*sub* art. 3, co. 7, l. 89/01).

Molteplici argomenti di carattere logico-sistematico confortano poi ulteriormente l'interpretazione indennitaria.

Tra questi, la considerazione, in primo luogo, che l'equa riparazione deriva, nello schema configurato dalla citata legge n. 89, da una attività lecita dell'Amministrazione, quale innegabilmente è l'attività giudiziaria. La quale non diviene illecita per il solo fatto del suo, sia pure eccessivo, protrarsi e rileva, comunque, in funzione esclusiva del suo porsi in contrasto con il "termine ragionevole di cui all'art. 6 della CEDU", indipendentemente - come detto - da qualsiasi (non richiesto) connotato di colpa di organi giudiziari o di ogni altra autorità dello Stato (che può essere, in tesi, anche quella legislativa o amministrativa per i profili, rispettivamente, disciplinatori del processo o di organizzazione delle strutture), la cui attività possa avere inciso sulla durata della procedura (vedi art. 2, punto 2, l. 89 cit.).

La constatazione, inoltre, che l'endiadi "equa riparazione", nei contesti normativi in cui si trova già adoperata (artt. 314 e 643 cpp, in materia di ingiusta detenzione e di errore giudiziario), è stata già del pari qualificata in termini di indennizzo (cfr. Cass. 2760/97).

La considerazione, infine, che, nei casi di vero e proprio illecito connesso alla durata eccessiva del processo, già prima della legge Pinto - ed ora indipendentemente da questa - è attribuito al danneggiato una specifica azione risarcitoria dalla legge n. 117 del 1988 sulla responsabilità civile dei magistrati.

Dal che, quindi, la conclusione che quella avente ad oggetto l'"equa riparazione" per la non ragionevole durata del processo non - è obbligazione *ex delicto*, ma obbligazione *ex lege*, riconducibile, nel quadro delle fonti di cui all'art. 1173 c.c., agli "atti o fatti idonei a produrla secondo l'ordinamento giuridico".

7.2. La ritenuta natura indennitaria dell'equa riparazione non conduce, però, di per sé al preteso automatismo della sua attribuzione in favore del soggetto che lamenti violazione del suo diritto alla ragionevole durata del processo.

A siffatta violazione - accertabile in base ai criteri che l'art. 2 l. 89/01 mutua dall'art. 6 della CEDU e che rileva, si ripete, nella sua oggettività - la predetta legge n. 89 non ricollega, infatti, l'applicazione di una pena privata, multa o sanzione nei confronti dell'apparato, ma, appunto, una equa riparazione in favore del soggetto che "per effetto" della eccessiva durata del giudizio, violativa del riconosciuto suo diritto ad una durata ragionevole dello stesso, abbia subito un danno, patrimoniale o non patrimoniale.

Tale danno - che, sul piano diacronico, è correlato al solo periodo eccedente la durata della procedura - va dunque dimostrato dalla parte legittimata a chiederne il ristoro. Ancorché, per quanto in particolare attiene al danno non patrimoniale o c.d. morale, tale prova possa essere in concreto agevolata dal ricorso a presunzioni e a ragionamenti inferenziali, che trovano fondamento nella conoscenza, in base ad elementari e comuni nozioni di psicologia, degli effetti che la pendenza di un processo civile, penale e amministrativo provoca nell'uomo medio.

7.3. Né è sostenibile in contrario che nella lesione del diritto alla ragionevole durata del processo [l'*an* de] il danno sia *in re ipsa*, costituendo la violazione di quel diritto, all'un tempo, sia il fatto *causam dans* del danno, sia l'evento in sé di danno (danno evento), così come ritenuto nelle sentenze 7713/2000 e 6507/2001 di questa Corte.

Dette pronunce si riferiscono ben vero, ed unicamente, ad ipotesi di "diritti fondamentali della persona" la cui inviolabilità sia garantita da norme costituzionali immediatamente precettive e la cui violazione "non può rimanere senza la sanzione minima risarcitoria", costituendo perciò danno evento di per sé risarcibile (Così Corte cost. 1986 n. 184, a proposito del diritto alla salute e del danno biologico).

Ma tale non è il caso del diritto alla ragionevole durata del processo, che trova, invece la sua fonte al livello di legge ordinaria (n. 89/01 cit.). E che - contrariamente a quanto pur da taluni affermato - non è direttamente riconducibile alla previsione dell'art. 111 della Costituzione.

Disposizione, quest'ultima, che - per il profilo della ragionevole durata, che assume come connotato del giusto processo - prefigura un canone oggettivo di disciplina della funzione giurisdizionale e non direttamente una garanzia del singolo strutturata in termini di diritto soggettivo; contiene cioè una norma meramente programmatica, non utilizzabile come strumento di controllo della durata del singolo processo (a ciò appunto ora provvedendo la l. 89/01) e che, rileva, invece, unicamente come parametro di controllo della legge che sia in tesi in contrasto con gli obbiettivi della ragionevole durata dei processi. Spettando, dunque, in tale contesto, al legislatore bilanciare le istanze di ragionevolezza della durata del processo con il "quantum" delle garanzie concedibili, al suo interno, alle parti. [Nel che, poi, è il vero nodo, non più eludibile, del "caso Italia". Atteso che, in particolare per quel che attiene al settore civile, la consentita esperibilità del ricorso alla Corte di legittimità, sostanzialmente senza filtri, senza significativi limiti di materia e di valore e senza il limite stesso di reiterabilità della impugnazione - da cui consegue, in ogni caso di accoglimento con rinvio, il ritorno del processo alla fase precedente - definisce un complessivo modello di giudizio per il quale non esiste un momento predefinibile di arresto, che potrebbe virtualmente durare all'infinito e, con tale latitudine può essere utilizzato anche per controversie di minimo valore economico (L. 5.000 nel caso deciso da Cass. 2670/96). Con la conseguenza, in un sistema così conformato, che l'afflusso delle nuove controversie non è bilanciato dallo smaltimento di quelle pregresse, per notevole parte delle quali si verifica un effetto di stagnazione, con un complessivo sovraccarico, in progressivo incremento, delle strutture giudiziarie, tale rendere ardua la sollecita definizione dei processi.]

7.4. Non ha errato, quindi, la Corte territoriale nel presupporre la necessità della prova della sussistenza di un danno in concreto ai fini della correlativa equa riparazione ex art. 2 l. 89/01.

Né è censurabile, in questa sede di legittimità, il giudizio di fatto, congruamente per altro motivato, con cui la stessa Corte ha, nella specie, escluso la ricorrenza di un danno morale (quello materiale non essendo stato neppure richiesto): in considerazione, tra l'altro, della gestione non individuale, ma collettiva della lite e della sua inerenza a rivendicazione non personali ma di categoria, sulla cui fondatezza per di più nessuno dei ricorrenti aveva creduto al punto di proporre appello avverso la decisione negativa di I° grado.

Da ciò, conclusivamente, l'infondatezza della censura in esame.

8. Restano assorbite le doglianze attinenti, come detto, al *quantum* del preteso danno, di cui al residuo terzo mezzo dell'impugnazione.

9. Il ricorso va integralmente, pertanto, respinto.

La novità delle questioni trattate giustifica la compensazione delle spese del giudizio di cassazione tra le parti.

PER QUESTI MOTIVI

La Corte rigetta il ricorso e compensa le spese.

Cassazione (sez. un. civ.), sent. 26 gennaio 2004 n. 1340, *Corbo*

Ai fini della liquidazione dell'indennizzo del danno non patrimoniale conseguente alla violazione del diritto alla ragionevole durata del processo, ai sensi della l. 24 marzo 2001 n. 89, l'ambito della valutazione equitativa, affidato al giudice del merito, è segnato dal rispetto della convenzione europea dei diritti dell'uomo, per come essa vive nelle decisioni, da parte della corte europea dei diritti dell'uomo, di casi simili a quello portato all'esame del giudice nazionale, di tal che è configurabile, in capo al giudice del merito, un obbligo di tener conto dei criteri di determinazione della riparazione applicati alla corte europea, pur conservando egli un margine di valutazione che gli consente di discostarsi, purché in misura ragionevole, dalle liquidazioni effettuate da quella corte in casi simili; tale regola di conformazione, inerendo ai rapporti tra la citata legge e la convenzione ed essendo espressione dell'obbligo della giurisdizione nazionale di interpretare ed applicare il diritto interno, per quanto possibile, conformemente alla convenzione e alla giurisprudenza di Strasburgo, ha natura giuridica, onde il mancato rispetto di essa da parte del giudice del merito concretizza il vizio di violazione di legge, denunziabile dinanzi alla corte di cassazione; l'accertamento dei casi simili e delle eque soddisfazioni del danno non patrimoniale in essi operate dalla corte di Strasburgo, pur rientrando nei doveri d'ufficio del giudice, può giovarsi della collaborazione delle parti, ed in particolare dell'attore, che ha interesse a fornire al giudicante ogni elemento utile alla determinazione del quantum del danno nella misura da lui chiesta, anche nelle ipotesi in cui non sia configurabile a suo carico un onere probatorio (nell'enunciare il principio di cui in massima, le sezioni unite hanno cassato con rinvio il decreto della corte territoriale, avendo questo fissato una riparazione del danno non patrimoniale in misura pari a meno di un decimo di quella accordata in casi simili dalla corte europea, e quindi in un importo notevolmente ed irragionevolmente difforme dalla normativa della CEDU, come interpretata ed applicata dai giudici di Strasburgo).

[omissis]

SVOLGIMENTO DEL PROCESSO

Con ricorso alla Corte di appello di Roma depositato il 3 maggio 2001, Luigi Corbo, premesso che aveva instaurato presso la Pretura di Benevento una causa iscritta a ruolo in data 9 gennaio 1990 per il risarcimento de danno dipendente da incidente stradale per l'ammontare complessivo di L. 2.380.000 e che il giudizio si era concluso dopo circa 11 anni con sentenza del giudice di pace di Benevento depositata il 14 dicembre 2000 che aveva parzialmente accolto la domanda, chiedeva, ai sensi dell'art. 2 della legge 21 marzo 2001 n. 89, il risarcimento dei danni, materiali e morali, quantificati in L. 24.000.000, previa declaratoria di violazione dell'art. 6, paragrafo 1, della Convenzione europea dei diritti dell'uomo (d'ora in poi: CEDU), per il mancato rispetto del termine ragionevole del processo.

Costituitosi il Ministero della giustizia, la Corte di appello adita, con il decreto depositato il 10 luglio 2001, ha ritenuto sussistente la violazione dell'art. 6 della CEDU ed il diritto del ricorrente ad un equa riparazione del conseguente danno, riferibile al solo periodo eccedente il termine ragionevole di durata del processo, e cioè ad otto anni (e non a gli undici anni in cui è durato il processo). Ha, poi, escluso il danno patrimoniale, riconoscendo il solo danno non patrimoniale, che ha liquidato nella somma di L. 1.000.000, ritenendo che esso vada correlato soprattutto agli "interessi in gioco", che, nel caso di specie, sono costituiti dalla "definizione di un giudizio di trascurabile valore economico, per soli danni alle cose, quantificati in domanda per poco più di due milioni ed accolta nella misura di poco più di L. 1.800.000".

Avverso il decreto della Corte di appello di Roma Luigi Corbo ha proposto ricorso per Cassazione, deducendo due motivi. Il Ministero della giustizia si è limitato a costituirsi in giudizio.

Il ricorso, assegnato in un primo momento alla Prima Sezione di questa Corte, a cui il ricorrente ha presentato memoria, è stato poi assegnato alle Sezioni unite, con provvedimento del Primo Presi-

dente del 18 giugno 2003, che ha accolto l'istanza del ricorrente, per la soluzione di questione di massima di particolare importanza. Il Ministero della giustizia ha presentato memoria alle Sezioni unite.

MOTIVI DELLA DECISIONE

1. I due motivi di ricorso sono strettamente connessi perché censurano il quantum del danno non patrimoniale liquidato dalla decisione impugnata.

Con il primo motivo il ricorrente deduce "violazione e mancata applicazione dell'art. 2 Legge n. 89/2001. Contestuale violazione e mancata applicazione degli artt. 1223, 1226, 1227, 2056 c.c. Contestuale violazione e mancata applicazione dell'art. 6 p. 1 e dell'art. 13 della CEDU. Omessa, insufficiente o contraddittoria motivazione circa un punto decisivo della controversia: in relazione all'art. 360 a 3 e 5 c.p.c.". Il ricorrente premette che la violazione del termine di durata ragionevole del processo determina la violazione di un diritto costituzionalmente ed internazionalmente tutelato, posto a presidio di un bene inviolabile, il cui valore non è immediatamente valutabile in termini pecuniari e la cui compressione, pertanto, determina ex se un danno non patrimoniale; e rileva che il bene costituito dal diritto alla ragionevole durata del processo è identico per chiunque sia parte di un processo e per ogni tipo di processo. Secondo il ricorrente, la decisione impugnata ha male utilizzato il parametro della "posta in gioco", dato che esso è adoperato dalla giurisprudenza della Corte di Strasburgo al fine di riconoscere con maggiore facilità, in ipotesi delicate, l'esistenza della lesione, mentre la Corte di appello vi ha fatto ricorso per arginare la pretesa del danneggiato. In tal modo il danno non patrimoniale è stato determinato in misura "manifestamente iniqua in relazione ai parametri costantemente utilizzati dalla Corte di Strasburgo".

Con il secondo motivo il ricorrente deduce violazione e mancata applicazione dell'art. 2, commi 1 e 3, della legge n. 89/2001 e dell'art. 13 della CEDU. Premesso che i diritti protetti dalla CEDU devono trovare anzitutto attuazione e tutela in sede nazionale, con il ricorso agli strumenti apprestati dai singoli ordinamenti, rileva che con l'impugnato decreto si è stravolto il rimedio della legge n. 89/2001, pervenendosi ad una liquidazione del danno non patrimoniale "chiaramente violativa dei parametri e standards valutativi elaborati dalla Corte europea".

2. La questione di massima posta dal presente ricorso concerne l'ambito del sindacato della Corte di Cassazione sui decreti della Corte di appello che determinano il quantum dell'equa riparazione spettante al ricorrente a titolo di danno non patrimoniale; in particolare, se possa costituire vizio della liquidazione del danno la mancanza di relazione ragionevole della somma accordata dalla Corte di appello ai parametri di commisurazione della equa soddisfazione (art. 41 CEDU) utilizzati dalla Corte europea dei diritti dell'uomo in casi simili.

La soluzione della questione di massima richiede che si precisi quale effetto giuridico debba attribuirsi, nella liquidazione del danno non patrimoniale da indennizzare in applicazione della legge n. 89/201, ai criteri seguiti dalla Corte europea nella riparazione dello stesso tipo di danno, e quindi alle pronunzie della stessa Corte sulle conseguenze della violazione del termine ragionevole di durata del processo.

Il che, a sua volta, esige la considerazione della lettera e delle finalità della legge n. 89/2001.

3. Come chiaramente si desume dall'art. 2, comma 1, della detta legge, il fatto giuridico che fa sorgere il diritto all'equa riparazione da essa prevista è costituito dalla "violazione della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, ratificata ai sensi della legge 4 agosto 1955 n. 848, sotto il profilo del mancato rispetto del termine ragionevole di cui all'art. 6, paragrafo 1, della Convenzione". La legge n. 89/2001, cioè, identifica il fatto costitutivo del diritto all'indennizzo *per relationem*, riferendosi ad una specifica norma della CEDU. Questa Convenzione ha istituito un giudice (Corte europea dei diritti dell'uomo, con sede a Strasburgo) per il rispetto delle disposizioni in essa contenute (art. 19), onde non può che riconoscersi a detto giudice il potere di individuare il significato di dette disposizioni e perciò di interpretarle.

Poiché il fatto costitutivo del diritto attribuito dalla legge n. 89/2001 consiste in una determinata violazione della CEDU, spetta al Giudice della CEDU individuare tutti gli elementi di tale fatto giuridico, che pertanto finisce con l'essere "conformato" dalla Corte di Strasburgo, la cui giurisprudenza si impone, per quanto attiene all'applicazione della legge n. 89/2001, ai giudici italiani.

Non è necessario, allora, porsi il problema generale dei rapporti tra la CEDU e l'ordinamento interno, su cui si è ampiamente soffermato il Procuratore Generale in udienza. Qualunque sia l'opinione che si abbia su tale controverso problema, e quindi sulla collocazione della CEDU nell'ambito delle fonti del diritto interno, è certo che l'applicazione diretta nell'ordinamento italiano di una norma della CEDU, sancita dalla legge n. 89/2001 (e cioè dall'art. 6, p. 1, nella parte relativa al "termine ragionevole"), non può discostarsi dall'interpretazione che della stessa norma da il giudice europeo.

L'opposta tesi, diretta a consentire una sostanziale diversità tra l'applicazione che la legge n. 89/2001 riceve nell'ordinamento nazionale e l'interpretazione data dalla Corte di Strasburgo al diritto alla ragionevole durata del processo, renderebbe priva di giustificazione la detta legge n. 89/2001 e comporterebbe per lo Stato italiano la violazione dell'art. 1 della CEDU, secondo cui "le Parti Contraenti riconoscono ad ogni persona soggetta alla loro giurisdizione i diritti e le libertà definiti al titolo primo della presente Convenzione" (in cui è compreso il citato art. 6, che prevede il diritto alla definizione del processo entro un termine ragionevole).

Le ragioni che hanno determinato l'approvazione della legge n. 89/2001 si individuano nella necessità di prevedere un rimedio giurisdizionale interno contro le violazioni relative alla durata dei processi, in modo da realizzare la sussidiarietà dell'intervento della Corte di Strasburgo, sancita espressamente dalla CEDU (art. 35: "la Corte non può essere adita se non dopo l'esaurimento delle vie di ricorso interne"). Da esso deriva il dovere degli Stati che hanno ratificato la CEDU di garantire agli individui la protezione dei diritti riconosciuti dalla CEDU innanzitutto nel proprio ordinamento interno e di fronte agli organi della giustizia nazionale. E tale protezione deve essere "effettiva" (art. 13 della CEDU), e cioè tale da porre rimedio alla doglianza, senza necessità che si adisca la Corte di Strasburgo.

Il rimedio interno introdotto dalla legge n. 89/2001, in precedenza, non esisteva nell'ordinamento italiano, con la conseguenza che i ricorsi contro l'Italia per la violazione dell'art. 6 della CEDU avevano "intasato" (è il termine usato dal relatore Follieri nella seduta del Senato del 28 settembre 2000) il giudice europeo. Rilevava la Corte di Strasburgo, prima della legge n. 89/2001, che le dette inadempienze dell'Italia "riflettono una situazione che perdura, alla quale non si è ancora rimediato e per la quale i soggetti a giudizio non dispongono di alcuna via di ricorso interna. Tale accumulo di inadempienze è, pertanto, costitutivo di una prassi incompatibile con la Convenzione" (quattro sentenze della Corte in data 28 luglio 1999, su ricorsi di *Bottazzi*, *Di Mauro*, *Ferran* e *A.P.*).

La legge n. 89/2001 costituisce la via di ricorso interno che la "vittima della violazione" (così definita dall'art. 34 della CEDU) dell'art. 6 (sotto il profilo del mancato rispetto del termine ragionevole) deve adire prima di potersi rivolgere alla Corte europea per chiedere la "equa soddisfazione" prevista dall'art. 41 della CEDU, la quale, quando sussista la violazione, viene accordata dalla Corte soltanto "se il diritto interno dell'Alta Parte contraente non permette che in modo incompleto di riparare le conseguenze di tale violazione". La legge n. 89/2001 ha, pertanto, consentito alla Corte europea di dichiarare irricevibili i ricorsi ad essa presentati (anche prima dell'approvazione della stessa legge) e diretti ad ottenere l'equa soddisfazione prevista dall'art. 41 CEDU per la lunghezza del processo (sentenza 6 settembre 2001, *Brusco* c. *Italia*).

Tale meccanismo di attuazione della CEDU e di rispetto del principio di sussidiarietà dell'intervento della Corte europea di Strasburgo, però, non opera nel caso in cui essa ritenga che le conseguenze della accertata violazione della CEDU non siano state riparate dal diritto interno o lo siano state "in modo incompleto", perché, in siffatte ipotesi, il citato art. 41 prevede l'intervento della Corte europea a tutela della "vittima della violazione". In tal caso il ricorso individuale alla Corte di Strasburgo ex art. 34 della CEDU è ricevibile (sentenza 27 marzo 2003, *Scordino ed altri* c. *Italia*) e la Corte provvede a tutelare direttamente il diritto della vittima che essa ha ritenuto non completamente tutelato dal diritto interno.

Il giudice della completezza o meno della tutela che la vittima ha ottenuto secondo il diritto interno è, ovviamente, la Corte europea, alla quale spetta di fare applicazione dell'art. 41 CEDU per accer-

tare se, in presenza della violazione della norma della CEDU, il diritto interno abbia permesso di riparare in modo completo le conseguenze della violazione stessa.

La tesi secondo cui, nell'applicare la legge n. 89/2001, il giudice italiano può seguire un'interpretazione non conforme a quella che la Corte europea ha dato della norma dell'art. 6 CEDU (la cui violazione costituisce il fatto costitutivo del diritto all'indennizzo attribuito dalla detta legge nazionale), comporta che la vittima della violazione, qualora riceva in sede nazionale una riparazione ritenuta incompleta dalla Corte europea, ottenga da quest'ultimo Giudice l'equa soddisfazione prevista dall'art. 41 CEDU. Il che costringerebbe l'interessato ad un duplice giudizio, uno davanti al giudice nazionale per chiedere l'indennizzo previsto dalla legge n. 89/2001 e l'altro davanti alla Corte europea per ottenere l'integrazione della riparazione che il diritto interno ha consentito, in ipotesi, in modo soltanto incompleto (secondo il giudizio della stessa Corte europea). In tal modo il rimedio predisposto dal legislatore italiano con la legge n. 89/2001 diverrebbe sostanzialmente mutile e si realizzerebbe una violazione del menzionato principio di sussidiarietà dell'intervento della Corte di Strasburgo.

Deve, allora, concordarsi con la detta Corte europea la quale, nella citata decisione sul ricorso Scordino (relativo alla incompletezza della tutela accordata dal giudice italiano in applicazione della legge n. 89/2001), ha affermato che "deriva dal principio di sussidiarietà che le giurisdizioni nazionali devono, per quanto possibile, interpretare ed applicare il diritto nazionale conformemente alla Convenzione".

Nella stessa decisione Scordino si è precisato, con specifico riferimento alla riparazione del danno non patrimoniale, che il giudice nazionale "può allontanarsi da un'applicazione rigorosa e formale dei criteri adottati dalla Corte" europea, ma, pure conservando un "margine di valutazione", non può liquidare somme che non siano in "relazioni ragionevoli con la somma accordata dalla Corte negli affari simili", restando quindi fermo il suo dovere di "conformarsi alla giurisprudenza della Corte così accordando somme conseguenti".

La legge n. 89/2001 non pone alcun ostacolo a tale dovere di prendere a punto di riferimento dell'equa riparazione del danno non patrimoniale la giurisprudenza della Corte europea, perché detta legge richiama, attraverso l'art. 2056 c.c., l''art. 1226 c.c., che prevede una valutazione con criteri equitativi, i quali possono essere commisurati, in linea generale, all'equa soddisfazione prevista dall'art. 41 CEDU.

Consegue che i criteri di determinazione del quantum della riparazione applicati dalla Corte europea non possono essere ignorati dal giudice nazionale, anche se questi può discostarsi in misura ragionevole dalle liquidazioni effettuate a Strasburgo in casi simili.

Tale regola di applicazione della legge n. 89/2001, per quanto attiene alla riparazione del danno non patrimoniale, ha natura giuridica, perchè inerisce ai rapporti tra la detta legge e la CEDU, onde il mancato rispetto di essa da parte del giudice del merito concretizza il vizio di violazione di legge denunziabile a questa Corte di legittimità. Occorre, cioè, precisare che, mentre, in linea generale, il criterio adottato dal giudice del merito per la liquidazione equitativa del danno, in applicazione dell'art. 1226 c.c., non è censurabile in cassazione, quando il relativo potere di scelta è stato esercitato in maniera logica (v., *ex plurimis*, Cass. 5 giugno 1996 n. 5265; 10 aprile 1996 n. 3341), la liquidazione del danno non patrimoniale effettuata dalla Corte di appello a norma dell'art. 2 della legge n. 89/2001, pur conservando la sua natura equitativa, è tenuta a muoversi entro un ambito che è definito dal diritto, perché deve riferirsi alle liquidazioni effettuate in casi simili dalla Corte di Strasburgo, da cui è consentito discostarsi purché in misura ragionevole. L'ambito giuridico della riparazione equitativa del danno non patrimoniale è, in altri termini, segnato dal rispetto della CEDU, per come essa vive nelle decisioni, da parte di detta Corte, di casi simili a quello portato all'esame del giudice nazionale.

L'accertamento dei casi simili e delle eque soddisfazioni del danno non patrimoniale in essi operate dalla Corte di Strasburgo, pur rientrando nei doveri di ufficio del giudice, può giovarsi della collaborazione delle parti, ed in particolare dell'attore, che ha interesse a fornire al giudicante ogni elemento utile alla determinazione del quantum del danno nella misura da lui chiesta, anche nelle ipotesi in cui non sia configurabile a suo carico un onere probatorio (in senso analogo v. l'art. 14 della

legge 31 maggio 1995 n. 218, per quanto attiene allo "aiuto delle parti" nell'accertamento della legge straniera, che pure è compiuto di ufficio dal giudice).

Va, infine, avvertito che, in ogni caso, nella determinazione del quantum dell'indennizzo, il giudice è vincolato, sul piano processuale, al rispetto della domanda e della corrispondenza tra il chiesto ed il pronunciato, onde egli non può mai liquidare un ammontare superiore a quello chiesto dall'attore.

4. Applicando i principi espressi nel precedente paragrafo, si rileva che la decisione impugnata ha liquidato come danno non patrimoniale, causato da un giudizio di primo grado in cui essa ha ravvisato un ritardo ingiustificato di otto anni, la somma di L. 1.000.000. La Corte europea, in due recenti decisioni emanate il 19 febbraio 2002 e relative a ritardi della giustizia italiana, ha determinato l'equa soddisfazione per il danno non patrimoniale nella somma di Euro 10.000 per un giudizio di primo grado che è durato poco più di otto anni (*Sardo* c. *Italia*) e nella somma di Euro 8.000 per un giudizio che è durato sette armi ed undici mesi (*Donato* c. *Italia*).

La decisione impugnata ha liquidato, quindi, una somma che è meno di un decimo di quella accordata in casi simili dalla Corte europea, onde si ha, nel presente caso, un divario analogo a quello già censurato dalla Corte europea nella citata decisione Scordino.

La Corte di appello, a giustificazione della riparazione da essa effettuata, ha fatto richiamo ad altre due pronunzie della Corte europea del 19 febbraio 1991: quella sul caso *Manzoni*, in cui è stata liquidata la somma di L. 1.000.000 per un tempo di oltre sette anni e quella sul caso *Pugliese* in cui non è stata riconosciuta alcuna somma per un tempo di oltre cinque anni (essendosi la Corte limitata al riconoscimento dell'avvenuta violazione). Va, però, rilevato che, come ha esattamente osservato il ricorrente, non vi è alcuna somiglianza tra i due casi richiamati dalla decisione impugnata e la situazione posta a base del presente giudizio. In detti due casi si tratta di processi penali protrattisi per più gradi di giudizio ed in cui la Corte ha emanato decisioni non recenti, mentre vanno preferite come punti di riferimento, in linea generale, decisioni recenti della Corte europea e, con riferimento al caso di specie, pronunce su ritardi verificatisi in giudizi non penali (come le due decisioni del 19 febbraio 2002 che si sono in precedenza qui richiamate).

Né la liquidazione esigua può trovare giustificazione nella entità degli "interessi in gioco" nel processo presupposto. Tale entità può determinare una riduzione significativa dell'indennizzo, ma non può ridurlo a meno di un decimo di quanto normalmente venga liquidato dalla Corte europea in casi simili.

5. In conclusione, la decisione impugnata, avendo fissato una riparazione del danno non patrimoniale in misura notevolmente ed irragionevolmente difforme dalla normativa della CEDU, per come essa vive nella giurisprudenza della Corte di Strasburgo, è viziata per violazione di legge, onde essa va cassata.

La causa va rinviata alla Corte di appello di Roma, che, in diversa composizione, determinerà nuovamente l'indennizzo da corrispondere al ricorrente per la riparazione del danno non patrimoniale derivante dal mancato rispetto del termine ragionevole di durata del processo, adeguandosi ai criteri adottati in casi simili dalla Corte europea dei diritti dell'uomo, pure se con un margine di valutazione che sia ragionevole.

Il giudice di rinvio si pronunzierà anche sulle spese del giudizio di Cassazione.

P.Q.M.

La Corte accoglie il ricorso, cassa la decisione impugnata e rinvia la causa alla Corte di appello di Roma, anche per le spese del giudizio di Cassazione.

Cassazione (sez. I civ.), sent. 17 giugno 2004 n. 11350, *Di Caprio*

La disciplina dell'equa riparazione per mancato rispetto del termine ragionevole di cui all'art. 6, par. 1, della convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, quale introdotta dagli art. 2 seg. l. 24 marzo 2001 n. 89, non è applicabile ai giudizi in materia tributaria involgenti la potestà impositiva dello stato, in conformità delle indicazioni (delle quali occorre tener conto attesa la coincidenza dell'area di operatività dell'equa riparazione ai sensi della l. n. 89 del 2001 con quella delle garanzie assicurate dalla citata convenzione) emergenti dalla giurisprudenza della corte europea dei diritti dell'uomo, indicazioni che si muovono nel senso della non estensibilità del campo di applicazione del detto art. 6 della convenzione alle controversie tra il cittadino ed il fisco aventi ad oggetto provvedimenti impositivi, stante l'estraneità ed irriducibilità di tali vertenze al quadro di riferimento delle liti in materia civile, cui ha riguardo il già citato art. 6

[omissis]

FATTO

1. Il ministero ha impugnato per cassazione il decreto in data 8 luglio 2002, con il quale la Corte d'appello di Roma lo ha condannato al pagamento della somma di euro ottocento in favore di Ivonne Concetta Di Caprio, a titolo di equo indennizzo, ai sensi dell'art. 2 l. n. 89 del 2001, per la violazione del "termine ragionevole di durata" del processo da questa instaurato davanti alla Commissione tributaria di Benevento e concluso con sentenza della Commissione regionale di Napoli, che aveva accolto l'istanza della contribuente per la declaratoria di nullità di un avviso di liquidazione di maggiori imposte relativa ad un atto di compravendita.

L'intimata resiste con controricorso.

2. Con l'unico mezzo dell'odierno ricorso, illustrato con memoria, il ministero — denunciando violazione e falsa applicazione degli art. 3, 3° comma, l. 89/01; 6, par. 1, della convenzione europea dei diritti dell'uomo (CEDU) e della l. 848/55 — sostiene che abbia errato la corte di merito nel non rilevare la (pur eccepita) inammissibilità della domanda della Di Caprio, per inapplicabilità della disciplina in questione ai giudizi in materia tributaria, alla stregua dell'interpretazione del citato art. 6 CEDU resa, su tale profilo, dalla corte di Strasburgo (sent. 12 luglio 2001, *Ferrazzini* c. *Governo italiano*).

MOTIVI DELLA DECISIONE

1. La questione sottesa al motivo impugnatorio dell'avvocatura di Stato — se sia, o non, applicabile anche ai giudizi in materia tributaria la disciplina dell'equa riparazione, per "mancato rispetto del termine ragionevole di cui all'art. 6, par. 1, CEDU", quale introdotta dagli art. 2 ss. l. 89/01 — va risolta in senso negativo per le ragioni e nei limiti di cui appresso si dirà.

Conducono convergentemente infatti a tale soluzione:

a) la considerazione del collegamento genetico (quale reiteratamente sottolineato pure nei lavori preparatori) e funzionale (testualmente ed univocamente postulato dall'art. 2) della citata legge nazionale con la convenzione europea dei diritti dell'uomo;

b) il valore conformativo, in termini di diritto vivente (o del c.d. valore di cosa interpretata) che riveste la giurisprudenza della corte di Strasburgo, relativamente alla definizione e delimitazione della portata applicativa della fattispecie disciplinata dalla norma europea (art. 6, par. 1, cit.), alla cui violazione, appunto, il nostro legislatore ha inteso porre rimedio con il meccanismo riparatorio che qui viene in discussione;

c) le chiare indicazioni emergenti dalla giurisprudenza di quella corte europea (anche di recente ribadite) nel senso della non estensibilità del campo di applicazione dell'art. 6, par. 1, CEDU alle controversie tra il cittadino ed il fisco, aventi ad oggetto provvedimenti impositivi.

1.1. Come riassuntivamente infatti ricordato anche nelle recenti pronunzie delle Sezioni unite n. 1338 e 1340 del 2004, l'approvazione della l. 89/01 (c.d. legge Pinto) è stata determinata dalla necessità di prevedere un rimedio giurisdizionale interno contro le violazioni relative alla durata dei processi in modo da realizzare quel principio di sussidiarietà dell'intervento della corte di Strasburgo, sul quale si fonda il sistema europeo di protezione dei diritti dell'uomo e dal quale deriva che gli Stati che hanno ratificato la CEDU debbano riconoscere a tali diritti una "protezione effettiva (art. 13 CEDU) e cioè tale da porre rimedio [alle eventuali loro violazioni] senza necessità che si adisca la corte di Strasburgo".

Un tale rimedio in precedenza non esisteva nell'ordinamento italiano, con la conseguenza che i ricorsi contro l'Italia per violazione dell'art. 6 CEDU avevano "intasato" (è il termine usato dal relatore Follieri nella seduta del Senato del 28 settembre 2000) il giudice europeo. Rilevava la corte di Strasburgo, prima della l. 89/01, che le dette inadempienze dell'Italia riflettono una situazione che perdura, alla quale non si è ancora rimediato e per la quale i soggetti a giudizio non dispongono di alcuna via di ricorso interna. Tale accumulo di inadempienze è pertanto costitutivo di una prassi incompatibile con la convenzione (quattro sentenze della corte in data 28 luglio 1999, su ricorsi di *Bottazzi, Di Mauro, Ferrari*).

La l. 89/01 ha così dunque posto riparo a quelle precedenti inadempienze dell'Italia, restituendo all'intervento della corte europea il carattere suo proprio di sussidiarietà (e non di supplenza) rispetto all'intervento interno.

Da ciò la perfetta simmetria di contenuto della norma nazionale rispetto alla prescrizione comunitaria, nel senso e per la ragione (chiaramente esplicitati nei lavori preparatori: v. relazione alla legge Pinto, in atti senato n. 3813 del 16 febbraio 1999) che il meccanismo riparatorio introdotto dal legislatore italiano del 2001 mira ad assicurare al ricorrente "una tutela analoga a quella che egli riceverebbe nel quadro dell'istanza internazionale", poiché il riferimento diretto all'art. 6 (quale all'uopo inserito nel testo dell'art. 2 l. 89/01) consente di trasferire sul piano interno "i limiti di applicabilità della medesima disposizione esistenti sul piano internazionale".

1.2. Questa simmetria tra i due piani (interno ed internazionale) di tutela dei diritti dell'uomo — coessenziale, come detto, all'attuazione del principio di sussidiarietà che deve ricondurli a sistema — si realizza, appunto, conformando la fattispecie violativa cui è ricollegata l'equa riparazione *ex lege* 89/01 a quella disegnata dalla norma comunitaria di riferimento, come in concreto (quest'ultima) vive attraverso l'esegesi della corte di Strasburgo. Atteso che — come pure precisato nei richiamati recenti arresti delle sezioni unite — poiché il fatto costitutivo del diritto attribuito dalla l. 89/01 consiste in una determinata violazione della CEDU, spetta al giudice della CEDU individuare tutti gli elementi di tale fatto giuridico che, pertanto, finisce per essere "conformato" dalla corte di Strasburgo, la cui giurisprudenza si impone, per quanto attiene all'applicazione della l. 89/01, ai giudici italiani.

1.3. Ora, appunto, con riguardo al quesito esegetico posto dal ricorso in esame, la Corte europea dei diritti dell'uomo, dopo aver premesso che la nozione di controversia in materia civile e di controversia in materia penale (in relazione e nei limiti delle quali è tutelato dall'art. 6, par. 1, CEDU il diritto alla ragionevole durata del processo) va determinata "in modo autonomo" da essa corte, poiché qualsiasi altra soluzione rischierebbe di portare a risultati incompatibili con l'oggetto e la portata della convenzione (v. sentenze in cause *Konig* c. *Repubblica federale di Germania* del 28 giugno 1978; *Baraona* c. *Portogallo* dell'8 luglio 1987; *Maaonia* c. *Francia*; *Pierre Bloch* c. *Francia* del 21 ottobre 1997) — ha già poi avuto, a tal fine, occasione di escludere che rientrino nella sfera di applicazione della convenzione le controversie relative ad obbligazioni, pur di natura patrimoniale, che "risultino da una legislazione fiscale" ed attengano, invece che a diritti di natura civile, a doveri civici "imposti in una società democratica" (v. *Schoeten Meldrum* c. *Paesi Bassi* del 9 dicembre

1994). Mentre con la più recente sentenza *Ferrazzini* c. *Italia* del 12 luglio 2001, cit., quella stessa corte — ripropostasi di (e dopo aver provveduto a) "verificare", alla luce dei cambiamenti intervenuti nella società con riguardo alla tutela concessa agli individui nei loro rapporti con lo Stato, se il campo di applicazione dell'art. 6, par. 1, CEDU dovesse o meno estendersi alle vertenze relative alla legittimità dei provvedimenti dell'amministrazione finanziaria — ha ancora una volta ribadito l'estraneità ed irriducibilità delle suddette vertenze al quadro di riferimento delle liti in materia civile, cui ha riguardo il più volte citato art. 6 CEDU. Ed ha all'uopo sottolineato che "le evoluzioni verificatesi nelle società democratiche non riguardano la natura essenziale dell'obbligazione per gli individui di pagare le tasse" poiché "la materia fiscale fa parte ancora del nucleo duro delle prerogative della potestà pubblica".

2. Da ciò, quindi, la conclusione, per quel che qui rileva, che l'equa riparazione prevista dalla legge nazionale per la violazione dell'art. 6, par. 1, CEDU non è riferibile all'eventuale eccessiva protrazione della durata di controversie, involgenti la potestà impositiva dello Stato, che dal quadro di tutela della norma comunitaria restano, per come visto, escluse.

3. Né è sostenibile che siffatta conclusione sia contraddetta dalla previsione dell'art. 3 l. 89/01, che include, tra i soggetti legittimati passivi rispetto all'azione di riparazione, anche il ministero delle finanze quando si tratti di procedimenti tributari. Detta ultima disposizione — che per la sua natura di norma processuale attinente alle forme di esercizio del diritto non potrebbe immutare ed ampliare i contenuti della tutela, quale definita e circoscritta dalla normativa di portata sostanziale di cui al precedente art. 2 legge cit. va letta, infatti, in modo assolutamente coerente con il complessivo impianto sistematico della legge nazionale e della convenzione, nel senso della sua riferibilità a quelle (e soltanto a quelle) controversie di competenza del giudice tributario, che siano riferibili:

a) alla materia civile, in quanto riguardanti pretese del contribuente che non investano la determinazione del tributo ma solo aspetti a questa consequenziali, come nel caso, ad esempio, del giudizio di ottemperanza ad un giudicato del giudice tributario ex art. 70 d.leg. 546/92 od in quello (anch'esso di competenza di quel giudice come rammentato da sez. un. 18208/03, non massimata) di giudizio vertente sull'individuazione del soggetto di un credito di imposta non contestato nella sua esistenza;

b) alla materia penale, intesa quest'ultima — secondo la "nozione autonoma" elaborata anche per tale profilo dalla giurisprudenza della CEDU, di cui il giudice nazionale deve tener conto — come comprensiva anche delle controversie relative all'applicazione di sanzioni tributarie, ove queste siano commutabili in misure detentive ovvero siano, per la loro "gravità", assimilabili sul piano dell'afflittività ad una *sanction pènale* (v. sentenza *Janosevic* c. *Suede* del 23 luglio 2002).

4. Priva di concreto rilievo è, a questo punto, anche l'argomentazione della ricorrente, per cui nulla impediva al legislatore nazionale di ampliare l'ambito di tutela predisposto dalla convenzione, estendendo l'equa riparazione anche alle procedure tributarie in senso stretto.

Quel che vincola l'interprete è, infatti, non ciò che il legislatore avrebbe in astratto potuto ma ciò che effettivamente esso ha in concreto voluto disporre. Ed il legislatore del 2001 (come inequivocabilmente si è visto emergere dalla lettera, dalla ratio, dal sistema e dalle finalità della l. n. 89) ha inteso propriamente, ed esclusivamente, far coincidere l'area di operatività dell'equa riparazione con quella (di violazione) delle garanzie assicurate dalla CEDU.

5. Né la l. 89/01 — così come interpretata in correlazione e piena sintonia con l'art. 6, par. 1, della convenzione — autorizza il dubbio, adombrato dal p.g. in udienza, di un suo possibile contrasto con il novellato art. 111 Cost. che, nel tutelare a sua volta la ragionevole durata come elemento del giusto processo, fa riferimento ad ogni tipologia di processo, non escluso quello tributario.

Una siffatta questione di legittimità costituzionale sarebbe infatti, per definizione, inammissibile con riguardo ai limiti istituzionali della funzione sindacatoria della Corte costituzionale in rapporto alla funzione legislativa, non essendo richiedibile a quella corte un intervento volto ad elevare il

tasso di costituzionalità di norme che siano (come si prospetta per quelle in esame) non integralmente attuative o comunque non pienamente in sintonia con il precetto costituzionale.

In tal caso, invero, resta in premessa escluso alcun vulnus alla Costituzione e la possibile correzione migliorativa della norma — in direzione di una integrale o più completa realizzazione del valore costituzionale — resta di esclusiva competenza del legislatore (Corte cost. 188/95, id., 1996, I, 464).

6. In conclusione, deve escludersi, in relazione all'oggetto del processo a quo (involgente l'imposizione tributaria) che fosse in relazione alla durata dello stesso proponibile domanda di equa riparazione ex art. 2 l. 89/01.

Dal che l'accoglimento del ricorso del ministero con la conseguente cassazione senza rinvio del decreto impugnato.

7. Ai sensi ed in applicazione del novellato art. 384 c.p.c., la causa può decidersi nel merito, conseguendo direttamente — alla rilevata estraneità della domanda al quadro normativo di tutela della citata l. 89/01 — il rigetto della stessa.